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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 REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

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.

The State argues the trial judge's concern S.T.'s testimony may have been "rehearsed" weighed in favor of finding the witness was not competent. *See* Brief of Respondent at 4; 9. Appellant disagrees. The trial judge does not determine whether or not a witness is credible; the question for the trial judge is competency—does the witness have the capacity to tell the truth. Whether the testimony seemed rehearsed went to credibility not competency. Credibility is a matter for the jury. "Under South Carolina law, the competency of a witness is to be determined by the trial court, whereas the credibility of a witness is exclusively for the jury to decide." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 338 (2020). *See State v. Needs*, 333 S.C. 134, 142, 508 S.E.2d 857, 861 (1998) (witness was competent despite her conflicting statements to police and admissions of perjury 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").

The trial judge's discretion extends only to whether the witness is "mature enough" to tell the truth and whether the witness is not "incapable of" telling the truth. *See S.C. Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) ("*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.") (emphasis added); Rule 601(b), 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) the proposed witness *is incapable of* understanding the duty of a witness to tell the truth.") (emphasis added).

The State quotes *Doe's* explanation that, "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." *See* Brief of Respondent at 4. *Doe* was decided in 1987. The South Carolina Rules of Evidence became effective in 1995. *See* Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995.") Rule 601(a), SCRE provides, "Every person is competent to be a witness except as otherwise provided by statute or these rules." The comments to Rule 601(a) explain that this rule changed the law regarding competency of children. "Under this rule, children are presumed to be competent unless it is shown otherwise." When the case was tried in 2022, S.T. was presumed to be competent per Rule 601(a), SCRE.

As seen, Rule 601(b), SCRE provides, "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) the proposed witness is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE dovetails with the *Doe* factors, which require, *inter alia*, that a witness be able to understand questions and narrate answers, and be willing to tell the truth. S.T. met the *Doe* factors and Rule 601(b), SCRE. *See* Brief of Appellant at 10 – 11.

The State notes Appellant initially opposed S.T.'s testimony. *See* Brief of Respondent at 6 – 7. It should be noted that at that point the defense had not been disclosed the substance of S.T.'s testimony. This is how things came about. During pretrial motions, the State said it had intended to call S.T. as witness, since he was present in the living room when the shooting occurred. However, the prosecutor stated S.T.'s mother did not want him to testify, and the court was presented with a letter from S.T.'s therapist, which said witnessing the shooting had traumatic effects on S.T. The State then moved that it be allowed to offer the jury testimony from the mother about why S.T. was not testifying. Defense counsel stated, "This is all new to me Judge." R. 7, l. 11 – 12, l. 22. "They have never made a proffer on what the child would say. I have no idea what the child would say." R. 10, ll. 5-7. The State proffered the mother's testimony. During direct examination, the mother said S.T. had been in counseling for depression prior to the shooting due to his grandmother's death. The mother said combined with the shooting, S.T. was "fragile." She stated S.T. would become very emotional if forced to talk about the shooting. R. 14, l. 2 – 16, l. 14. During cross-examination, defense counsel asked the mother, "what did he tell you he saw?" and the mother stated S.T. told her: "He said, that Uncle Tony was being mean to daddy and that he was fighting with him. He was tussling with him, like tussling or wrestling with him." R. 18, ll. 15-20.

After eliciting this information, defense counsel stated he had no objection to the testimony. The solicitor again stated that she *did* intend to call the child, unless she was permitted to put the mother up in the child's absence to explain to the jury why he was not testifying. R. 19, l. 7 – 20, l. 12. The judge asked defense counsel if he intended to call the child. After speaking with the mother, defense counsel said, "I don't know, if I'm gonna call him or not." R. 26, l. 17 – 27, l. 6. The court said it was not inclined to let S.T. testify "when the child's

therapist says: 'He is mentally unstable to cope or regulate his feelings when discussing this incident.'" "I am not gonna let an 8 year old be called to the witness stand and testify as to whether or not his father is a murderer." However, the court deferred ruling and ordered the parties not to mention the child to the jury yet. R. 27, l. 17 - 28, l. 13. After the State rested without calling S.T., defense counsel proffered S.T.'s testimony, and the court ruled he was not competent, as discussed in the Brief of Appellant. *See* Brief of Appellant at 5 – 8.

Counsel's initial opposition to S.T. testifying when counsel did not know the substance of the would-be testimony did not somehow bar his subsequent attempt to offer S.T.'s testimony after he learned what the testimony would be. Counsel was surprised by the State's motion and was trying ensure he would not be forced to violate a cardinal rule of cross-examination: do not ask a question to which you do not know the answer. *E.g.*, *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987) ("An abiding maxim of the successful trial lawyer, like the motto of the Boy Scouts, is 'Be Prepared.'"). Once the facts were developed and counsel learned the substance of S.T.'s testimony, his strategy necessarily changed. S.T. was able to answer counsel's questions logically, he recounted the events, and understood his duty to tell the truth. "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." R. 388, ll. 18-21.

The State argues that S.T. gave inconsistent answers. *See* Brief of Respondent at 8. The trial judge's questions, while well-intended, were unfortunately couched in a manner that was not child-friendly—hypotheticals regarding what S.T. would tell an imaginary five-year-old about lies and truth. R. 385, l. 21 – 386, l. 12. In contrast, counsel's questions to S.T. were in concrete terms appropriate for children, about "good" and "evil" in the context of what S.T. knew from church. R. 388, ll. 7-25. S.T. stated he was in the courtroom to tell the truth, and he

stated that although he had talked to his mother and sister about the shooting, they did not tell him to lie. R. 389, ll. 1-9. Eleven-year-old S.T. was competent. Any concerns about his credibility were for the jury. *Needs*, 333 S.C. at 142, 508 S.E.2d at 861.

The State also argues S.T.'s fragile psychological state meant that he could not meet the requirements of Rule 601. *See* Brief of Respondent at 10. Whether S.T. would be distressed by recounting the events is not the same thing as whether he was "incapable of expressing himself" about the events. Rule 601(b)(1), SCRE. He was able to express himself clearly about what he saw. "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." R. 386, l. 23 – 387, l. 3. "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." R. 387, ll. 4-8. S.T.'s testimony met *Doe's* "mature enough" to understand and Rule 601's "[]capable of" understanding requirements. *S.C. Dep't of Soc. Servs. v. Doe*, 292 S.C. at 219, 355 S.E.2d at 547; Rule 601(b), SCRE.

The State further argues S.T. would be harmed by testifying. *See* Brief of Respondent at 4. However, as this Court recognized in *Doe*, "Where a potential for harm exists, the wise exercise of judicial discretion can protect the child witness from stress." *S.C. Dep't of Soc. Servs. v. Doe*, 292 S.C. at 220-21, 355 S.E.2d at 548. The court could have used its discretion to ensure S.T. was treated sensitively while allowing the jury to hear his testimony.

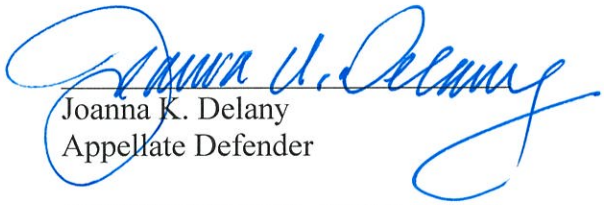
The State cites *In re Michael H.*, 360 S.C. 540, 602 S.E.2d 729 (2004), in support of its position. *See* Brief of Respondent at 6. The Supreme Court in *In re Michael H*. held the trial

judge has the discretion to order a psychological examination of the complaining victim in a child sexual abuse prosecution where the defendant can show a compelling need. *In re Michael H.*, 360 S.C. at 546-49, 602 S.E.2d at 732-33. This is not a child sexual abuse case, and *In re Michael H.* is inapposite.

Finally, the State argues S.C. Code Ann. § 16-3-1535(F) supports its position. *See* Brief of Respondent at 6. S.C. Code Ann. § 16-3-1535(F) states, "The *summary* court judge must recognize and protect the rights of victims and witnesses as diligently as those of the defendant." (emphasis added). A murder trial is a circuit court proceeding, not a summary court proceeding. *See,* e.g., S.C. Const. art. V, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law."); *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) (circuit courts have subject matter jurisdiction to try criminal matters). § 16-3-1535 is inapplicable to this matter.

CONCLUSION

Based on the foregoing argument, and for the reasons contained in Appellant's principal brief, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

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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 Reply 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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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case have 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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