No. COA 23-277 THIRTEEN A DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

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 )

 v. ) **From Bladen**

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GABRIEL JAMES MCDOWELL )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**QUESTION PRESENTED**

1. **WHETHER DEFENDANT IS ENTITLED TO A NEW TRIAL WHEN THE COURT ERRONEOUSLY ADMITTED THE VIDEO OF AN INTERVIEW WITH A JAILHOUSE SNITCH WHICH WAS NON-CORROBORATIVE AND INADMISSIBLE AS THE STATE’S PURPOSE WAS TO INTRODUCE ALLEGATIONS IT FAILED TO ELICIT FROM THE WITNESS DURING HIS TESTIMONY?**
2. **WHETHER DEFENDANT’S CONVICTIONS SHOULD BE VACATED WHEN STATE ACTION PLACED A JUVENILE INTO A SITUATION IN WHICH A GROUP OF ADULT INMATES WERE ABLE TO PRESSURE THE JUVENILE INTO CONFESSING AND THE STATE THEN TOOK ADVANTAGE OF ITS VIOLATIONS OF STATUTORY AND CONSTITUTIONAL JUVENILE PROTECTIONS TO INTRODUCE INTO EVIDENCE THE CONFESSION OBTAINED BY THE ADULT INMATES ?**

**PROCEDURAL HISTORY**

 On January 8, 2018, Defendant was indicted in 17CRS051779 with one count of first-degree murder.

 The case came on for trial at the March 21, 2022 Session of the Bladen County Superior Court, the Honorable Douglas B. Sasser presiding. On March 30, 2022 the jury found Defendant guilty of first degree murder.

 On August 12, 2022 the case came on for a sentencing hearing for determination of the sentence pursuant to N.C.G.S. § 15A-1340.19A and N.C.G.S. § 15A-1340.19B. After hearing evidence, the court made findings of fact and conclusions of law. The court ordered Defendant be sentenced to life imprisonment with parole, meaning Defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.

 The defendant entered Notice of Appeal in open court. (Sentencing Tp. 61)

**GROUNDS FOR APPELLATE REVIEW**

 This is an appeal of right pursuant to the provisions of N.C. Gen. Stats. §§ 7A-27(b) and 15A-1444(a) and Rule 4(a) N.C.R.App.P. from final judgments of conviction by a defendant who pled not guilty and was found guilty of non-capital crimes.

**STATEMENT OF THE FACTS**

 On the evening of December 6, 2017, Prestell Bryant found the body of Charles Leon Leach lying on his bed covered by a blanket. He had died from a violent assault. Family members lived in a cluster of nearby homes. Gabriel James McDowell was seen entering one of the homes and leaving after having changed clothes. A relative called 911 when he found blood on the sweatpants Gabriel had left in his house. Gabriel was interviewed that evening and arrested the next morning for the murder of his uncle, Leon Leach.

A. The Body Of Leon Leach Was Found By His Long Time Girlfriend Prestell Bryant

 Prestell Bryant, seventy-eight years old at the time of her testimony, told the jury Leon Leach had been her sweetheart for about twenty years. She spent time with Mr. Leach daily. (Tpp. 85-86) On December 6, 2017, she called Mr. Leach around 1:00 p.m. to let him know she was going to a funeral, but would be over later and he should build a fire. When she arrived at his house that night, she noticed his truck was not parked in its usual spot. The door to Mr. Leach’s house was difficult to open because a big TV blocked the entrance. Ms. Bryant pushed the door harder and walked around the television. After setting food she had brought on a kitchen counter, Ms. Bryant walked back through the house. She noticed the fire had been set but had gone out. The door to Mr. Leach’s bedroom was closed. She opened the door and discovered Mr. Leach’s body on the bed. He was covered with a blanket. (Tpp. 96, 103-104) Ms. Bryant asked a neighbor to call 911.

 Seneca Spaulding called the victim Uncle Leon. In December 2017, Seneca had graduated from high school and was living with his mom and a different uncle about a minute walk up a dirt trail from Uncle Leon’s house. (Tp. 399) Photographs showed the relationship between the trail and the cluster of homes belonging to family members, including his great-grandmother and his Aunt Anna. (Tpp. 394-396) On December 5, the day before the incident, Seneca rode with Gabriel, Shane Lewis, Faith Monroe and Najee Tate to a bank in town to attempt to cash a check belonging to Mr. Leach. (Tpp. 402-403) After the bank teller asked some questions, she gave the check back. The group left. Seneca was not expecting any money from the check. Shane was going to get gas money. (Tp. 404)

 Seneca and Gabriel were together on the morning of December 6. Gabriel texted his girlfriend on Seneca’s phone to let her know he would pick her up at school. Gabriel left Seneca’s home sometime around noon. (Tpp. 405- 407) Later that day, Seneca texted Gabriel’s girlfriend to find out if Gabriel still had a bike he needed. She replied she was with Gabriel and the bike was behind Leon’s house. (Tp. 408) Seneca rode the bike to Faith’s house. When he returned home around 7:00 or 8:00, he saw police cars on the dirt road. (Tp. 411)

 After Uncle Will told Seneca that Uncle Leon had been killed, Seneca walked into his bedroom. As Seneca opened his bedroom door, Uncle Will spotted Gabriel’s blue sweatpants in the room. He called the police. (Tpp. 413-414) Later Gabriel called Seneca to ask if he had left his sweatpants in Seneca’s bedroom. (Tp. 415) Wilbur McDuffle (Uncle Will) lived with his sister, Carol Spaulding and his nephew, Seneca. On the evening of December 6, Uncle Will was sitting in his truck talking on the phone. He saw Gabriel enter the house wearing sweats, but he had changed to shorts when he left the house. After Uncle Will found the sweatpants in Seneca’s room, he realized they were stained with blood. (Tpp. 423, 424, 428).

B. Gabriel Was Interrogated The Night Of The Murder And Arrested The Next Morning When He Voluntarily Returned To The Sheriff’s Department

 Captain Morgan Johnson collected the sweatpants from Seneca’s room. When Johnson went back outside a bystander pointed out Gabriel. Because Gabriel was a juvenile, Captain Morgan had his mother join his conversation with Gabriel in his car. Gabriel told him he found Uncle Leon dead in his bedroom covered by a blanket when he went to his house. After finding Uncle Leon’s body, Gabriel changed his clothes and went to church with his family. (Tpp. 448, 451) As this statement was inconsistent with the evidence, Captain Morgan asked Gabriel and his parents to follow him to the Bladen County Sheriff's Department. (Tp. 463) In the first interview at the sheriff’s department, which began at approximately 11:12 p.m. on the evening of December 6, Gabriel told the officer that he went to Seneca’s house in the morning to do some schoolwork on his laptop because he had been suspended.[[1]](#footnote-1) About 1:00 he walked to his Uncle Leon’s house. He heard noises and saw a man running out of the house and another individual sitting in his uncle’s truck. Gabriel entered the house, called for Uncle Leon and found him dying in his bedroom. He told Captain Johnson the men had Bloods gang insignia on their clothes. He knew street names for the two men and when asked replied that he could identify the men on Facebook. (State’s Exhibit 272A)

 After the first interview ended, the detective took Gabriel into his office to pick out the two individuals Gabriel had named as the perpetrators. (Tp. 467) The next morning Gabriel and his parents returned to the sheriff’s office for a second interview. (Tp. 468; State’s Exhibit 272B) Before beginning the second interrogation, the detective informed Gabriel that he had talked with the district attorney and was told to charge Gabriel with first-degree murder. Gabriel told the detective the two men were assaulting the victim when he walked into the house. They pulled a gun on him and ordered him to help dispose of the body or he would end up just like the victim. (Tp. 473) The detective spent much of the interview asking Gabriel to give a detailed description of: what each of the other two men did to the victim; where each assault took place in the house; the order of the assaults; and what assistance Gabriel provided. (State’s Exhibit 242B)

 After the second interview, the officer took out arrest warrants for Gabriel and the two individuals Gabriel had identified. (Tpp.473-474) On December 20, 2017, the detective conducted a third interview of Defendant. (Tp. 482; SE 282C) In this interview, Gabriel told the detective on the day of the incident Gabriel’s mother dropped him off at his grandmother’s house in the morning. He used her laptop to do some work for his school. Later that day he took his uncle’s truck to pick up his girlfriend from school. He drove her to Uncle Leon’s house where they had sexual relations. She had to be back at school by 4:30 for a game. After dropping off his girlfriend, Gabriel drove the truck back to Uncle Leon’s house and walked to Seneca’s home. Gabriel then went back to Uncle Leon’s house, thinking that if his uncle had not returned, he could take the truck again. The detective spent most of the remaining interview asking for details about how the two men Gabriel had accused knew Uncle Leon and what prompted them to go to Uncle Leon’s house. The detective asked for details concerning the appearance of the two men. Gabriel said one of the men had a mask covering his head and a bandana. His hair stuck out from the head covering. The detective asked what each man did at specific times and what Gabriel did and saw. Gabriel told the detective the men held a gun on him, forcing him to assist them. The men beat up his uncle with a log, carried him to the kitchen, continued beating him and then carried him to his bedroom where they slashed his throat. After the assault, Gabriel returned to Seneca’s home.

 Tykia Deloach, Gabriel’s girlfriend at the time, explained she and Gabriel were both students at West Bladen. As Gabriel had been suspended she communicated with him on December 6 through Facebook Messenger. (Tpp. 369, 371) Gabriel picked her up when she was released from school at approximately 3:00. They drove to his uncle’s house. (Tpp. 374-375) The couple had sex on a couch, then he drove her back to school because she had a game that started at 4:30 p.m. (Tpp. 382, 384)

 Curtis Hollingworth was in the custody of the Columbus County jail when Gabriel was arrested. (Tp. 505) At first Gabriel was not allowed out of his cell with the other inmates because he was a minor. Hollingworth testified that at some point the jail relaxed the rule and allowed Gabriel to mix with the other inmates. (Tp. 509) Hollingsworth testified that Gabriel told him he worked for his uncle doing odd jobs and feeding the animals. Gabriel would take his uncle’s truck for joy rides. He tried to cash his uncle’s check. (Tp. 511) Hollingworth thought Gabriel told him he was inside his uncle’s house trying to steal something when his uncle came home. They got “into a little tussle” and Gabriel cut his uncle’s throat and beat him with a log. (Tp. 512) Gabriel told other adult inmates for at least three days that two individuals had beaten his uncle. The inmates convinced him to change his story. Hollingworth asked to talk with detectives. Hollingworth was in custody pending charges of trafficking in cocaine and trafficking in heroin. He plead to attempting to traffic cocaine and attempting to traffic heroin for a 14-month minimum split sentence for each charge. His probation was revoked. (Tp. 539)

C. Leon Leach Died From Blunt Force Injuries

 The pathologist, Dr. Adesuwa Egharevba, noted blunt force injuries to the head and sharp force injuries on the victim’s neck and back. (Tpp. 333, 337, 338) The incised wounds or cuts to the neck were superficial, only penetrating the skin and musculature, not damaging any major blood vessels. (Tp. 337) Three stab wounds were found on the victim’s back. These wounds did not penetrate deeply and did not damage any major organs, arteries, or blood vessels. (Tp. 340) In her opinion the cause of death was blunt force injuries of the head. (Tp. 346)

 The crime scene investigation revealed bloody drag marks leading from the dining area and hallway to the bedroom. (Tp. 125) Slight blood pooling was seen on the kitchen floor with blood splatter on the kitchen and bedroom ceilings and on the china cabinet. (Tp. 127, 132) Multiple blood stains were on the front door. (Tp. 171) In the investigator’s opinion bloodstains on curtains, the floor and the cabinet indicated a secondary scene occurred in the dining area. (Tp. 224) Bloodstains were found on logs in the woodpile near the wood stove. (Tp. 236) A piece of bark from a log was found in the bedroom. (Tp. 262) Swabbings of the blood on the log were submitted for DNA testing. The DNA profile from the log matched that of the victim. (Tp. 606) The DNA swab taken from the underarm of the victim’s jacket was consistent with the Defendant’s DNA profile. (Tp. 624) Blood stains on Defendant’s sweatpants were consistent with the victim’s profile. (Tp. 640)

 The two individuals Gabriel named in the interrogations, Malik Riggins and Raliek Lapaix, were arrested for the murder, but the charges were dismissed. (Sentencing Tp. 34)

D. The Sentencing Court Found Several Mitigating Factors And Sentenced Gabriel McDowell To Life With The Possibility Of Parole

 The jury reached a verdict of guilty of first-degree murder on March 30, 2022. Sentencing was continued until August 12, 2022. As Gabriel was sixteen- years-old at the time of the crime, a sentencing hearing was required under N.C.G.S. §15A-1340.10. Jamie Sykes, a mitigation specialist, explained to the court that Gabriel was diagnosed with Attention Deficit/Hyperactivity Disorder at age five. He was prescribed medication for the disorder up until the time of the crime. (Sentencing Tp. 10) Gabriel started drinking alcohol with older relatives around age ten. From age ten to twelve Gabriel was sexually abused on multiple occasions by a member of his extended family. He did not receive treatment or counseling. (Sentencing Tp. 12) Gabriel did not do well in school His grades for core subjects ranged from the 50’s to the low 70’s. (Sentencing Tp. 14) Since his incarceration, Gabriel earned his GED from Bladen Community College and completed 322 courses through the Pathway to Achieve program. (Sentencing Tp. 15; Rpp. 86-103)

 Before announcing the sentence, the court acknowledged the exceptional brutality of the murder. But he explained his role at sentencing was to determine whether Gabriel, who was sixteen at the time of the offense, was incorrigible and irredeemable. (Sentencing Tp. 54) The court found as mitigating factors that Gabriel was only sixteen years of age at the time of the offense and did not exhibit signs of maturity beyond that of an ordinary sixteen-year-old. The court found that since Gabriel had been taken into custody he had not presented any significant disciplinary issues. The court found as mitigating that although Gabriel had done poorly in school, ihe had obtained his GED and completed at least 4,641 educational credits since his incarceration. The court found as mitigating that Gabriel was the victim of sexual abuse beginning when he was 10 years of age and continuing until he was 12 years of age, for which he did not receive any counseling. The court found that Gabriel would likely benefit form mental health counseling, as well as other appropriate cognitive behavioral treatment and vocational programs. The court found as a factor towards mitigation that Gabriel has a family support network which may encourage him towards rehabilitation. (Sentencing Tpp. 54 – 57)

 The court concluded as a matter of law that despite the facts of the crime and the defendant’s attempts to conceal the murder, deny his involvement and false accusations of others, he has not demonstrated that he was either incorrigible or irredeemable. After considering all relevant facts and circumstances, the court determined that the appropriate sentence was life with parole, meaning he shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.

**ARGUMENT**

I. **DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED A VIDEO OF AN INMATE’S INTERVIEW WHICH WAS NON-CORROBORTIVE AND INADMISSIBLE AS THE STATE’S PURPOSE WAS TO INTRODUCE ALLEGATIONS WHICH HAD NOT BEEN TESTIFIED TO UNDER OATH**

 From the day of his arrest on December 7, 2017, Gabriel McDowell was held in custody in the Columbus County jail. Despite being a juvenile, Gabriel was allowed to spend time out of his cell with adult inmates. Curtis Hollingsworth was held in the Columbus County jail on drug charges at the same time as Gabriel. Hollingsworth approached jailers and asked to talk about what Gabriel had said to him. When called to testify under oath, Hollingsworth gave limited details, even asserting at points that he did not remember or wasn’t sure if he was remembering correctly. (Tpp. 511, 512, 513, 516) After Hollingsworth’s testimony, the State recalled Detective Morgan to introduce into evidence the Hollingsworth interview.[[2]](#footnote-2) Defense counsel objected as what was said was not corroborative, but added facts to which Hollingsworth had not testified to under oath. (Tp. 553) Defendant is entitled to a new trial because the trial court erroneously admitted the recorded statement of Curtis Hollingworth.

standard of review

 “The standard of review for this court assessing evidentiary rulings is abuse of discretion.” *State v. Cook*, 193 N.C. App. 179, 181 (2008). “An abuse of discretion occurs when the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Moore*, 152 N.C. App. 156, 161 (2002).

**discussion**

A. Captain Johnson’s Interview Of Hollingsworth Was Significantly More Probing Eliciting Allegations Not Asked About Or Testified To Under Oath At Trial

 When the State began asking Detective Johnson about State’s Exhibit 282, the recording of Johnson’s interview with Hollingsworth, defense counsel objected: “And, candidly, I do not see how it particularly corroborates or necessarily impeaches his testimony. It just deals with different facts, substantially different facts, in substantially more detail.” (Tp. 554) Counsel added the State had an opportunity to ask Hollingsworth about the additional details when he was on the stand under oath, but the State did not ask these questions. Much of Hollingsworth’s trial testimony concerned the lay-out of the jail and how inmates were able to socialize with one another. (Tpp. 507 – 510) Hollingsworth’s testimony concerning the assault was limited to generalities:

Q, What did he say happened on the day of the murder?

A. Well, first he kept telling different stories: He walked in on two guys; they put the gun to his face. Then, like, as the days go by, he start coming out more and more about different parts that happened and what happened, the situation about when he was in . . . I think he said he was in there trying to steal something and the uncle came home and caught him, and they got into a little tussle, and he said he cut his throat . . . took a knife and cut his throat and beat him with a log.

(Tp. 512) Asked where the assault happened, Hollingsworth stated that it started in the living room, and he moved him to the bedroom. (Tp. 513) The prosecutor moved on to questions about framing the other two men. (Tp. 514) When the prosecutor returned to asking about the assault, Hollingsworth testified Gabriel told the other inmates that he put the clothes “behind the headboard in his room . . .cousin’s room.” (Tp. 516) The remaining questions to Hollingsworth were directed to whether he knew any of the individuals mentioned by Gabriel, why he was in jail and if he had been promised anything for his testimony.

 Captain Johnson’s interview with Hollingsworth on January 31, 2018 elicited hearsay assertions of what Hollingsworth thought Gabriel had said to him which the prosecutor had not attempted to elicit during Hollingsworth’s testimony under oath. The recording is 19 minutes and 42 seconds long. (SE 282) The officer began by referencing a prior unrecorded interview with Hollingsworth. (SE 282, 01:18[[3]](#footnote-3)) Johnson asked Hollingsworth if Gabriel had said anything new since their last interview, adding “I had him moved for you.” (SE 282, 01:36) In the interview Hollingsworth alleged Gabriel had told him “he did it for the drugs, for his uncle’s drugs.” (SE 282, 02:30) Hollingsworth said Gabriel told him he had gone to his uncle’s house on the day before the assault to take whatever he could pawn when his uncle walked in and caught him. (SE 282, 05:30) The next day it happened again. This time when his uncle walked in, they got into a confrontation. (SE 282, 05:44) They started fighting. Gabriel blanked out and beat his uncle to death with a log sitting by the fireplace. “He took a knife and cut his throat.” (SE 282, 05:47-05:59) Gabriel told Hollingsworth he had searched the house before and found bricks of cocaine. (SE 282 06:37) Gabriel said he gave one to his older brother, one to his little brother and put one in a storage unit. (SE 282 06:48 – 06:49) Hollingworth said Gabriel took his uncle’s truck all the time. His girlfriend was pregnant. (SE 282 08:26) Johnson asked Hollingsworth if Gabriel had gone into more detail about how they were fighting. Gabriel said his uncle was small. He was stronger than his uncle. “His uncle weren’t no problem, he beat him, kicked him, stomped him. Hit him with the log. Beat him with the log.” (SE 282, 10:00 – 10:13) The log was from outside in the woodpile. (SE 282, 10:16) Gabriel said the only thing he was worried about was the knife because he knew they couldn’t get prints off of the log. (SE 282, 10:33) When Hollingsworth asked Gabriel why he did it, Gabriel responded he just blanked out. (SE 282, 11:04) He said he wished he had not done it. (SE 282, 11:09) Hollingsworth asked Gabriel if he would do it again and he responded that he would do it again “if they pushed me, I’d do it again.” (SE 282, 11:11–11:19) Johnson asked for more details. Hollingsworth said Gabriel said he beat him with the log, stomped his uncle in the face, kicked him and cut his throat. (SE 282, 16:51 – 17:01) Johnson ended the interview saying he would talk to Hollingsworth’s attorney and see “what we can do for you.” (SE 282 18:40 -18:44)

 Publishing Hollingsworth’s interview to the jury did not corroborate his testimony. Instead, the interview added substantial evidence of alleged inculpatory statements by Gabriel that were not volunteered by Hollingsworth or asked for by the prosecutor during Hollingsworth’s trial testimony. In the recorded interview Hollingsworth said:

* Hollingsworth told Captain Johnson Gabriel did it for the drugs.
* Hollingsworth told Captain Johnson Gabriel had tried the day before to rob pawnable items from his uncle.
* Hollingsworth told Captain Johnson Gabriel said his uncle was small, so it was no problem to beat him.
* Hollingsworth told Captain Johnson Gabriel related he kicked his uncle, stomped on his face, hit him with a fire log and cut his throat.
* Hollingsworth told Captain Johnson that Gabriel was worried about fingerprints on the knife, but not on the log.
* Hollingsworth told Captain Johnson that Gabriel admitted he would do it again.

These admissions were not in Hollingsworth’s trial testimony and added information that was not before the jury in any other way. Gabriel’s response to Hollingsworth that he wished it had not happened, but would do it again, did not corroborate anything in Hollingsworth’s testimony or add credibility to Hollingsworth’s testimony.

B. Prior Statements As To Facts Not Referred To In Trial Testimony And Not Adding Credibility To The Witness Are Not Admissible

 It is well settled that “prior consistent statements are admissible only when they are in fact consistent with the witness’ trial testimony.” *State v. Stills*, 310 N.C. 410, 415 (1984). “P]rior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence.’” *State v. Frogge*, 345 N.C. 614, 618 (1997), quoting *State v. Ramey*, 318 N.C. 457, 469 (1986). Corroboration was defined in *State v. Riddle*, 316 N.C. 152 (1986):

Corroboration is “the process of persuading the trier of the facts that a witness is credible.” 1 Brandis on North Carolina Evidence § 49 2d rev. ed. 1982). We have defined “corroborate” as “to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence.” *State v. Higginbottom*, 312 N.C. 760, 769, 324 SE.2d 834, 840 (1985)

*Riddle* at 156-157. Slight variations between the witness testimony and the prior statement do not render the statement inadmissible. *State v. Britt*, 291 N.C. 528, 535 (1977). This Court has warned that there is a danger in allowing “almost any out-of-court statement ever made by any witness.” *State v. Bell*, 87 N.C. App. 626, 633 (1987) “New evidence may not be introduced by the state under a claim of ‘corroboration.’” *State v. Stills*, 310 N.C. 410, 416 (1984) “If a prior statement of the witness, offered in corroboration of his testimony at trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce the ‘new’ evidence under the claim of corroboration.” *State v. Brooks*, 260 N.C. 186, 189 (1963). Our Supreme Court limited the prohibition against new evidence to facts that did not add weight or credibility to the testimony: “However, the witness’s prior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence.” *Ramsey* at 469.

 Hollingsworth’s assertions in the January recorded interview that Gabriel had attempted to rob from his uncle before, that he not only hit his uncle with a log but also stomped on his face and kicked him, that assaulting his uncle was no problem because his uncle was so small and that Gabriel told Hollingsworth he would do it again are not facts referred to in the trial testimony and do not add credibility to Hollingsworth. If anything, the recorded statement lessened his credibility as at the end Captain Johnson told Hollingsworth he would be talking to Hollingsworth’s attorney to see what he could do for him.

C. The Non-Corroborative Allegations In Hollingsworth’s Recorded Interview Constituted Reversible Error

 A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a). The additional details in the almost twenty-minute recording were highly prejudicial to Gabriel. Hollingsworth’s interview alleged that: Gabriel repeatedly robbed from his uncle; he thought assaulting his uncle was easy because of his uncle’s size; gave disturbing details of the assault not otherwise available to the jury; and alleged that Gabriel believed he would do it again. The jurors in this case could find Gabriel guilty of first-degree murder, second-degree murder or not guilty. (Rp. 84) The jury had been instructed that second-degree murder differs from first-degree in that neither specific intent to kill, premeditation, nor deliberation are necessary elements. (Tp. 81) Had the jury not heard Hollingsworth’s rendition of what he had extracted from Gabriel, one or more of the jurors might have had reasonable doubt that this was a premeditated and deliberated crime or that Gabriel intended to kill his uncle. As the verdict would have been second-degree murder if Hollingsworth’s interview had not been published to the jury, Defendant has met the prejudice burden of showing a different verdict would have been reached if the interview had not been published to the jury.

 Defendant respectfully requests his conviction be vacated.

II. **DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE WAS ALLOWED TO PUBLISH TO THE JURY DEFENDANT’S CONFESSION EXTRACTED FROM HIM WHEN DEPUTIES PLACED THE SIXTEEN-YEAR-OLD DETAINEE INTO A SITUATION IN WHICH A GROUP OF ADULT INMATES COULD BRIBE OR THREATEN HIM INTO CONFESSING**

 From the day of his arrest on December 7, 2017, sixteen-year-old Gabriel McDowell was held in custody in the Columbus County jail. Despite being a juvenile, Gabriel was allowed to spend time out of his cell sitting with adult inmates. Curtis Hollingsworth was held in the Columbus County jail on drug charges at the same time as Gabriel. After he was allowed out of his cell, Gabriel would sit with an unknown number of adult inmates. The number or criminal history of these inmates is not on the record. After these adult inmates pressured Gabriel into changing his story, Hollingsworth approached jailers asking to talk to officers about what Gabriel had said. Detective Johnson met with Hollingsworth. A week later Hollingsworth was brought into an interview room and his exchange with Johnson was recorded. This second interview began with Johnson asking Hollingsworth if he had been able to learn any new details during the intervening week. The interview concluded with Johnson telling Hollingsworth he would meet with his attorney to see what could be done for him.

 Defendant is entitled to a new trial because as he was a juvenile the government had a statutory and constitutional duty to protect him from adult inmates. Instead, the government allowed the vulnerable juvenile to be badgered into a confession after he had an appointed attorney, but outside of the attorney’s presence. The constitutional and statutory violations were exacerbated when the detective sent Hollingsworth back to Gabriel’s pod and the next week asked Hollingsworth for new details. Hollingsworth’s rendition of what Gabriel said to him should have been suppressed as: its exclusion is required by federal and state constitutions; the importance of the particular interest violated; the extent of the deviation from lawful conduct; and the extent to which the violation was willful. N.C.G.S. §15A-974. Defendant’s constitutional protections to the right to silence, due process, the right to effective assistance of counsel and freedom from cruel or unusual punishment were violated. U.S. Const. Amends. V, VI, VIII and XIV. N.C. Const. Art. I, Sec 19, 23, 27 and 35.

standard of review

 When defense counsel’s objections are insufficient for appellate review, this Court reviews for plain error. N.C. R. App. P. 10(a)(4); *State v. Lawrence*, 365 N.C. 506, 516 (2012).

**discussion**

A. Juvenile Protections Are Governed By Constitutional And Statutory Provisions

1. A Series Of United States Supreme Court Cases Hold Juveniles Are Vulnerable To The Outside Pressures And Require Protections Not Required For Adults

“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); accord, *Gall v. United States*, 552 U.S. 38, 58 (2007); *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Johnson v. Texas*, 509 U.S. 350, 367 (1993). The United States Supreme Court has found juveniles are “more vulnerable or susceptible to negative influences and outside pressures” than adults. *Roper* at 555 (2005). Seventy-five years ago, the United States Supreme Court recognized that children must be afforded special consideration during interrogations because they are more vulnerable to the pressures of interrogation than adults. See *Haley v. Ohio*, 332 U.S. 596, 599 (1948). The Supreme Court has repeatedly recognized the significance of adolescent brain development. See *J.D.B. v. North Carolina*, 564 U.S. 261, 272-73 (2011); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471-72 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 206-208 (2016); *Jones v. Mississippi*, 141 S.C. 1307, 1316 (2021). In *Miller*, the Court set out three significant gaps between juveniles and adults: 1) Children have a “lack of maturity and underdeveloped sense of responsibility,” resulting in recklessness, impulsivity and risk-taking; 2) children are more vulnerable to negative influences and pressures including from family; and 3) a child’s character is not fixed and irretrievable depravity is unlikely. *Miller* at 471, quoting *Roper* at 569. In *J.D.B. v. North Carolina*, the United States Supreme Court explained:

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children “generally are less mature and “generally are less mature and responsible than adults,” *Eddings*, 455 U.S., at 115-116, 102 S. Ct. 869, 71 L. Ed. 2d 1; that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” *Bellotti* v. *Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (plurality opinion); that they “are more vulnerable or susceptible to . . . outside pressures” than adults, *Roper*, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1; and so on. See *Graham* v. *Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (finding no reason to “reconsider” these observations about the common “nature of juveniles”). Addressing the specific context of police interrogation, we have observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” *Haley* v. *Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948) (plurality opinion); see also *Gallegos* v. *Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962) “[N]o matter how sophisticated,” a juvenile subject of police interrogation “cannot be compared” to an adult subject). Describing no one child in particular, these observations restate what “any parent knows” --indeed, what any person knows--about children generally. *Roper*, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

*J.D.B*. at 272-273.

2. Federal And State Statutes Mandate Sight And Sound Separation Of Juvenile Inmates From Adult Inmates

 Federal statutes have been enacted with the purpose of protecting juveniles while they are held in custody. Compliance is mandatory for a state to receive federal funds for juvenile justice, jails and prisons. 34 U.S.C.S. §§11133(a), 30305, 30307. In 2003 Congress passed the Prison Rape Elimination Act based on findings including “Young first-time offenders are at increased risk of sexual victimization.” 34 U.S.C.S. § 30301(4). One of the purposes of the Juvenile Justice and Delinquency Prevention Act, is to support programs “designed to meet the needs of at-risk youth and youth who come into contact with the justice system.” 34 U.S.C. §§ 11102(4). The act requires sight and sound separation between juvenile inmates and adult inmates: “juveniles alleged to be or found to be delinquent or juveniles within the purview of paragraph (11) will not be detained or confined in any institution in which they have sight or sound contact with adult inmates.” 34 U.S.C.A. § 11133(a)(12)(A). Our legislature enacted statutes to implement the federal requirement. Juveniles detained in North Carolina jails cannot converse with, see, or be seen by the adult population. N.C.G.S. §§ 7B-1501(11), 7B-1905(c). Despite the clear federal and state mandatory statutory requirements, officers of the Columbus County jail allowed sixteen-year-old Gabriel McDowell to sit at a table with adult inmates who pressured him into a confession which was later introduced at trial. The confession which was obtained outside of the presence of Gabriel’s attorney was obtained through state action in violation of his constitutional rights to effective representation, freedom from cruel or unusual punishment and due process. U.S. Const. Amends. V, VI, VIII and XIV; N.C. Const. Art. I., Secs. 19, 23, 27 and 35.

3. Opinions From The United States Supreme Court Regulate Interrogation Of Juveniles

 a. Once A Suspect Has Invoked His Rights Questioning Outside The Presence Of Counsel Must Cease

 Based on the Fifth and Fourteenth Amendments, *Miranda v. Arizona*, 384 U.S. 436 (1966), requires law enforcement officers to advise a criminal suspect of his the right to remain silent and his right to have an attorney present during questioning. *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981) (citing *Miranda* at 479). “If [the accused] requests counsel, “the interrogation must cease until an attorney is present.” *Id*. at 482, (quoting *Miranda*, at 474) In North Carolina if the accused is a juvenile, under age eighteen, he or she has a right to have a parent, guardian, or custodian present during questioning. N.C. Gen. Stat. § 7B-2101(a)(3). Once a suspect has invoked his rights, questioning may resume in the absence of counsel only if “the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards* at 484-85. The rule requiring all interrogation to cease when an adult defendant requests an attorney, applies equally to a juvenile. *State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986), aff’d, 321 N.C. 290, 362 S.E.2d 159 (1987). When a juvenile’s confession results from police-initiated custodial interrogation in the absence of counsel after the juvenile has invoked his right to have a parent present during questioning, the resulting confession is inadmissible. *Id*. at 107-108, 343 S.E.2d 518, 522. *Miranda’s* safeguards operate “whenever a person in custody is subjected to either express questioning or its functional equivalent.” This includes “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit and incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 300-301(1980) In this case Gabriel’s confession was the functional equivalent of an interrogation as it was the result of actions of the sheriff’s deputies operating the jail whose repeated violations of statutes requiring sight and sound separation facilitated the prohibited interactions between Gabriel and the group of adult inmates.

b. Special Considerations Govern Findings Of Fact In North Carolina When A Juvenile’s Interrogation Is Questioned.

 Our Supreme Court has instructed while:

[N]ot every statement obtained by police from a person in custody is considered the product of interrogation. Interrogation is defined as either express questioning by law enforcement officers, or conduct on the part of law enforcement officers which constitutes the functional equivalent of express questioning. The latter is satisfied by any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.

*State v. Fisher*, 158 N.C. App. 133, 142-143 (2003), affirmed, 358 N.C. 215 (2004). In *State v. Council*, this Court applied the *Fisher* principles to a city police chief who had been the juvenile’s coach talking to the defendant while he was being transported from his home to the station. This Court found:

While these findings are supported by the evidence and properly address whether Shroeder engaged in interrogation of Defendant by “express questioning[,]” the trial court made no “determination of whether [Schroeder] should have known [his] conduct was likely to elicit an incriminating response” by considering “(1) the intent of the police; (2) whether the practice [wa]s designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of ]D]efendant to a particular form of persuasion.”

*State v. Council*, 232 N.C. App. 68, 75 (2014), quoting *Fisher* at 142-143. Council found that as the trial court’s findings of fact failed to address *Fisher,* denial of the defendant’s motion to suppress was error. *Id.* Under *Fisher*, conduct of the sheriff’s deputies, who are law enforcement officials, constituted the “functional equivalent of express questioning.”

B. Admitting A Confession Into Evidence Which Was Obtained By Actions Of Government Officials Who Facilitated Coercion Of A Juvenile By A Group Of Adult Inmates Violated Gabriel’s Constitutional Rights

 Curtis Hollingsworth testified he was held in the Columbus County starting in September 2017 on drug charges. (Tp. 506) Sometime in December 2017 Hollingsworth met Gabriel McDowell when they were housed in the same jail pod. Hollingsworth explained forty inmates were held in separate cells. Inmates stayed in their cells except for meals and to watch TV. (Tpp. 508-509) Hollingsworth understood Gabriel should have been housed separately, but “after a while, once he got used to it, they let him out with us.” (Tp. 509) Gabriel sat at a table with Hollingsworth and an unknown number of other adult men. The men pressured him into changing his story for “two days, three days, maybe four days.” (Tp. 509) Gabriel was a juvenile susceptible to the pressures of adults. Gabriel’s detailed story to Hollingsworth about how he had assaulted his uncle was the result of days of pressure by a group of adult men on a juvenile.

 Hollingsworth decided to relate his version of what Gabriel had told him to officers. An interview was recorded on January 31, 2018. The notes of the first unrecorded interview were not introduced into evidence. (SE 282, 01:11) At the start of the recorded interview, Detective Johnson asked Hollingsworth if Gabriel had “said anything new” since the last interview, indicating Johnson knew the jail was not following federal and state statutes requiring juveniles to be separated by sight and sound from adult inmates and that he had purposefully instructed Hollingsworth to continue pressing Gabriel for details of the assault. (SE 282, 01:30) Hollingsworth explained to Johnson that “we all got around the table” and Gabriel told the men that he had walked in on two men assaulting his uncle. (SE 282, 04:27) “The next day he switched it up again. The third day switched it up again.” (SE 282, 04:28-04:48) The other men repeatedly told Gabriel they did not believe him. After days of being pressured by the adult inmates to change his story, Gabriel confessed. Johnson ended the interview by telling Hollingsworth he would talk to his attorney and “see what we can do for you.” (SE 282, 18:39-18:40).

 The recorded interview leaves no question that Johnson: 1) knew the jail was violating federal and state statutes by failing to separate Gabriel by sight and sound from the adult inmates: 2) intentionally and purposefully had the jail continue to violate the statutes in order to facilitate further interaction between Gabriel and the adult inmates; and 3) knew Gabriel was being interrogated by adult inmates without his attorney present after Gabriel had invoked his right to counsel.

 Gabriel was subjected to interrogation by adult men he had reason to fear and without the presence of his attorney or his parents in violation of federal and state statutes and constitutional protections. As video from security cameras was not introduced, the State cannot show how many men were at the table or what tactics the men used to pressure Gabriel into changing his story. Allowing Gabriel to be pressured by these adults over a period of several days was especially egregious in this case as Gabriel had been abused by adult men, both by introducing him to drugs and alcohol and sexually.[[4]](#footnote-4) (Sentencing Tp. 12) Hollingworth’s summary of the adult men pressuring Gabriel over a period of days gives no details of what threats or incentives the table full of men used against Gabriel to elicit the confession. A juvenile housed with men would be unable to withstand the pressure to do what they asked as juveniles “are more vulnerable or susceptible to . . . outside pressures” than adults, *Roper*, 543 U.S. at 569. Detective Johnson knew Gabriel was represented by counsel, as his attorney was present at the December 20, 2017 interview. Despite this knowledge, Johnson used Hollingsworth to interrogate Gabriel outside the presence of his attorney. The actions of the sheriff’s deputies who operated the jail and of Detective Johnson violated Gabriel’s constitutional rights to not be forced to be a witness against himself, due process, effective assistance of counsel and freedom from cruel or unusual punishment. U.S. Const. Amends. V, VI, VII and XIV; N.C. Const. Art. I, Secs. 19, 23 and 27. North Carolina has an added protection: “A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.” N.C. Const. Art. I, Sec. 35. Fundamental principles demand that the State not be permitted to gain a juvenile’s confession by violating federal and state statutes enacted to protect the juvenile from the threats, pressures and bribes of adult inmates. Placing a juvenile in danger to obtain a confession must be found to violate fundamental principles.

C. Under The Plain Error Standard Of Review Admitting The Recording Of Hollingsworth’s Interview Constituted A Grave Error Amounting To A Denial Of Fundamental Rights

 As defense counsel did not object to Hollingsworth’s testimony and only objected to the recording based on lack of corroboration, this Court reviews the error under the plain error standard. “Plain error review allows appellate courts to alleviate the potential harshness of preservation rules.” *State v. Lawrence*, 365 N.C. 506, 514 (2012), citing to *State v. Odom*, 307 N.C. 655, 660 (1983). Plain error is a “fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,” or “where [the error] is grave error which amounts to a denial of a fundamental right of the accused,” or the error has “resulted in a miscarriage of justice or in the denial to appellant of a fair trial’” or where the error is such as to “seriously affect the fairness, integrity or public reputation of judicial proceedings.” *Odom* at 660, quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (1982). Admitting into evidence a confession obtained by subjecting a juvenile to the possible threats and bribes of adult inmates seriously affected the fairness integrity and public reputation of the judicial proceeding.

 “To show that an error was fundamental, a defendant must establish as prejudice that after examination of the entire record the error had a probable impact on the jury’s finding. *Lawrence* at 518. In this case there is a probable impact on the jury’s finding that the defendant was guilty of first-degree murder as Hollingsworth’s testimony and recorded interview contained the only admission by Gabriel that he was the perpetrator and contained evidence that could have been interpreted as showing premeditation and deliberation. The jurors in this case could find Gabriel guilty of first-degree murder, second-degree murder or not guilty. (Rp. 84) The jury had been instructed that second-degree murder differs from first-degree in that neither specific intent to kill, premeditation, nor deliberation are necessary elements. (Tp. 81) Without the Hollingsworth recording, this jury would have found Defendant guilty of premeditated murder. The Supreme Court has instructed that “[a} confession is like no other evidence” and “confessions have a profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so [by a trial court].” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting in part, *Bruton v. United States*, 391 U.S. 123 (1968) Hollingsworth’s interview contained gruesomely disturbing admissions by Gabriel that had not come before the jury in any other manner, including his statement that he would do it again, if he were pushed. (SE 282, 11{11 – 11:19) As in *Fulminante*, admitting Gabriel’s confession through Hollingworth had a profound impact on his jury, which had a choice between first and second degree murder.

D. The Cold Record Indicates Further Investigation Is Required For A Claim Of Ineffective Assistance Of Counsel

 Gabriel’s trial counsel failed to object to the admission of Hollingsworth’s testimony, or the recording based on the violation of statutory and constitutional rights. Defendant asserts failing to object to this glaring violation constitutes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1970). “IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166 (2001). The record in this case is incomplete as to: jail logs showing movements of the inmates; information concerning the number and crimes of the inmates with whom Gabriel was sitting when he was pressured into changing his story; testimony from the other adult inmates with whom Gabriel interacted; Detective Johnson’s notes from the first interview to determine what new information Hollingsworth obtained when he was sent back to Gabriel’s pod; any information as to possible reasons for the defense counsel to decide not to object to sheriff’s deputies violating the sight and sound separation statutes and using the violation to obtain a confession. Defendant requests this Court find the ineffective assistance claim has been brought prematurely and dismiss the claim without prejudice, allowing Defendant to bring the claim pursuant to a subsequent motion for appropriate relief in the trial court. See, *State v. Thompson*, 359 N.C. 77, 123 (2004), citing to *Fair* at 167.

CONCLUSION

For the reasons set forth above, Defendant respectfully contends that this Court should vacate his convictions.

Respectfully submitted this the 22nd day of May 2023.

Electronic Filing

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**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed electronically pursuant to Rule 26.

 I further hereby certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Cadon William Hayes, Assistant Attorney General, by electronic mail to cwhayes@ncdoj.gov .

 This the 22nd day of May 2023.

Electronic Filing

Marilyn G. Ozer

Attorney at Law

**CERTIFICATE OF COMPLIANCE**

 Undersigned counsel certifies that this Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it was prepared using Microsoft Word, Century Schoolbook, 13-point type. The word count, including footnotes and citations, is less than 8750 words, as indicated by Word, the program used to prepare the brief.

 This the 22nd day of May 2023.

Electronic Filing

Marilyn G. Ozer

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**APPENDIX A**

**TESTIMONY OF CURTIS HOLLINGSWORTH**

1. Three interviews were recorded at the sheriff’s office. The interviews were uploaded to a DVD marked State’s Exhibit 272. The first interview began at approximately 11 p.m. on December 6. Gabriel and his parents were present. (State’s Exhibit 272A) The second interview began on the morning of December 7, again with Defendant’s parents present. (State’s Exhibit 272B) The third interview took place on December 20. At this interview Gabriel’s attorney was present, but not his parents. (State’s Exhibit 272C). [↑](#footnote-ref-1)
2. Hollingsworth’s testimony at trial is attached hereto as Appendix A. A copy of the DVD labelled State’s Exhibit 242 has been filed at this court under Rule 9(d). [↑](#footnote-ref-2)
3. The times noted in this brief are the numbers that appear on the bottom of the screen, showing time elapsed, not the time of day. [↑](#footnote-ref-3)
4. Over 90 percent of youth involved in the justice system report having experience trauma, with the majority reporting repeated exposure to traumatic events. Hayley M.C. Cleary et al., How Trauma May Magnify Risk of Involuntary and False Confessions Among Adolescents, 2 Wrongful Conviction L. Rev. 173, 177 (2021) [↑](#footnote-ref-4)