RECEIVED
Jun 13 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001038

THE STATE, ...RESPONDENT,

v.

MANLY M. THOMPSON, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

104 North Main Street
Lancaster, South Carolina 29720
(803) 416-9367

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Appellant's Statement of Issue on Appeal 1

Respondent's Counterstatement of Issue on Appeal 1

Statement of the Case 2

Standard of Review 3

<u>Argument:</u>

Judge McKinnon properly questioned the minor child, weighed the factors in *S.C. D.S.S. v. Doe* alongside information from the child's therapist, and rightly exercised his discretion in finding the minor was not competent to testify. The child did not know the difference between a truth and a lie, his testimony came off as rehearsed, and a showing of the permanent harm that testifying could do to him was validly made ……………………………………………………………....4

Conclusion……………………………………………………………………………………11

TABLE OF AUTHORITIES

Cases

In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004)…………………………..……………6

Peyton v. Strickland, 262 S.C. 210, 203 S.E.2d 388 (1974)………………………..…………10

South Carolina Dept. of Social Services v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct. App. 1987)……………………………………………………………………...………..….i, 4

State v. Givens, 267 S.C. 47, 225 S.E.2d 867 (1976)……………….…………………………5

State v. Green, 267 S.C. 599, 230 S.E.2d 618 (1976)………………………..……………..5, 10

State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)………………………..…………………3

Statutes

S.C. Code §16-3-1535(F) (1997)……………………………………………………......…6

Rules

Rule 601, SCRE…………………………………………………………………………4, 10

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it ruled eleven-year-old S.T. was not competent to testify, since S.T. was mature enough to relate the facts and understand the duty to tell the truth when testifying?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

After the defense initially firmly conceded and insisted the child was not competent to testify, whether Judge McKinnon properly exercised his discretion by interviewing the child *in camera*, weighing and balancing the right factors, and ruling the child was indeed incompetent to testify as the defense already asserted?

STATEMENT OF THE CASE

Appellant Manly Maurice Thompson was indicted at the December 2019 term and a later 2022 term of the grand jury for Richland County for murder, possession of a weapon during the commission of a violent crime, and unlawful possession of a pistol by a person convicted of a violent crime. (2019-GS-29-02852 (two counts) & 2022-GS-29-00772) R. 644-646. He was prosecuted by Assistant Solicitors Melissa McGillis and Luck Campbell, and was represented by Hemphill Pride, Esq. R. 1. Appellant proceeded to trial by jury from July 12 to 15, 2022, and was found guilty as charged. R. 600. He was sentenced by the Honorable William A. McKinnon to life for murder and five concurrent years' imprisonment for each of the other two indictments. R. 632-633. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STANDARD OF REVIEW

"The determination of a witness's competency to testify is a question for the trial court, and the trial court's decision will not be overturned absent an abuse of discretion." *State v. Needs*, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998).

ARGUMENT

Judge McKinnon properly questioned the minor child, weighed the factors in *S.C. D.S.S. v. Doe* alongside information from the child's therapist, and rightly exercised his discretion in finding the minor was not competent to testify. The child did not know the difference between a truth and a lie, his testimony came off as coached, and a showing was made of the permanent harm that could be done to him should he be allowed to testify.

This is a very straightforward case. Appellant argues Judge McKinnon abused his discretion when he interviewed the minor child, weighed the *S.C. D.S.S. v. Doe* factors, and ruled he was not competent to testify. The State disagrees and submits Appellant's argument is without merit. Judge McKinnon did not make an error of law and all his conclusions were validly supported by evidence in the record. He questioned the child *in camera* and the child could not tell him the difference between the truth and a lie, had multiple inconsistent answers, was hesitant to answer any of the judge's questions except for the monologue the child presented about what happened the night of the murder (indicating the child might have been coached), and a showing was made that permanent harm could be done to the child by testifying. Judge McKinnon was permitted by law to consider other factors than those strictly outlined in *Doe*, and he validly and reasonably exercised his judicial discretion. This Court should affirm.

"A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE. "At common law, persons fourteen years of age and older are presumed competent to give evidence; proof of competency is required for children under that age." *S.C. D.S.S. v. Doe*, 292 S.C. 211, 218, 355 S.E.2d 543, 547 (Ct. App. 1987) (emphasis added).

"Incompetency means that the witness lacks the mental capacity to perceive, recall, or relate the facts or to understand the duty to tell the truth when testifying." *Id*. at 219, 355 S.E.2d at 548.

While children of tender years are not per se incompetent to testify, a child's "competency to testify depends on showing to the satisfaction of the trial judge that the child is substantially rational and responsive to the questions asked and is sufficiently aware of the moral duty to tell the truth and the probability of punishment if he lies." *Id*. at 219, 355 S.E.2d at 547; *State v. Givens*, 267 S.C. 47, 225 S.E.2d 867 (1976). The factors a judge should look at in determining the above are, is the child mature enough:

(1) to understand questions and narrate answers,

(2) to perceive facts accurately through the medium of the senses,

(3) to recall them correctly,

(4) to relate a true version of the facts perceived,

(5) to know the difference between right and wrong, good and bad,

(6) to understand it is right or good to tell the truth and wrong or bad to lie,

(7) to be willing to tell the truth, and

(8) to fear punishment if he lies?

S.C. D.S.S. v Doe, 292 S.C. at 219, 355 S.E.2d at 547.

The trial judge alone makes the competency determination. *State v. Green*, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976). The judge "must rely on his personal observation of the child's demeanor and responses to inquiry on voir dire examination" and the judge must not merely accept the "representation of counsel that a child is not competent." *S.C. D.S.S. v. Doe*, 292 S.C. at 219, 355 S.E.2d at 547. If, however, a real showing that permanent harm could be done to the child by testifying can be made, "the wise exercise of judicial discretion can protect the child

witness from undue stress." *Id*. at 220-221, 355 S.E.2d at 548. S.C. Code § 16-3-1535(F) directs judges to "recognize and protect the rights of victims and witnesses as diligently as those of the defendant." S.C. Code § 16-3-1535(F) (1997). If, after the trial court has examined the child and has considered other legal factors not relevant here, and that judge finds additional psychological examinations of the child are needed, the judge has the discretion to order them, which suggests he has the authority to depart from the *Doe* factors in making any determination on competency. *In re Michael H*., 360 S.C. 540, 602 S.E.2d 729 (2004). If he can order them, he certainly can review the results of psychological tests that have already been administered.

In this case, Tonya George, the mother of the 11-year-old minor (11 at the time of trial, 8 years old at the time of the murder), approached the solicitor and shared her concerns about how damaging it would be to her child if he had to testify. R. 7, 14, 27. The minor had witnessed his father murder his uncle, and had severe depression, post-traumatic stress disorder, adjustment disorder, attention-deficit/hyperactivity disorder, and hyperactive/impulsive presentation as a result. R. 7, 15; Court's Exhibit 1 R. 635. Ms. George asked the judge if her child could be excused from testifying, and the solicitor told the judge *the State* was initially planning on calling the child to testify, but "traumatizing children is not what we're here for." R. 8-9. The solicitor said, "[i]n the alternative, what we would intend to do is, possibly excuse him from testify[ing]." R. 9. The child was in counseling and "fear[ed] for his safety and his life," and the solicitor did not "want to cause permanent damage to the child or have him seek to harm himself . . . ." R. 9.

The defense, contrary to what was raised in their brief, then said, "If that's the case, and the State realizes that that would be injurious to the child, obviously, <u>the child should not be called</u>." R. 9 (emphasis added). The defense then went on to tell the judge that he had no idea what the minor would say, and that they did not want the trial court to hear testimony from the

minor's mother about what the minor would testify to because it was not relevant. R. 10. The State even made the defense the offer of having the child's mother testify in lieu of the child as to what the child would say, but the defense rejected the "reasonable compromise." R. 10.

The defense continued to protest that the hearing was going to occur, saying:

> If the child is not eligible to testify because of a disability, and that's what I gather from reading . . . Court's Exhibit 1, which is a letter regarding the child's mental health. It appears the child suffers under a disability. And according to the letter it would be injurious for the child to come and testify.
>
> **So there's no question about whether the child – there shouldn't be a question about whether the child can testify based on this . . . document, on Court's Exhibit 1.** If that's the case, what is the probative value in having the mother come in and testify why the child can't testify?

R. 11-12 (emphasis added).

The child's mother then told the court what the child witnessed, and the defense then said he would have no objection to the testimony. R. 18-19. The State told the court they would be presenting other witnesses who saw the shooting, and assured the court the jury would not know that the minor in question was even present at the shooting. R. 20. The defense then withdrew their objection to the child's mother testifying in lieu of the child. R. 21.

After conversations about hearsay and about excluding any mention of the child from the trial, the defense then said Appellant was going to testify and asked permission of the judge to be able to mention his son's presence in the room during the shooting. The judge said the defense could not both "oppose actual testimony from his son" and also mention the son at trial. R. 25. Only then did the defense begin to change their mind and ask the court to allow the child's testimony. R. 23-25. But their decision at that juncture was that they were *not* "going to call the child" to testify. R. 25.

The court then ruled, “I am not inclined to let an 8-year-old testify regarding an alleged shooting involving his father as the defendant, when the child’s therapist says: ‘He is mentally unstable to cope or regulate his feelings when discussing this incident.’” R. 27-28. “I’m not going to let an 8-year-old be called to the witness stand and testify as to whether or not his father is a murderer.” R. 28.

The parties then revisited the issue during trial after the prosecution rested. R. 383-384. The minor child was put on the stand *in camera*, and the judge, solicitor, and defense all had the opportunity to question him. The minor first said he was 10 when he was really 11 years old. R. 385. He said he did not know why everyone was in court that day and had no understanding of it. *Id*. Then, after multiple questions from the judge about what the difference was between a truth and a lie, when asked “what does it mean to lie” he said, “I don’t know.” R. 385-386. Then, after the child relayed what he had witnessed, he said he had not talked to anyone about what he was going to say in court, when that was not true – he had at the very least talked to his therapist about the murder. R. 387. After the child denied having talked to anyone about the murder at all yet again, the parties had a bench conference, and the judge asked the child a third time, “I want to ask you one more time. What you just told me about what happened . . . you’ve never talked about what you were going to say in court with your mom or anybody?” The child said, “No, sir.” R. 387. The child changed his answer later. R. 389.

Judge McKinnon, after the defense was done with their questions, then said to the child, “Just a couple of minutes ago . . . I asked you, had you talked about what you were going to say with anyone? And I asked you twice and you told me no. Can you explain why you changed your answer?” The child then said, “I don’t know” two times. R. 389. Then, on the defense’s re-direct, the child said he *had* talked to his mom on the way to court that day about “[w]hat I was

supposed to say." R. 390. The defense reminded the child what he had told the judge about what happened the night of the murder, and asked the child, "Did your mother tell you to say that?" The child at first nodded, but then said "no." R. 391. The solicitor put on the record, "I would just note that every time the child hesitated to respond, he was looking at his mother for guidance." R. 391. The defense said he was looking for confidence. *Id*.

Judge McKinnon, in making his ruling, noted both that the child said his mother had told him to tell the truth *and* that his mother had told him what to say. R. 392. The defense then, in a reversal of their original arguments, made an argument as to the materiality of the witness. R. 394. The judge ruled the child was not competent to testify and told the parties he was pulling the factors straight from *South Carolina Department of Social Service v. Doe* from 1987 in making his ruling. R. 394. "One of the key [factors] is to understand the difference between the truth and a lie. I asked the witness, could he do that? He was unable to answer, even though I gave him a significant amount of time and I phrased it. I tried to make it in a child friendly form." R. 394. "He said he didn't know." R. 395. This testimony only bolstered the therapist's conclusion about the child's mental condition. "Further, the Court is concerned that the testimony was rehearsed, obviously, not by counsel." R. 395. "[W]hen I asked him questions, he was very hesitant, and you could tell he was nervous about being in court, except one question. When I asked him what happened, and he gave me a monologue. That struck the Court as rehearsed."

The court, as an additional sustaining ground, then cited the letter from the child's therapist and spoke about how allowing the testimony would be asking the child to testify in a matter that involved the shooting of his uncle by his father before affirming his ruling: he would not allow the child to testify. R. 395. Unlike in *State v. Green*, where a six-year-old's testimony

remained "firm and unwavering," this minor's therapist attested that the minor could not "recall the traumatic event without becoming overwhelmed or completely shutting down." Court's Exhibit 1; *State v. Green*, 267 S.C. at 602, 230 S.E.2d at 619. Further, the therapist said the minor "continue[d] to be terrified and extremely emotional when questioned about the incident and he is still mentally un[]able to cope or regulate his feelings." The therapist's letter only underscored how the minor could not meet either provision of Rule 601, SCRE: he could not express himself and he did not understand what it meant to tell the truth. Like in *State v. Green*, therefore, Judge McKinnon took "special care to ensure" whether the minor was competent or incompetent to testify. *Id*. at 603, 230 S.E.2d at 619.

The question of competency is not about how old the child is or was, but about what the trial judge thought about the child's ability to testify competently according to the factors above. The trial judge's ruling cannot be reversed unless a clear showing of abuse of discretion can be made. *Peyton v. Strickland*, 262 S.C. 210, 203 S.E.2d 388 (1974). Both *S.C. D.S.S. v. Doe* and Rule 601, SCRE, focus primarily on whether the child understood the difference between the truth and a lie, and on the child witness's duty to tell the truth, and the child never gave the trial court a clear answer on that factor to the court's satisfaction. Judge McKinnon asked the right questions, weighed and balanced the answers, and made a ruling that is based in law and in fact. This Court should affirm.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgments, convictions, and sentences of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY: s/ Julianna E. Battenfield
Julianna E. Battenfield
S.C. Bar No. 103135

Attorney for Respondent
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

OFFICE OF THE ATTORNEY GENERAL

Columbia, South Carolina

June 13, 2024

RECEIVED
Jun 13 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001038

THE STATE, ...RESPONDENT,

v.

MANLY M. THOMPSON, ...APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This is the 13th day of June 2024.

s/Julianna E. Battenfield
Julianna E. Battenfield
Assistant Attorney General

ATTORNEY FOR RESPONDENT

RECEIVED
Jun 13 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001038

THE STATE, ...RESPONDENT,

v.

MANLY M. THOMPSON, ...APPELLANT.

PROOF OF SERVICE

I, Julianna E. Battenfield, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent, Certificate of Compliance, and Proof of Service have been forwarded to Appellant's counsel Joanna K. Delany., via email today, June 13, 2024 to JDelany@sccid.sc.gov, and Ms. Delany's legal assistant, Kaylynn Warren, to KWarren@sccid.sc.gov.

I further certified that all parties required by Rule to be served have been served. This is the 13th day of June 2024.

s/Julianna E. Battenfield
Julianna E. Battenfield
Assistant Attorney General

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

Brandy Rankin

From: Brandy Rankin
Sent: Thursday, June 13, 2024 11:39 AM
To: Delany, Joanna
Cc: Warren, Kaylynn; Julianna Battenfield
Subject: The State v. Manly M. Thompson - Final Brief, Certificate of Compliance, Proof of Service - Appellate Cae No. 2022-001038
Attachments: Final Brief of Respondent, Certificate of Compliance, Proof of Service, 6-13-24 (03605626xD2C78).pdf

Follow Up Flag: Worldox

Dear Ms. Delany,

Please find attached the Respondent's Final Brief, Certificate of Compliance, and Proof of Service in the above captioned case. These documents will be filed with the South Carolina Court of Appeals today, June 13, 2024 along with a copy of this email. Have a great afternoon!

Sincerely,
Brandy Rankin

Brandy Rankin, Legal Assistant to Julianna E. Battenfield
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-6305

This email, together with any attachments, may be legally privileged. If you have received it in error, please notify the sender immediately, and then delete it from your system. This email and any replies to this email may be subject to disclosure under the Freedom of Information Act.