

1 patient, client, or emotionally dependent
2 patient or client.”

3 THE COURT: Ms. Schaefer, what is
4 your client's position regarding that
5 proposed amendment?

6 MS. SCHAEFER: My understanding is
7 the amended is just to conform the
8 language to the uniform jury instruction
9 for Count II, so we would have no
10 objection.

11 THE COURT: The amendment will be
12 allowed under Rule 2.48. It's clearly
13 allowed. It doesn't change the substance
14 of the case, so the amendment will be
15 allowed.

16 Counsel, we'll pick up that other
17 matter in chambers where it's required to
18 be heard, so we'll take that up now.

19 (In chambers, outside the presence
20 of the jury, in the presence of the Court,
21 the Defendant, and counsel at 2:42 p.m.)

22 THE COURT: We're back on the
23 record at this time. We're in chambers
24 with the Defendant being present with Ms.
25 Schaefer and Ms. Timmins for the State.

1 And this is in regards to a Rule
2 5.412 Motion filed by Ms. Schaefer, which
3 the Court has a copy of. The State did
4 file a response to that.

5 Again, I've read both the Rule
6 5.412 Motion as well as the Resistance. I
7 tried to do as much research last night
8 and during the noon hour and this morning
9 as possible.

10 Ms. Schaefer, is there record you
11 want to make on that Motion?

12 MS. SCHAEFER: Yes, Your Honor.

13 My understanding after the
14 deposition of one of the witnesses, a
15 Kxxxxxxx [REDACTED], is that she had made
16 various allegations towards her adoptive
17 parents who live in the state of
18 Wisconsin. And while we did know that
19 there were sexual abuse allegations, we
20 were not entirely clear of what those
21 consisted of. And after speaking--after
22 deposing her on Monday, the day before the
23 trial began, I was able to get a little
24 more detail on what those claims were, and
25 then to speak to her adoptive mother who

1 indicated those were not true, as well as
2 some information on some other allegations
3 of physical abuse that Kxxxxxxx has made in
4 the past that were unfounded and
5 unsubstantiated and Ms. [REDACTED]--or
6 excuse me--Ms. [REDACTED]--and that's [REDACTED]
7 [REDACTED], I believe--would testify were false
8 allegations.

9 THE COURT: Can you outline what
10 you believe Ms. [REDACTED] would say?

11 MS. SCHAEFER: My understanding
12 from speaking with Ms. [REDACTED] is that she
13 would testify to her relationship with
14 Kxxxxxxx [REDACTED]; that she and her husband
15 adopted Ms. [REDACTED] when, I believe, she
16 was 7 or 8 years old; and that Kxxxxxxx has
17 had a series of behavioral problems that
18 escalated when she got to high school;
19 that Kxxxxxxx would self-harm and then
20 report to others that it was her mother
21 and father, slash, aunt and uncle. My
22 understanding is Ms. [REDACTED] is her
23 paternal aunt and also her adoptive
24 mother.

25 I explained to her what it was

1 specifically that Kxxxxxxx was accusing her
2 specifically of as far as sexual abuse,
3 and she made it clear that that was not
4 true, and this was a pattern of behavior
5 that Kxxxxxxx would engage in of making
6 false allegations against her and her
7 husband, both of a physical abuse nature
8 and a sexual abuse nature.

9 She would also testify that my
10 advising her was the first she knew of--
11 she knew that there had been sexual abuse
12 allegations, but she did not know exactly
13 what they entailed. And she would further
14 testify that they simply weren't true.

15 THE COURT: What was the timing on
16 this then?

17 MS. SCHAEFER: Pardon?

18 THE COURT: The timing of the prior
19 allegations which Ms. [REDACTED] said are
20 false.

21 MS. SCHAEFER: My understanding
22 after deposing Ms. [REDACTED] is that the
23 allegations of physical abuse had occurred
24 prior to her going to Midwest Academy;
25 that there had been at least two or more

1 occasions where the Department--or
2 Wisconsin's version of the Department of
3 Human Services had done assessments; that
4 the sexual abuse allegations did not
5 transpire until she was at Midwest
6 Academy. And those allegations involved
7 not only her adoptive parents but also
8 some foster parents in, I believe, the
9 state of Oregon. And those were
10 disclosed-- According to Ms [REDACTED],
11 they occurred when she was younger, but
12 they were disclosed when she was at
13 Midwest Academy.

14 THE COURT: And I'll ask both of
15 you, but in the deposition did Kxxxxxx
16 ever say--or recant those? Is there
17 information that she recanted those
18 allegations?

19 MS. SCHAEFER: No, she did not.
20 With regard to the allegations of physical
21 abuse that occurred where the Wisconsin
22 DHS, or their equivalent, investigated she
23 did confirm that those assessments were
24 unfounded and/or unsubstantiated, but she
25 did not out and out recant or say they

1 were not true.

2 THE COURT: Okay. I know that this
3 person would be able to call in by
4 telephone. Again, the Court expressed
5 concern about that. I believe it's In Re
6 the Estate of Rutter, about telephonic
7 evidentiary presentations in a case like
8 this. But would that be substantially
9 what she would say if she was called as a
10 witness, if you were to make an offer of
11 proof?

12 MS. SCHAEFER: Yes. That's my
13 understanding from what we discussed
14 Tuesday morning, I believe it was.

15 THE COURT: Ms. Timmins, your
16 response? And, again, if you want to
17 respond to that or--and I have your motion
18 right in front of me--or your Resistance.
19 I'm sorry.

20 MS. TIMMINS: The State would rely
21 on its motion (sic). And I'm at a bit of
22 a disadvantage because this has just been
23 filed. I assume we're just making
24 arguments at this point. This is not the
25 actual 5.412 hearing; is that correct?

1 THE COURT: Well, we've got to have
2 it at some point. I mean--

3 MS. TIMMINS: Well, here's the
4 State's position.

5 THE COURT: Okay.

6 MS. TIMMINS: This should not be
7 heard because it is late. If you read the
8 cases, the requirement of the timeframe is
9 not there just because. There's a reason
10 for it. And what's going on right here is
11 exactly the reason.

12 We're in the middle of trial. This
13 witness is supposed to testify tomorrow,
14 and we're having to deal with this issue.

15 Now, if we were to have an actual
16 hearing on it, I would have evidence to
17 present. Kxxxxxxx would have a right to
18 testify. There are other people and other
19 documents that I can bring in, because the
20 Court has to make a decision as to whether
21 or not Kxxxxxxx's statement is false.

22 So I don't see how that's possible
23 without a full hearing that both sides
24 have the opportunity to present evidence
25 on.

1 So because of the untimeliness,
2 because of the situation we're in right
3 now, this should not be heard.

4 The Defendant wanted a speedy
5 trial, and this is of his making. And
6 they had this evidence in the discovery
7 materials. Kxxxxxx's deposition was taken
8 on Monday, but all the information that
9 she confirmed was in the discovery
10 materials, so it could have been filed
11 earlier.

12 In regards to all of the
13 allegations disclosed when she got to the
14 academy, I do believe there is--and I
15 don't want to say for sure because I need
16 to be able to gather evidence--but I
17 believe that there are documents regarding
18 her admittance to the academy that talks
19 about Kxxxxxx's prior abuse that Ms.
20 [REDACTED] filled out. So I don't think--I'm
21 not for sure if the Oregon information all
22 of a sudden came up. And it's my
23 understanding that that was confirmed.
24 But again, I need to look at the
25 documents.

1 Kxxxxxxx has never recanted any of
2 this. She confirmed on the record that
3 there was a DHS unfounded report, but as
4 we all know in the judicial system,
5 unfounded does not equal false, which is
6 similar to the case that I put in my
7 motion where, you know, if a sheriff's
8 office decides not to pursue a case or a
9 police officer decides not to pursue a
10 case, that doesn't mean that the victim is
11 lying. It's just whatever else happened
12 and the case was not pursued.

13 If we had a full hearing, we could
14 maybe get to the bottom of this. I don't
15 believe that we should even be dealing
16 with this.

17 THE COURT: Ms. Schaefer?

18 MS. SCHAEFER: I have nothing
19 further, Your Honor.

20 THE COURT: Based upon the
21 information presented, the Motion filed by
22 the defense will be denied on several--
23 first of all, the timing. I believe it's
24 the Baker case set forth the standard, and
25 then footnote 3 of the Alberts case sets

1 forth that a defendant intending to offer
2 such evidence must make a written motion
3 to offer such evidence no later than
4 fifteen days before trial. We're way past
5 that.

6 Stating further, "This procedural
7 requirement would also apply to alleged
8 false claims of sexual conduct because
9 they are covered by the rape-shield law
10 unless proven to be false. The motion
11 must be accompanied by a written offer of
12 proof and the trial court must order a
13 hearing in chambers to determine
14 admissibility of such evidence."

15 Even without the timing issue, just
16 the nature of the--if I take your offer of
17 proof that that's what she would state if
18 she was here, it would also be
19 insufficient for the Court to make a
20 determination by a preponderance of the
21 evidence that this statement was false.

22 These types of allegations are
23 multi-dimensional. And I don't want to
24 get in the situation, and I believe it was
25 in the State's argument, of doing a trial

1 within a trial, which this could turn
2 into, and I mean a long, long hearing.
3 And that's why that timing provision is in
4 there, so as to avoid that.

5 And even if that were the case, if
6 we went the other way, I would determine
7 that it would be--that the probative value
8 would exceed the prejudice in this case at
9 this time given what I know to this point
10 in the case.

11 So the Motion will be overruled and
12 denied. I'll try and put that in writing
13 also in more detail. But we can proceed
14 with opening statements now.

15 (In open court, outside the
16 presence of the jury, in the presence of
17 the Court, the Defendant, and counsel at
18 2:54 p.m.)

19 THE COURT: The record should
20 reflect that all counsel are present and
21 the Defendant. We're outside the presence
22 of the jury. We are ready to begin with
23 opening statements at this time. You can
24 bring in the jury.

25 MS. SCHAEFER: Your Honor, just for