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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANLY MAURICE THOMPSON,

APPELLANT

APPELLATE CASE NO. 2022-001038

FINAL BRIEF OF APPELLANT

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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?

STATEMENT OF THE CASE

On December 19, 2019, a Richland County Grand Jury indicted Manly Thompson (Appellant) for murder, possession of a firearm during the commission of a violent crime, and possession of a handgun by a person convicted of a crime of violence. Appellant was tried before the Honorable William McKinnon, from July 11 – 15, 2022. Appellant was represented by Hemphill Pride. Luck Campbell and Melissa McGuiness prosecuted the case.[1]

Appellant was convicted as indicted and he was sentenced to serve concurrent terms of imprisonment of: life without the possibility of parole; zero days time served (since Appellant was sentenced to life); and five years, respectively. On July 21, 2022, Appellant moved for a new trial. On August 1, 2022, the court denied the motion.[2]

This appeal follows.

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1 R. 638; R. 1; R. 30.

2 R. 600, ll. 8-24; R. 632, l. 10 – 633, l. 17; R. 642; R. 636; R. 637.

STANDARD OF REVIEW

In criminal cases, an appellate court may review only errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial [court]," and the court's "decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the decision of the trial court is controlled by an error of law or lacks evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

"Qualification of a witness is within the trial judge's discretion and his ruling will be reversed only for an abuse thereof." *State v. Hudnall*, 293 S.C. 97, 99, 359 S.E.2d 59, 61 (1987), *overruled on other grounds by State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).

ARGUMENT

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.

Eleven-year-old S.T. witnessed the fatal altercation between Appellant and Decedent. Appellant tried to call S.T. as a witness, but the court erroneously found he was not competent to testify. S.T. knew the difference between the truth and a lie and was able to rationally relay what he had witnessed. He should have been permitted to testify.

Relevant facts

The State alleged that at approximately 3:00 on the afternoon of September 28, 2019, Appellant shot and killed his brother, Tony Gladden (Decedent), in their mother's living room. Appellant, who had been living in his mother's home off and on, testified Decedent made an unprovoked attack on him by striking Appellant on the back of the head. Appellant said he swung back at Decedent; the two men began tussling and Decedent reached for Appellant's gun, which was in Appellant's waistband. They struggled over the gun and Appellant fired the first shot. Appellant continued to fire: "I just couldn't stop. It was all an accident, a big accident." Stippling around Decedent's wounds showed the gun was fired at close range.[3]

Several other people were at the home at the time, either inside the house or just outside. Queen Thompson, who was the mother of Appellant and Decedent, was present in another room of the home but did not witness the shooting. She only came out after she heard gunshots. Michael Gladden (Michael), a brother of Appellant and Decedent, was outside on the front porch and did not witness the shooting. Michael claimed Appellant walked outside after the shooting

3 R. 72, l. 17 – 75, l. 25; R. 398, l. 3 – 412, l. 7; R. 410, l. 24 – 411, l. 3; R. 305 – 306, l. 13 R. 638.

and said, "Well, if he's not dead I'm going to go in there and make sure he is dead." Michael admitted he and Appellant did not get along. Michael did not get along with Decedent either. When law enforcement arrived, Michael was sitting calmly by the porch drinking a beer.[4]

Marcus McGee, a neighbor, was also outside on the front porch and did not witness the shooting. McGee's son, T.M., was also present at the time of the shooting. The State alleged T.M., who was fourteen years old at the time of the trial, was inside the living room and witnessed the killing. In contrast, the defense asserted T.M. was not in the living room at the time and did not witness the shooting. According to T.M., he was in the living room playing a video game and he witnessed Appellant enter the room and shoot Decedent in an unprovoked attack. T.M. claimed there was no arguing or fighting, Appellant just came in with the gun and shot Decedent five or six times.[5]

Appellant's son, S.T., was present in the living room and witnessed the shooting. The State raised S.T.'s availability as a witness pretrial. The State had subpoenaed S.T. but had never talked to him. S.T.'s mother sought to have him excused from testifying because he was "depressed" and "fragile." She presented a letter from his therapist's office. The court withheld ruling until S.T. was present. The defense attempted to call S.T. as a witness in its case-in-chief. S.T. was questioned in camera, and he testified that he was eleven years old and had finished the fourth grade.[6]

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4 R. 110, l. 4 – 117, l. 11; R. 463, l. 10 – 464, l. 22; R. 104, ll. 12-16.

5 R. 118, l. 3 – 121, l. 7; R. 82, l. 18 – 90, l. 18; R. 415, ll. 10-16; R. 460, l. 24 – 461, l. 9.

6 R. 14, l. 2 – 19, l. 25; R. 7, l. 11 – 28, l. 13; R. 385, ll. 1-6. The letter was Court's Exhibit #1 and is located at p. 635 of the Record on Appeal.

S.T. was asked what happened the day of the shooting, and he testified: "I was riding my bike and Uncle Tony pulled up and dad asked, did Uncle Tony want a drink? Then Uncle Tony said, no, then started being mean by saying bad words and went in the house on the couch. And I went in and got grapes and dad came in and they started arguing and fighting.[7]

> THE COURT: So you say your dad and Uncle Tony were fighting. What do you mean by "fighting"?
>
> THE WITNESS: Wrestling.
>
> THE COURT: Wrestling? Who started the wrestling?
>
> THE WITNESS: Uncle Tony.[8]

The judge and defense counsel both asked S.T. about the difference between the truth and a lie. The judge asked S.T.,

> THE COURT: . . . [S.T.], if someone who was like five years old and said to you, [S.T.], tell me the difference between the truth and a lie, what would you tell that five year old?
>
> THE WITNESS: I know the truth.
>
> THE COURT: If a five year old said, what's the difference between the truth and a lie, how would you explain that to a five year old? It's okay, there's no rush. Take your time.
>
> THE WITNESS: I know the difference from a lie or the truth?
>
> THE COURT: What is the difference there? How would you explain that to a five year old if they said, I don't understand what the difference is, what would you say? How about this: What if a five year old said, [S.T.], what is a lie? Can you tell me, what would you tell a five year old, what does it mean to lie?
>
> THE WITNESS: I don't know.[9]

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7 R. 386, l. 15 – 387, l. 3.

8 R. 387, ll. 4-8.

9 R. 385, l. 21 – 386, l. 12.

In contrast, defense counsel questioned S.T. in more age-appropriate manner:

> Q. When you go to church, did you learn about evil and good?
>
> A. Yes, sir.
>
> Q. Is it good or evil to tell a lie?
>
> A. Evil.
>
> Q. Do you know the difference between good and evil?
>
> A. Yes.
>
> Q. What is the difference?
>
> A. Good is telling the truth. Evil is telling lies.
>
> Q. Can you give me an example of telling the truth. Let me ask you this: Did you come here today to tell the truth or to tell lies?
>
> A. Tell the truth.[10]

The court asked S.T. if he had spoken with anyone "about what you're going to say in court today with anyone before today?" and S.T. said, "No." However, defense counsel asked S.T. if he had spoken with his mother and sister about the case and S.T. said, "Yes."[11]

Defense counsel argued he should be permitted to call S.T. as a witness: "that witness is material. That witness is necessary. Any elimination of that witness respectfully, your Honor, I would submit would be a violation of the defendant's due process rights to a fair trial if you eliminate it. You know how important that is and so does the State. The State doesn't even argue

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10 R. 388, ll. 13-25.

11 R. 387, l. 9 – 389, l. 9.

against them putting it in." Defense counsel noted, "this child says clearly, that – and he spit it right out. He says what he saw.[12]

The court ruled as follows.

> **I find the witness is not competent to testify**. As an initial matter, one of the key --- **looking at the factors for *South Carolina Department of Social Services v. Doe* from 1987**. **It's an eight-factor analysis**. **One of the key ones 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 a child friendly form. I said, "If a 5 year old asked you what's the difference between a truth and a lie, what would you say?" He said he didn't know. And so that – that, alone, I think is the basis to exclude the testimony.
>
> **Further, the Court is concerned that the testimony was rehearsed**, obviously, not by counsel. Counsel just met the witnesses, But when 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 a monologue. That struck the Court as rehearsed. That's troublesome.
>
> **Further, I have the letter from his therapist** which says – and according to the letter, "He is terrified and extremely emotional when questioned about this incident and mentally unstable to cope or regulate his feelings."
>
> Again, what his therapist says, "He is terrified and emotional when questioned about this incident." He has told me he – he was unable to explain to me on the witness stand the difference between the truth and a lie. And the concern is the Court is concerned about the rehearsed nature of his testimony. **In addition, the fact that you're asking a child to testify in a matter involving the shooting of his father and his uncle**. I find the child is not competent to testify and I will not allow him to testify.[13]

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12 R. 394, ll. 2-8; R. 393, ll. 19-20.

13 R. 394, l. 16 – 395, l. 24 (emphasis added).

The jury was charged on murder, voluntary manslaughter, and self-defense. In closing argument, the prosecutor argued to the jury that "[t]he only evidence in the record that there was any sort of altercation or fight or tussle, was from Mr. Thompson himself." Appellant was convicted of murder and sentenced to life imprisonment.[14]

Discussion

The trial court erred in finding S.T. was incompetent. He was *eleven* years old. The prosecutor did not even challenge his competency. S.T. met the factors from the *Doe* case, as will be discussed below, and the record does not support the court's finding to the contrary. The court also abused its discretion when it imposed additional prerequisites to admission beyond those laid out in *Doe* and the evidence rules: a requirement that a party show the witness had not rehearsed his testimony; a requirement that a party show the witness's testimony had been approved by his therapist; and a requirement a party show the testimony was not regarding conduct by the witness's family members. The extra hurdles imposed by the court were not required by law.

"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." *S.C. Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 548 (Ct. App. 1987). "[A] child of tender years is not per se incompetent because of age." *Id.*, 292 S.C. at 218, 355 S.E.2d at 547. "Every person is competent to be a witness except as otherwise provided by statute or these rules." Rule 601(a), SCRE. "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 as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2)

14 R. 547, l. 11 – 553, l. 21; R. 561, ll. 13-15.

the proposed witness is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE.

"The question of the competency of a child witness is to be determined by the trial judge." *Doe*, 292 S.C. at 219, 355 S.E.2d at 547 (citing *State v. Green*, 267 S.C. 599, 230 S.E.2d 618 (1976)). "In making his determination, the judge must rely on his personal observation of the child's demeanor and responses to inquiry on voir dire examination." *Doe*, 292 S.C. at 219, 355 S.E.2d at 547. "Courts presume a witness to be competent because bias or other defects in a witness's testimony—revealed primarily through cross examination—affect a witness's credibility and may be weighed by the factfinder." *State v. Needs*, 333 S.C. 134, 142, 508 S.E.2d 857, 861 (1998), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). "The party opposing the witness has the burden of proving a witness is incompetent." *Needs*, 333 S.C. at 143, 508 S.E.2d at 861.

The court's finding that an application of the eight-factor test laid out in *Doe* precluded S.T.'s testimony was unsupported by the record. "If the child is 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, then he is competent to testify." *Doe*, 292 S.C. at 219, 355 S.E.2d at 547.

S.T.'s in camera testimony established that he was mature enough (1) to understand the questions and give answers, (2) to perceive what happened in the living room that day, (3) to remember what he had seen, and (4) to relate a true version of what he saw. S.T.'s testimony also established that (5) He knew the difference between good and evil. (6) He understood it was

right to tell the truth and wrong to lie. S.T. testified, "Good is telling the truth, Evil is telling lies." (7) He was willing to tell the truth. When asked whether he came to court to tell the truth or tell lies, S.T. said: "Tell the truth." (8) S.T. was mature enough to fear punishment for lying: he was eleven and said he learned about good and evil in church.

See also State v. Hudnall, 293 S.C. 97, 99, 359 S.E.2d 59, 61 (1987) (*overruled on other grounds by State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993)) (victim three years old at time of trial was not competent to testify because "her responses to questioning indicate she is incapable of distinguishing right from wrong, truth from falsehood, or reality from make-believe"); *State v. Green*, 267 S.C. at 606, 230 S.E.2d at 621 (six-year-old competent to testify where he knew difference between right and wrong, and feared punishment for lying, even if he was not questioned about belief in God).

S.T. met the *Doe* test and this was all that was required. The court improperly found that an opinion from S.T.'s therapist's office, that he would be upset and emotional if he testified, weighed against competency. "We have no doubt that many witnesses, adults as well as children, find a court appearance stressful." *Doe*, 292 S.C. at 220, 355 S.E.2d at 548. "We are frankly skeptical of the vogue among child advocacy professionals to ascribe lasting psychological harm to a single courtroom appearance by a child. Where a potential for harm exists, the wise exercise of judicial discretion can protect the child witness from undue stress." *Doe*, 292 S.C. at 220–21, 355 S.E.2d at 548. "Means already exist to insure a child witness is treated sensitively and in a manner designed to ameliorate the stress of giving testimony . . ." *Id.*, 292 S.C. at 221, 355 S.E.2d at 548. Emotional distress did not prevent S.T. from testifying rationally in camera about what happened—it would not have prevented him from testifying about it before the jury.

The court also erred in finding concerns about the child being coached precluded admissibility. *See State v. Needs*, 333 S.C. at 142, 508 S.E.2d at 861 ("bias or other defects in a witness's testimony—revealed primarily through cross examination—affect a witness's credibility and may be weighed by the factfinder"). "After the trial court properly has determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury." *Needs*, 333 S.C. at 144, 508 S.E.2d at 862. Whether S.T was credible or appeared to have been coached was a matter for the *jury* to determine.

The court abused its discretion when it excluded S.T.'s testimony. He knew the difference between good and evil from church, and he knew lying was evil. He demonstrated that he was capable of rationally expressing himself about what he saw: he said that Appellant and Decedent had been "wrestling" before the shooting. S.T. was eleven years old—not a toddler or kindergartener. He was presumed to be competent, and the State did not argue or demonstrate otherwise. Rule 601(b), SCRE; *Doe*, 292 S.C. at 219, 355 S.E.2d at 547.

Appellant had a bedrock right to call witnesses in his defense. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law includes "a right to be heard and to offer testimony." *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (citing *In re Oliver*, 333 U.S. 257, 273 (1948)). The Sixth Amendment applies to the States through the Fourteenth Amendment, and "grants a defendant the right to call 'witnesses in his favor.'" *Rock*, 483 U.S. at 52. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

Appellant was prejudiced by the error. "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." *State v. Lee-Grigg*, 374 S.C. 388, 414, 649 S.E.2d 41, 55 (Ct. App. 2007), *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010) (citation omitted). "No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Id.*, 374 S.C. at 414, 649 S.E.2d at 55. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

The solicitor argued in closing that the only evidence there was a fight was from Appellant's own testimony. The testimony of S.T. would have supported Appellant's version of events. It was relevant to both self-defense and voluntary manslaughter. This was a material and prejudicial error. *Pagan*, 369 S.C. at, 212, 631 S.E.2d at 267; *Washington v. Texas*, 388 U.S. at 19.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of June, 2024.

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CERTIFICATE OF COUNSEL

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

This 13th day of June, 2024

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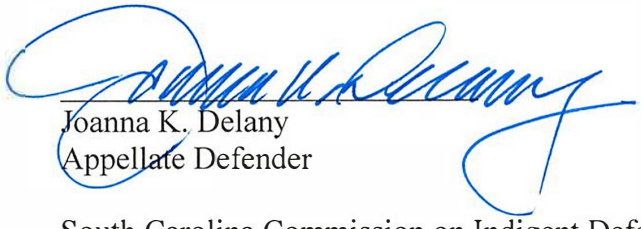
APPELLATE CASE NO. 2022-001038

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Julianna Battenfield, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 13th day of June, 2024.



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