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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SIMMONS JR.,

APPELLANT

APPELLATE CASE NO. 2013-002389

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in allowing a pediatrician to testify to statements made by the alleged child victim beyond the time and place of the alleged sexual assaults in violation of Appellant's right to a fair trial where the statements were not made for the purpose of medical diagnosis or treatment?

II. Did the trial judge err in finding a child witness competent to testify where the record demonstrated the child witness lacked the ability to perceive the event with a substantial degree of accuracy, remember the event, communicate about it intelligibly, and be mindful of telling the truth because he heard voices and lacked the ability to distinguish between reality and make-believe?

STATEMENT OF THE CASE

On May 30, 2013, the Beaufort County grand jury indicted Appellant for two counts of criminal sexual conduct with a minor in the first degree (2012-GS-07-1536 & 2012-GS-07-1537). R. 379. The case was called to trial before the Honorable Carmen T. Mullen and a jury on June 18, 2013. R. 7. Mary Jordan Lempesis and Hunter Swanson Deysach represented the state, and Trasi Campbell represented Appellant. R. 8. After deliberating for several hours, the jurors informed the judge they had reached an "impasse." R. 347, lines 4-8; R. 370. Thereafter, the judge instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (2002). R. 348, line 7 – R. 351, line 22. Two hours later, the jury found Appellant guilty as charged. R. 352, line 12 – R. 354, line 3. Judge Mullen sentenced Appellant to life imprisonment on both counts and ordered the sentences to be served concurrently. R. 355, line 20 – R. 356, line 5; R. 381;384.

Appellant filed a motion for new trial. R. 371. Judge Mullen presided over a hearing on the motion on October 31, 2013. R. 357. At the conclusion of the hearing, Judge Mullen orally denied the motion. R. 369, lines 15-16. Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Appellant is the father of Minor 1 and Minor 2, twin boys. The twins lived with a cousin, Rose Simmons, in a mobile home on heirs' property on Saint Helena Island. R. 87, lines 3-23; R. 88, lines 12-14; R. 153, lines 16-23. Appellant lived in the family home on the property as well. Also living in the family home were Appellant's sister and her husband and their three children. R. 62, lines 8-15; R. 72, lines 9-12; R. 89, line 1 – R. 90, line 2; R. 92, line 19 – R. 93, line 6; R. 153, line 24 – R. 154, line 4; R. 242, lines 1-9; R. 243, lines 1-25; R. 261, line 23 – R. 262, line 22. During the time that Appellant lived in the family home, Appellant's girlfriend or the mother of the twins lived with him. R. 97, line 22 – R. 98, line 7; R. 102, lines 20-24; R. 249, lines 15-18; R. 250, lines 7-15; R. 163, lines 2-19; R. 278, line 1 – R. 279, line 7. Quite naturally, the twins frequently visited with Appellant in the family home. R. 88, lines 22 -25; R. 90, lines 3-11; R. 91, lines 18-22; R. 154, lines 18-25; R. 280, lines 4-9. The home had no interior doors on the bedrooms; therefore, the family used sheets or blankets for privacy. R. 163, line 17 – R. 164, line 4; R. 247, lines 6-9; R. 254, line 22 – R. 255, line 6; R. 257, line 9 – R. 258, line 16; R. 264, line 21; R. 265, line 23.

After Appellant moved, his great-uncle and great-aunt, Johnnie and Cynthia Simmons, began to take a more active role in the twins' lives because Rose was unable to care for them on a full-time basis due to their continued behavioral problems. R. 72 , line 19 – R. 73, line 13; R. 90, line 12 – R. 91, line 11; R. 94, lines 2-5; R. 95, line 6 – R. 96, line 3; R. 99, line 25 – R. 100, line 4; R. 143, lines 1-17; R. 181, lines 7-9; R. 182, line 1 – R. 184, line 7; R. 209, lines 18-25; R. 210, lines 14-22. Soon, Johnnie and Cynthia wanted to adopt the boys. R. 96, lines 4-7; R. 100, lines 5-8; R. 185, lines 10-19; R. 211, line 25 – R. 212, line 4. However, Johnnie and Cynthia were concerned because one of the twins acted "too feminine" and the other was very dominant. R. 65, lines 16-19; R. 67, line 22 – R. 68, line 8; R. 185, line 20 – R. 186, line 5; R. 198, lines 18-24; R. 216, lines 2-23. Johnnie described Minor 1 as exhibiting "girlish mannerism[s]." R. 213, lines 5-12. Additionally, Cynthia

suspected the twins had been sexually abused because she examined the anus of Minor 1 and found it to be larger than expected.[1] R. 65, lines 20-22; R. 137, lines 9-15; R. 189, lines 2-24. Despite these suspicions, Cynthia did not consult the authorities because she feared Appellant would stop the adoption based upon the allegations. R. 64, lines 12-17; R. 64, line 21 – R. 65, line 4. However, Cynthia took the twins to a counselor who said there was nothing wrong. R. 66, lines 1-18; R. 201, lines 23-25.

After repeated behavior problems from the twins and the finalization of the adoption, Cynthia and Johnnie confronted them about the cause of their acting out. R. 192, lines 5-7; R. 193, lines 20-25; R. 213, line 19 – R. 214, line 8. Allegedly, the twins disclosed sexual abuse during this confrontation. After the confrontation, Cynthia took the twins to the pediatrician. R. 193, lines 3-13

Minor 1, who had practiced his testimony with the prosecutor, claimed Appellant touched Minor 1's penis and butt with his hands and made Minor 1 touch Appellant's penis. R. 131, lines 1- 20; R. 135, line 25 – R. 136, line 8. Minor 1 claimed this occurred more than once in Appellant's room and that Minor 2 watched. R. 132, line 2 – R. 132, line 13. In response to leading questions by the prosecutor, Minor 1 claimed Appellant touched Minor 1's penis with his mouth and put his penis in Minor 1's butt. R. 134, line 25 – R. 134, line 19. Minor 1 previously claimed Appellant made him suck the penises of other men, but he told the prosecutor prior to trial that this never happened; however, Minor 1 told the jurors that he had remembered the night before that this had in fact occurred. R. 140, line 12-23.

Minor 2, who also practiced his testimony with the prosecutor, claimed Appellant touched his penis with his hands. Minor 2 denied being touched anywhere else or with anything other than Appellant's hands. R. 155, line 10 – R. 156, line 6; R. 157, lines 9-11;

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[1] No medical personnel found Minor 1's anus to be larger than normal. R. 31, lines 11-20; R. 227, lines 1-7.

R. 159, lines 4-7; R. 162, line 19 – R. 163, line 1. Minor 2 claimed this touching occurred in Appellant's bedroom, but he was unsure if it occurred at night or in the day. R. 156, lines 13-24. Dissatisfied with Minor 2's testimony regarding the allegations of abuse, the prosecution introduced the video of his speaking with an interviewer at Hope Haven. R. 170, line 16 – R. 171, line 15; R. 175, line 7 – R. 178, line 11.

ARGUMENT

I. In violation of Appellant's right to a fair trial, the trial judge erred in allowing a pediatrician to testify to statements made by the alleged child victim beyond time and place of the alleged sexual assaults where the statements were not made for the purpose of medical diagnosis or treatment.

Relevant facts

Dr. James Simmons was the pediatrician for Minor 1 and Minor 2. R. 22, line 11 – R. 23, line 2. He recalled seeing Minor 1 and Minor 2 in September of 2011. After speaking with their adoptive parents, Dr. Simmons met with Minor 1 alone to discuss the disclosure of sexual abuse. R. 27, line 20 – R. 28, line 23. When Dr. Simmons began to elaborate on what Minor 1 said, Appellant objected to any statements beyond time and place. R. 29, lines 10-13. The prosecution argued the out-of-court statements were admissible under a hearsay exception, but was unable to articulate a particular rule. The trial judge assisted: "For medical diagnosis?" R. 29, lines 14-17.[2] The prosecutor quickly agreed with the judge's suggested, and the judge ruled the hearsay statement by Minor 1 admissible. R. 29, lines 18-20.

Thereafter, Dr. Simmons testified that Minor 1 said "his father, that he'd been watching porn, and that they had told him not to tell anybody because of their secret pact. And that I believe that his daddy had - - his father had touched his private area." R. 30, lines 1-8. Dr. Simmons then read from his notes:

> Okay. Here we go. Okay. That's right. That, he - - we talked, and I asked him what happened, and he said that - - I talked with them separately, and that Dad made them, and I have in quotations, quote/unquote, *Dad made them suck his penis*; and that the episode ended when he was - - when the

[2] Appellant raised the objection to Dr. Simmons' testimony in the motion for new trial. R. 371. During the hearing on the motion for new trial, Judge Mullen recalled that she had admitted the testimony pursuant to Rule 803(4), SCRE. Judge Mullen found no basis to grant a new trial based upon her ruling that the statement of Minor 1 through Dr. Simmons was admissible. R. 364, lines 3-12; R. 369, lines 15-16.

> custody of Mr. Johnnie Simmons. And that, also, they had been watching porno, and he said not to tell them because of the secret pact with Dad.

R. 30, lines 17-24.

Dr. Simmons examined Minor 1 and Minor 2 looking for signs of sexual abuse, but found none. Both boys had normal physical exams. R. 31, lines 15-20.

Discussion

All criminal defendants are entitled to a fair trial. U.S. Const. Amend. VI; S.C. Const. Art. 1, § 14. The Rules of Evidence are designed to ensure a fair trial occurs. One of the most important Rules of Evidence concerns the rule against hearsay; however, many exceptions to hearsay exist. A statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case ... where the declarant is the alleged victim and the statement is limited to the time and place of the incident." SCRE 801(d)(1)(D). This Court made clear the necessity of the statement remaining limited to time and place of the alleged incident. Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). If the statement goes beyond time and place, then it is hearsay and in order to be admissible, it must fall within one of the exceptions to the general rule against hearsay. State v. Burroughs, 328 S.C. 489, 497, 492 S.E.2d 408, 412 (Ct. App. 1997)(citing Rule 802, SCRE).

One of those exceptions to the general rule against hearsay is when a statement is "'made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.'" Id. at 501, 492 S.E.2d at 414 (quoting Rule 803(4), SCRE). "The rationale for the exception is that a patient has a strong motivation to be truthful about information that will form the basis of his diagnosis and treatment, making statements in this regard inherently trustworthy." Tracy A. Bateman, Admissibility of Statements Made for Purposes of

Medical Diagnosis or Treatment as Hearsay Exception under Rule 803(4) of the Uniform Rules of Evidence, 38 A.L.R.5th 433.

This Court held that "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." Burroughs, 328 S.C. at 501, 492 S.E.2d at 414. However, the testimony of a nurse that the alleged victim of a sexual assault told the nurse that her assailant asked for a hug before the assault "in no way can be viewed as 'reasonably pertinent' to the victim's diagnosis or treatment." Id.

This Court found the testimony of the nurse prejudicial to the defendant because it corroborated the victim's testimony in an extremely important way – the prosecution had presented two witnesses to testify the defendant had assaulted them after asking for a hug. Id. at 414-415, 328 S.C. at 502-503. This Court recognized that "[w]hile the victim's statement that Burroughs asked her for a hug might be an insignificant detail when considering her story alone, it becomes a very important detail after considering the stories of the other victims." Therefore, the improper corroboration of the alleged victim's testimony resulting from the erroneous admission of the testimony of the nurse was not harmless. Id. at 415, 328 S.C. at 503.

The South Carolina Supreme Court explained that a patient's history as told to the doctor is admissible only as to the information upon which the doctor relied in reaching his profession opinion. State v. Brown, 286 S.C. 445, 446, 334 S.E.2d 816, 816-817 (1985)(citing Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967)). In Brown, the doctor told the jury that the child-patient stated "Mr. Carl" performed certain sex acts on her. The Court held defense counsel's objection to the perpetrator's identity was not necessary for diagnosis or treatment should have been sustained. Id. at 446, 334 S.E.2d at 817. Further, the Court stated "[t]he perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." Id. at 447, 334 S.E.2d at 817. Therefore, "[a] doctor's testimony as to

history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." Id.

In Jolly v. State, 314 S.C. 17, 19, 443 S.E.2d 566, 568 (1994), the South Carolina Supreme Court found trial counsel provided ineffective assistance by failing to object to testimony by an uncle that the alleged child victim told the uncle that Jolly had abused her. Trial counsel had objected to a social worker testifying that the alleged victim made a prior statement that Jolly had abused her, but failed to object to the uncle's testimony. Id. On direct appeal, Jolly challenged the trial judge's decision to allow the social worker to testify to the hearsay statement. No decision was made as to the error of the ruling because no objection had been made to the uncle's testimony making the social worker's testimony cumulative to the uncle's testimony and the alleged victim's testimony. Id. The South Carolina Supreme Court reiterated the rule that in criminal sexual conduct cases, evidence from other witnesses that the alleged victim complained of a sexual assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars. Id. at 20, 443 S.E.2d at 568. The Court went on to hold that "[i]mproper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Id. at 21, 443 S.E.2d at 569 (emphasis in original). Thus, the Court held that had the uncle's testimony been properly objected, the appellate court would not have held the social worker's testimony was harmless and the outcome of the direct appeal would have been different. Id.

Minor 1's disclosures to Dr. Simmons far exceeded what was needed for medical diagnosis and treatment. In fact, given Minor 1's age, it is unlikely Minor 1 was giving any information to Dr. Simmons to assist in diagnosis and treatment. Therefore, the public policy basis for Rule 803(4), SCRE – that a patient tells the doctor the truth in order to receive accurate treatment – was not present here. Further, Dr. Simmons made no diagnosis

and administered no treatment based on Minor 1's statements; therefore, none of Minor 1's statements to Dr. Simmons fall within the exception created by the Rules. Minor 1 allegedly told Dr. Simmons that he was made to suck his father's penis – an activity for which no testing or examination could corroborate. Without question, Minor 1's disclosures of (1) watching pornographic movies and (2) having a secret pact with Appellant were completely unrelated to medical diagnosis or treatment. At a minimum, Minor 1's disclosure of the name and/or relationship of the person who allegedly assaulted him were unnecessary for medical diagnosis and treatment.

The prosecutor's theme during closing argument – consistent statements by the twins regarding the abuse – highlighted the prejudicial nature of Dr. Simmons' testimony regarding the identity of the abuser. Specifically, the prosecutor told the jurors to think about "their consistent stories, their consistent accounts of what their father did to them." R. 312, lines 15-19. Thereafter, the prosecutor recounted the witnesses who told the jury about statements made by the twins concerning alleged abuse, including the statements of Dr. Simmons:

> And the first one we heard on the stand was this account that [Minor 1] gave to Dr. Simmons, ..., the first account we heard is that [Minor 1] told Dr. Simmons that his dad had touched his penis, and his dad had made him suck his penis, and that they had a secret pact, and that his dad was making them watch porn, pornography.

R. 312, line 19 – R. 313, line 1.

The prosecutor did not stop there; she emphasized to the jury that Minor 1's statement to Dr. Simmons was "consistent with the other statements that [Minor 1] gave to both the interviewer at Hope Haven" and to the jurors. R. 313, lines 2-4. Repeatedly, the prosecutor told the jurors to "think about the consistencies" and that Minor 1 was consistent with his accounts. R. 317, lines 2-20; R. 323, lines 23-25; R. 326, lines 10-19; R. 326, lines 20-23; R. 327, line 8. The prosecutor informed the jurors that the judge would instruct them that "[t]he victims' statements in this case need not be corroborated. However, you didn't

just hear from [Minor 1] and [Minor 2]. You heard from Kristin Dalton, the nurse practitioner; from Dr. Simmons; from Investigator Fraser; from Cynthia and Johnnie; from Rose." R. 329, lines 8-12. Just as in Jolly, supra, Dr. Simmons' testimony of hearsay statements made by Minor 1 served to corroborate Minor 1's testimony in such a way to violate Appellant's constitutional right to a fair trial.

II. The trial judge erred in finding a child witness competent to testify where the record demonstrated the child witness lacked the ability to perceive the event with a substantial degree of accuracy, remember the event, communicate about it intelligibly, and be mindful of telling the truth because he heard voices and lacked the ability to distinguish between reality and make-believe.

Relevant facts

Prior to trial, Appellant moved for competency hearings regarding the two child witnesses, Minor 1 and Minor 2. Appellant noted the biological mother of the minors suffers from schizophrenia, and the minors had been receiving mental health counseling. Further, Appellant noted the minors had been medicated for several years to treat behavioral problems. Appellant explained that a mental health evaluation may be necessary to determine the competency of the minors. R. 2, line 20 – R. 3, line 23.

The trial judge required a hearing to determine Minor 1's competency immediately preceding his testimony before the jury. Minor 1 testified to his age, date of birth, favorite subject in school, and living arrangements. R. 104, line 13 – R. 105, line 12. Thereafter, Minor 1 said he knew what it meant to tell a lie. When asked if it were the truth or a lie that the judge is a man, he said it was a lie. He further said that it is wrong to tell a lie. R. 105, lines 17-24. Minor 1 admitted he had lied to his adopted mother and to teachers in school. R. 106, line 25 – R. 107, line 7. Although he knew it was wrong to lie, he did so because he "figured that [he] could get away with some things." R. 107, lines 10-15. He then said it was "not good to lie at all." R. 107, lines 16-18. When the judge questioned Minor 1 about telling lies, he answered that he would be punished for telling a lie by God who would write it down in the Book of Life and Minor 1 would be met with it at Judgment. R. 111, lines 8-12.

Minor 1 admitted to playing with imaginary friends when he was younger. R. 108, lines 2-5. He further claimed to have caught a frog the night before and talked to it. R. 108, lines 9-14. Although the frog merely "croaked" and said "ribbet," Minor 1 acknowledged

that he heard voices in his head. He said he heard them in his mind, but they were "not for real." R. 108, lines 15-21. However, when he would hear the voices in his head say something, he usually listened to them:

> Q. And when you hear them say something in your mind, do you ever listen to what they tell you to do?
>
> A. Most times I do. They tell me - - sometimes they tell me not to do things that's wrong, and sometimes they'll - - it's something within me that tells me to fight, like do something wrong, but I don't want to do something wrong.

R. 108, line 23 – R. 109, line 5. Thereafter, Minor 1 admitted that sometimes he cannot control his actions when he listens to the voices. R. 109, lines 6-13.

During the trial, several witnesses testified that the mother of Minor 1 and Minor 2 suffered from schizophrenia. R. 34, lines 13-16; R. 74, lines 3-18. Minor 1's pediatrician diagnosed him with attention deficient disorder when he was around the age of seven. R. 22, line 25 – R. 23, line 12; R. 71, lines 10-14. He prescribed medication to treat the disorder and adjusted the medication multiple times during his treatment period. R. 23, lines 13-25; R. 34, line 17 – R. 35, line 2. Further, he noted Minor 1 probably suffered from oppositional defiant disorder. R. 35, lines 3-8. The pediatrician had referred Minor 1 to a psychiatrist, but Minor 1 only attended one session. R. 39, lines 4-11. The primary investigator discovered that Minor 1 had a learning disability. R. 71, lines 15-17.

Thus, at the time the trial judge found Minor 1 competent to testify, she was aware of Minor 1's diagnosis of attention deficient and probable oppositional defiant, of his hearing voices and obeying those voices, and of his family history of schizophrenia. Despite these factors, the trial judge found Minor 1 competent to testify as a witness against Appellant concerning events that allegedly occurred several years prior to his testifying.

Discussion

According to South Carolina's Rules of Evidence, "[e]very person is competent to be a witness except as otherwise provided by statute or these rules." Rule 601(a), SCRE. Thus, there is a presumption of competency. The policy supporting such a presumption is the function of cross examination so that bias, prejudice or other defects in a witness's testimony, and as a result, the witness's credibility, will be revealed and weighed by the jury. State v. Needs, 333 S.C. 134, 142, 508 S.E.2d 857, 861 (1998). "The purpose of Rule 601(b) is to provide a minimum standard for the competency of a witness." Needs, 333 S.C. at 143, 508 S.E.2d at 861.

Although there is a presumption of competency, the Rules also provide "[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 ..., or (2) the proposed witness is incapable of understand the duty of a witness to tell the truth." Rule 601(b), SCRE. This Court adopted a four-part test to test for competency: "in order to be competent to testify a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath." Id. (citing Commonwealth v. Goldblum, 447 A.2d 234, 239 (Pa. 1982)); see also TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 627-628, 503 S.E.2d 471, 480 (1998)(holding that "[a] witness has to be capable of expressing himself and has to understand the obligation to tell the truth to be qualified to testify"). Questions of competency require a careful examination of the witness, including age, capacity, and moral and legal accountability. State v. Pitts, 256 S.C. 420, 430, 182 S.E.2d 738, 743 (1971).

Often, the competency of children to testify as witnesses is called into question as their understanding of the obligation to tell the truth, capability of expression, and ability to perceive is limited based upon youth alone. In 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), this Court held a child witness was incompetent to testify because she was "incapable of distinguishing right from wrong, truth from falsehood, or reality from make-believe."

Just as a witness's youth presents questions of competency, a witness's struggle with mental illness requires an examination for competency. This Court has held "[a] witness's mental illness is not enough to rebut the presumption" of competency. Sellers v. State, 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005). However, this Court affirmed a finding of incompetence of a witness where the witness's psychiatrist testified she did not believe the witness "would be a reliable witness because he suffering from major depression and the stress of testifying would render him unable to speak." The psychiatrist said the witness could not speak in stressful situations and would say anything to get out of the stressful situation. TNS Mills, Inc., 331 S.C. at 480, 503 S.E.2d at 628.

Although this Court decided Abbott v. Columbia Mills Co., 110 S.C. 298, 96 S.E. 556 (1918) before the promulgation of the Rules of Evidence, the principles announced remain good law and provide substantial guidance for the instant matter. This Court held the fact that a witness "had been adjudged a lunatic" did not incapacitate her as a witness. Id. at 298, 96 S.E. at 556. However, if at the time of the examination, the witness is "so under the influence of his malady as to be deprived of that share of understanding which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong," then the witness is not competent to testify. Id. (internal citations omitted). This Court explained the question is whether the witness can "distinguish between right and wrong, to appreciate the nature and obligation of an oath, to remember events correctly, and to answer questions intelligently." Id. (internal citations omitted).

Although having a mental illness is not enough to rebut the presumption of competency, the type of mental illness and its manifestations may disqualify a witness if the mental illness affects the ability of the witness to perceive the event with a substantial

degree of accuracy or affects the person's ability to recall and/or communicate those perceptions during testimony. In this case, the challenged witness was very young, suffered from a diagnosed mental disorder – attention deficit disorder – and showed the hallmarks of a more severe mental illness involving auditory hallucinations. The evidence established Minor 1's inability to distinguish real from make-believe due to his mental disorders and youth, which diminished his ability to perceive and remember the events with a substantial degree of accuracy about which he was testifying. Additionally, and perhaps most importantly, Minor 1's condition limited his understanding of telling the truth under oath because his perception of the truth was influenced by his hallucinations and age.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of February, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

February 23, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SIMMONS JR.,

APPELLANT

APPELLATE CASE NO. 2013-002389

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of February, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of February, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.