STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 2016-UP-182 (S.C. Ct. App. filed April 20, 2016)
2012-GS-07-01536; -01537

THE STATE,

RESPONDENT,

V.

JAMES SIMMONS JR.,

PETITIONER

Appellate Case No. 2016-001934

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Simmons, Jr., Appellant.

Appellate Case No. 2013-002389

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2016-UP-182
Heard March 9, 2016 – Filed April 20, 2016

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

PER CURIAM: James Simmons, Jr. appeals his conviction for two counts of first-degree criminal sexual conduct with a minor, arguing the circuit court erred in

(1) allowing a pediatrician to testify to statements made by a child victim and (2) finding a child witness competent to testify. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As an initial matter, we question whether Simmons preserved his argument that the circuit court erred in admitting the testimony of the pediatrician despite the limitations of certain hearsay exceptions to the South Carolina Rules of Evidence: *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("An objection must be made on a specific ground."); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (explaining that a contemporaneous objection is required to preserve issues for appellate review); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."); *State v. Hicks*, 330 S.C. 207, 217, 499 S.E.2d 209, 214 (1998) ("A contemporaneous objection is necessary to preserve errors for direct appellate review . . . ."). Even on the merits, we find the circuit court did not err in admitting the testimony of the pediatrician despite the limitations of certain hearsay exceptions to the South Carolina Rules of Evidence: *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (finding improper admission of hearsay testimony to be harmless error where there was abundant evidence in the record from which the jury could have found the defendant guilty, notwithstanding the hearsay testimony); *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) ("The improper admission of hearsay is reversible error only when the admission causes prejudice."); *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (stating the harmless-error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence (citing *Arizona v. Fulminante*, 499 U.S. 279, 306–08 (1991))); *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) ("To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." (quoting *State v. Kirton*, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008))); *Lee*, 399 S.C. at 527, 732 S.E.2d at 228 ("Error is harmless when it could not reasonably have affected the result of the trial." (quoting *Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151)).

2. As to whether the circuit court erred in finding a child witness competent to testify: Rule 601(a), SCRE ("Every person is competent to be a witness except as otherwise provided for by statute or these rules."); 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."); *Sellers v. State*, 362 S.C. 182, 190–91, 607 S.E.2d 82, 86 (2005) ("A witness's mental illness is not enough to rebut the presumption set forth in Rule 601, SCRE. A witness's mental capacity could, however, affect the credibility of that witness's testimony."); *State v. Needs*, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998) ("The determination of a witness's competency to testify is a question for the trial court, and . . . will not be overturned absent an abuse of discretion."), *modified on other grounds*, *State v. Cherry*, 361 S.C. 588, 601 n. 14, 606 S.E.2d 475, 482 n. 14 (2004); *id.* ("The party opposing the witness has the burden of proving a witness is incompetent.").

AFFIRMED.

WILLIAMS, LOCKEMY, and MCDONALD, JJ., concur.

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES SIMMONS JR.,

APPELLANT

APPELLATE CASE NO. 2013-002389

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

Opinion No. 2016-UP-182

PETITION FOR REHEARING

Following Appellant's convictions for criminal sexual conduct with a minor in the first degree, he filed a notice of appeal. In his brief, Appellant raised two issues to this Court. Appellant's first issue concerned the trial judge's erroneous ruling that testimony by a pediatrician of statements made by the alleged victim beyond the time and place of the alleged sexual assault was permissible under the medical diagnosis or treatment exception. Appellant's second issue challenged the trial judge's finding that a child witness was competent to testify. This Court heard argument in the case on March 9, 2016. On April 20, 2016, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Simmons, 2016-UP-182 (S.C. Ct. App. filed April 20, 2016). Pursuant to Rule 221(a), SCACR, Appellant asks this Court to rehear

this matter in light of the significant points overlooked and/or misapprehended by this Court in rendering its opinion, which will be explained more fully below. Appellant seeks rehearing as to both issues.

Hearsay

Appellant challenged the trial judge's erroneous admission of hearsay testimony by a pediatrician. Specifically, the doctor testified regarding statements made by Minor 1 concerning the allegation of sexual abuse. The following exchange took place:

Q	And Doctor, can you tell me what - - in talking to [Minor 1] what he told you happened.
Ms. Campbell:	Your Honor, I object. It's hearsay. It's objectionable under *803*. And certainly, he could limit it to the child's disclosure of date and time, and that's it.
Ms. Lempesis:	Judge, we'd say that this is under the hearsay exception, 803. Excuse me, let me pull it up. *803*.
The Court:	For medical diagnosis?
Ms. Lempesis:	For medical - - purpose of medical diagnosis, exactly.
The Court:	You can go ahead.
Ms. Lempesis:	Thank you.
Ms. Campbell:	I did - - well - -
By Ms. Lempesis:	
Q	Dr. Simmons, can you tell me what [Minor 1] told you happened.
A	I asked him, you know, *tell me what happened*. And he said, basically, his - - sorry, I'm a little nervous.
Q	That's okay. Just take your time.
A	Yeah. He said, basically - - basically, he said his - - 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.
Q	Touched his private area. Do you recall more specifically what [Minor 1] said?
A	I believe - - I believe he said his penis.
Q	Okay. And if you'd like to refer to your notes to try to refresh your memory as to what was said.
A	I'm sorry. I'm just a little nervous.
Q	That's fine. I think if you look at the front of your notes. Here we go.
A	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 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. 29 line 8 – R. 30, line 4.[1]

[1] This Court questioned whether the error was preserved for review, but did not make a specific finding regarding preservation and still addressed the merits of the claim. To the extent preservation remains a concern for the Court, Appellant submits the issue was raised to and ruled upon by the trial court. The solicitor asked what Minor 1 told the witness, and Appellant objected based on hearsay, recognizing that testimony limited to time and place would not be hearsay. Nevertheless, the judge ruled that the doctor's response to the very broad question would be permissible as an exception to hearsay under the rule permitting hearsay when it concerns statements made for the purposes of medical diagnosis or treatment. The objection and ruling preserved the argument. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(explaining that an issue must be "raised to and ruled upon by the trial judge to be preserved for appellate review"). The nature of Appellant's objection did not change – hearsay. The objection was (1) timely as it was made when the solicitor asked the question and prior to the answer revealing the objectionable response and (2) sufficiently specific as it altered the judge that the doctor's testimony would contain objectionable hearsay exceeding the time and place limitation. There was simply nothing more Appellant could or was required to do.

Addressing the claim, this Court found any error to be harmless. However, a careful review of the record and governing case law reveals the testimony could not have been harmless. The doctor's testimony revealed (1) the perpetrator's identity, (2) the alleged sex act, (3) the claim the two watched pornography together, and (4) that the two entered a secret pact not to reveal the information. The testimony was used to corroborate and bolster the testimony of the complaining witnesses – the solicitor's closing argument demonstrates exactly how prejudicial Dr. Simmons' testimony was.

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

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from Kristin Dalton, the nurse practitioner; from Dr. Simmons; from Investigator Fraser; from Cynthia and Johnnie; from Rose." R. 329, lines 8-12. 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. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)(holding 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"); State v. Burroughs, 328 S.C. 489, 502-503, 492 S.E.2d 408, 414-415 (Ct. App. 1997)(finding a nurse's testimony that the alleged victim of a sexual assault told the nurse that her assailant asked for a hug before the assault 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).

Witness' Competency

Appellant also challenged the trial judge's erroneous finding that a child witness was 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. Addressing the claim, this Court appeared to rely principally on the claim concerning the challenged witness's mental health, without consideration of the totality of the circumstances. A careful review of the record and governing case law reveals the not only was the witness's mental illness cause for concern, but the witness's age, family history of several mental illness, and ingestion of prescribed medications to address mental illness were relevant for consideration.

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. The Supreme 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." State v. Needs, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998)(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).

The evidence before the trial judge revealed the biological mother of the minors suffered from schizophrenia, and the minors themselves had been receiving mental health counseling. The minors had been medicated for several years to treat behavioral problems. R. 2, line 20 – R. 3, line 23; R. 34, lines 13-16; R. 74, lines 3-18. Minor 1 testified to his young age. R. 104, line 13 – R. 105, line 12. 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.

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. The Supreme 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, the 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 the 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. The 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). The 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.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

This 5th day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SIMMONS JR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. James Simmons #355956, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 5th day of May, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 5th day
of May, 2016.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

James Simmons, Jr., Appellant.

Appellate Case No. 2013-002389

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Isaac McDuffie Stone, III, Esquire
William M. Blitch, Jr., Esquire