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

APPELLATE CASE NO. 2013-002389

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

Other Authorities

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).

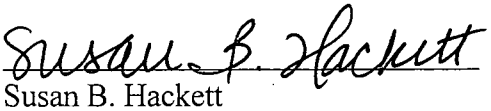
Although having a mental illness is not enough to rebut the presumption of competency, the type of mental illness and its manifestations may disqualify a witness if the mental illness affects the ability of the witness to perceive the event with a substantial

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,



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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

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THE STATE,

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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.

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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THE STATE, ...RESPONDENT

v.

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FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Rules:

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Should this Court decline to consider the issue of hearsay testimony when it was not properly preserved for review on appeal; nevertheless, the testimony about which Appellant complains was proper for purposes of medical diagnosis and treatment pursuant to Rules 803 (4), SCRE and was also proper pursuant to Rule 801(d)(1)(B), SCRE, to rebut the inference of recent fabrication and, alternatively, error, if any, is harmless because the testimony was cumulative to evidence elicited from other witnesses and was not such as to be so prejudicial as to have affected the result of the trial?

II.

Did the trial court abuse its discretion in finding Victim 1 competent to testify at trial when the record established that Victim 1 understood the duty to tell the truth and possessed the ability to perceive and accurately communicate the events at issue at trial to the jury?

STATEMENT OF THE CASE

Appellant was indicted in Beaufort County for two counts of criminal sexual conduct with a minor in the first degree (2102-GS-07-1536 & -1537). (R. p. 379-380; 382-383). On June 18, 2013, Appellant proceeded to trial before the Honorable Carmen T. Mullen and a jury. He was found guilty as charged and was sentenced to two concurrent terms of life imprisonment. (R. p. 355, line 20 – 356, line 5; 381; 384).

Appellant filed a motion for new trial and a hearing on the motion was convened on October 31, 2013. The motion was denied at the conclusion of the hearing. (R. p. 369, lines 15-16; 371-378).

Appellant filed and served notice of appeal and subsequently submitted a brief of Appellant. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant is the father of Victim 1 and Victim 2 who are twin boys. The twins lived in a mobile home on family property on Saint Helena Island beginning when they were eight months old. They were initially cared for by Mamie Ruth Simmons and later by Appellant's first cousin, Rose Simmons, after Mamie Ruth died. (R. 87, lines 3-23; R. 84, lines 12-14; R. 153, lines 16-23). In 2008, when the Victims were approximately eight years of age, Appellant moved to the white family house located on the family property next door to Rose's mobile home. Later, Appellant's sister, her husband, and their three children joined Appellant in that home. (R. 62, lines 8-15; R. 72, lines 9-12; R. 89, line 1 – R. 90, line 8; R. 92, line 19 – R. 93, line 6; p. 101, lines 17 – 25; p. 125; R. 153, line 24 – R. 154, line 4; R. 242, lines 1-9; . 243, lines 1-25; R. 261, line 23 – R. 262, line 22; p. 273). Appellant lived in the family home until approximately the summer of 2009 after the Victims completed the third grade. (R. p. 94, line 18 – p. 95, line 7; p. 97, lines 3 – 13). During the time that Appellant lived in the family home, either Appellant's girlfriend, Mahogany, or the mother of the twins, Cynthia Goethe, lived with him for periods of time. (R. 97, line 22 – R. 98, line 7; R. 102, lines 20-24; R. 249, lines 15-18; R. 250, lines 7-15; R. 263, lines 2-19; R. 278, line 1 – R. 279, line 7). The Victims frequently visited with Appellant in the family house, including staying overnight, bathing, eating and dressing there. (R. 88, lines 22-25; R. 90, lines 3-11; R. 91, line 18- p. 92, line 18; R. 154, lines 18-25; R. 280, lines 4-9. When the Victims slept at the family house, they would either stay in Appellant's bedroom with him or they would sleep with their little cousins. (R. 93, lines 9-19). The house had no interior doors on the bedrooms; therefore, the family used heavy 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 away and beginning in October 2009, great-uncle and great-aunt, Johnnie and Cynthia Simmons, began to take a more active role in the Victims' lives because Rose was unable to care for them on a full-time basis due to their behavior problems at school. (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. 191, lines 7-9; R. 182, line 1 – R. 184, line 7; R. 209, lines 18-25; R. 210, lines 14-22). Johnnie and Cynthia Simmons first cared for the Victims on weekends but in May 2010, the Victims lived with them on a full time basis. Johnnie and Cynthia eventually adopted the Victims. (R. 95, line 6 – p. 96, line 7; 100, lines 5-8; R. 185, lines 10-19; R. 211, line 25 – R. 212, line 4; R. 65, lines 16-19; R. 97, lines 22 – R. 68, line 8; R. 185, line 20 – R. 186, line 5; R. 198, lines 18-24; R. 216, lines 2-23). The adoption was complete in 2011. (R. p. 96, lines 1 – 7).

After moving in with Johnnie and Cynthia, the Victims initially did well in school but began having behavior problems again at the new school after a few months. (R. p. 187, line 11 – p. 188, line 2). Cynthia and Johnnie questioned the Victims about their bad behavior at the new school, including looking over bathroom stalls at others and feeling the private area of another student. The Victims revealed that they were sexually assaulted when the Victims lived on the family property. (R. p, 80; p. 191, line 1 – p. 192, line 16; R. p. 193, lines 20-25; p. 206, line 24 – p. 207, line 4; p. 213, line 19 – p. 214, line 8). Cynthia took the Victims to their pediatrician. R. 193, lines 3-16. She testified at trial that Victims were still wetting the bed between two to four times per week and that

both initially experienced nightmares. (R. pp. 195, lines 5 – 21; 196, lines 1 – 5). When she was caring for them on the weekends and encountered problems with bathing, she noticed once that Victim 1's anal area was completely red. (R. 188, line 6 - – p. 190, line 8).

Victim 1 testified that Appellant used his hands to touch Victim 1's penis and butt several times, made Victim 1 touch Appellant's penis, made Victim 1 put his penis in Appellant's mouth, and Appellant put his penis inside Victim 1's butt. (R. p. 131, line 1 – p. 132, line 10; p. 133, line 25 – p. 134, line 19; p. 146, lines 18 - 23). Victim 1 testified that the episodes occurred at night at Appellant's house in Appellant's bedroom when everyone was asleep. Victim 1 noted that Appellant threatened him if he told anyone. (R. pp. 132, lines 17-23; p. 148, lines 17 – 24).

Victim 2 described that Appellant touched his penis with his hands more than once and always in Appellant's bedroom, and threatened him if he told anyone. (R. p. 155, line 10 – p. 156, line18; pp. 157, lines 15-20). During the interview with Hope Haven, Victim 2 reported that Appellant's penis touched his butt. (R. p. 178, lines 13 – 24). Victim 1 also contended that Appellant brought men home and forced him to perform oral sex on the men. (R. pp. 67 lines 2-19;p. 84; pp. 140, line 12-23; pp. 141, lines 13-19; 146, lines 12-16). The Victims described that Appellant penetrated their anuses with his penis and made them perform oral sex on him and he on them. (R. p. 78).

The Victims were examined by their pediatrician and also by a pediatric nurse practitioner for Hope Haven, focusing on the body areas disclosed by the Victims as subject to abuse. Victim 1 disclosed multiple episodes of forced oral copulation and penile/anal penetration by Appellant and exposure to pornography while living "over

there." He also reported an itchy rash on his bottom, and soiling accidents. Their physical examinations of the Victims were normal which occurs in ninety-seven (97) percent of children who are sexually abused. (R. pp. 225-230; 235). Victim 2 disclosed oral copulation and penile/anal contact and bed-wetting. The episodes of bed-wetting were described as a common behavioral symptom for abused children.

ARGUMENTS

I.

This Court should decline to consider the issue of hearsay testimony when it was not properly preserved for review on appeal; nevertheless, the testimony about which Appellant complains was proper for purposes of medical diagnosis and treatment pursuant to Rules 803(4), SCRE, and was also proper pursuant to Rule 801(d)(1)(B), SCRE, to rebut the inference of recent fabrication and, alternatively, error, if any, is harmless because the testimony was cumulative to evidence elicited from other witnesses and was not such as to have affected the result of the trial?

Appellant contends the trial court erred in allowing the victims' pediatrician to testify to statements made by the Victims that he argues were beyond the time and place of the sexual assaults and were not made for purposes of medical diagnosis. Specifically, he contends testimony identifying him as the perpetrator, references to pornography and a secret pact with Victims exceeded what was permissible for medical diagnosis pursuant to Rule 803(4), SCRE.

Dr. James Simmons was called as the first witness at trial and was qualified as an expert in the area of pediatric medicine. He testified that he treated Victims from the ages of eight months until about one and one-half years before trial. He diagnosed Victims with attention deficit disorder when they were around the age of seven and prescribed medication for the condition. He also provided a diagnosis of possible opposition defiance disorder but no other mental illness for either Victim. (R. p. 22- 24; 45). Dr. Simmons recalled treating one of the victims for an irritated penis, uncontrollable bowels, and abdominal pain. (R. pp. 25 - 26). He opined that an irritated penis, uncontrollable bowels and abdominal pain could be the result of sexual abuse. (R. p. 27). He outlined classic textbook symptoms of sexual abuse to include a general behavior change, inappropriate behavior in school and urinary or stool incontinence. (R.

p. 27). He stated that he saw the Victims in September 2010 for sexual abuse. (R. pp. 27 – 28).

After speaking with Victims' parents, Dr. Simmons spoke with Victim 1 alone, asked what happened, and referred Victim 1 for a forensic examination. (R. p. 28). When asked what Victim 1 told him happened, Appellant objected to anything beyond time and place on the ground of hearsay and Rule 803, SCRE. The objection was overruled on the ground the information was obtained purposes of medical diagnosis and was admissible pursuant to Rule 803(4), SCRE, as an exception to hearsay. (R. p. 29, lines 10 - 20). Thereafter, Dr. Simmons testified that Victim 1 reported that when he was in the custody of Rose Simmons, they were watching "porn" and Appellant made "them suck his penis." Dr. Simmons testified that Victim 1 reported a secret pact with Appellant not to tell anyone. (R. p. 30, lines 1 – 24). Upon receipt of this information, Dr. Simmons terminated the discussion so as not to imprint Victim 1 with ideas. (R. p. 31; 32). Appellant did not object when Dr. Simmons offered this specific testimony as exceeding the scope of Rule 803(4), SCRE.

Dr. Simmons also testified that he conducted a physical examination of Victims but found no physical signs of trauma, which he opined is common. Over objection, Dr. Simmons testified as an expert that the lack of physical findings it is not uncommon because the areas of the body in question heal quickly, the offender might not use anything that would leave marks or injury, or the abuse is chronic. (R. p. 33; 47). Law enforcement authorities were contacted. (R. p. 31 – 32; 47).

Dr. Simmons was cross-examined by Appellant on his medical records respecting the Victims and the family history taken. He testified that his records reflect that the

Victims' mother suffers from schizophrenia and that in 2011 he increased the medication prescribed for the Victims' treatment of attention deficit disorder. In April 2012, Dr. Simmons noted a possible oppositional defiant disorder which tends to accompany attention deficit disorder. (R. p. 344, line 8 – p. 35, line 8). In 2004, Victim 2 was seen for constipation. (R. p. 35, lines 9 - 21). His records also reflect reports that Victim 2 was stealing medication from the school nurse and was seeing a therapist in May or June of 2011. His notes further reflect that in 2011, Victim 2 was not taking medication for attention deficit disorder and was having difficulty interacting with his peers but in late 2010, Victim 2 was not having difficulty sleeping or experiencing behavior problems. (R. p. 36, line 7 – p. 40, line 15). Dr. Simmons testified on cross-examination that Victim 1 reported that he "learned some faggot stuff." (R. 42, lines 4-11). Dr. Simmons last treated the Victims on November 22, 2011. (R. p. 43, lines 10-11).

Beaufort County Sheriff's investigator Jeremiah Fraser was called as the second witness and testified, in pertinent part, that based upon his investigation and interviews, Appellant was identified as the suspect in the allegations of sexual abuse and that the sexual abuse occurred in the home on the family property on Saint Helena Island. (R. p. 54, line 5 – p. 55, line 16; p. 61, lines 10 – p. 62, line 25). He stated that he was able to determine that Appellant, his two sons, and Leroy and Paulette Crocker lived in the white house on the property. (R. 62, lines 12 - 25). On cross-examination by Appellant, Fraser testified that Appellant sexually abused the Victim 1 by forcing him to perform oral sex on his friends and on each other. (R. p. 97, line 2 – p. 73, line 13; p. 84, lines 1 - 10). On redirect examination Fraser recounted the Victims' description of Appellant penetrating

their anuses with his penis and making them engage in acts of oral sex. (R. pp. 784, lines 1 - 18).

A pediatric nurse practitioner, who examined the Victims, testified without objection[1] that Victim 1 disclosed multiple episodes of forced oral copulation, penile/anal penetration and exposure to pornography while living "over there." She stated that Victim 1 identified Appellant as the perpetrator of the sexual abuse. Appellant raised no objection to the question or answer as falling outside the scope of Rule 803(4), SCRE, because it exceeded what was necessary for medical diagnosis. (R. p. 226, lines 3 - 20; p. 228, lines 1 – 19). Victim 2 disclosed oral/genital and penile/anal contact to the nurse practitioner.

On cross-examination, the pediatric nurse practitioner confirmed that she was given information that Victim 1 was being forced to perform oral sex on **Appellant** and Appellant's friends. (R. p. 235, lines 12 - 23). She additionally confirmed sources reporting that Victims were forced to perform oral sex on Appellant and each other and were forced to watch **pornographic movies**. (R. p. 236, line 3 - 25).

In his post-trial motion, Appellant merely complained that the trial court erred in allowing "the pediatrician to testify to unidentified hearsay statements made by Victim 1 and Victim 2 as being in violation of Rule 803(4), SCRE. (R. p.371; R. p. 364, lines 3 - 8).

[1] Appellant made a general pretrial motion to bar the pediatric nurse from testifying based upon a vague, inapplicable reference to State v Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). The motion was denied *in limine* when the State indicated it planned to call the pediatric nurse to testify about her physical examination of Victims and the information she received from them for purposes of medical diagnosis. The State explained that the information received by the pediatric nurse practitioner determined the scope of her examination pursuant to Rule 803(4), SCRE. Appellant did not object in any manner when the testimony was elicited later at trial.

For the first time on appeal, Appellant identifies what he contends were hearsay statements related by Dr. Simmons which Appellant now asserts fall outside the scope of Rule 803(4), SCRC as exceeding what was necessary for medical diagnosis.

First, Respondent submits that the issue is not properly preserved for appeal. Appellant failed to make a specific, contemporaneous objection to the trial court to enable the court to consider and rule upon the issue when the testimony was offered at trial. He merely generally objected to testimony that exceeded time or place. He never addressed the medical diagnosis exception to hearsay and never argued that the testimony about which he now complains exceeded the permissible scope of Rule 803(4), SCRE. His failure to contemporaneously preserve this issue for appeal precludes review by this Court. See State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) (stating that an objection must be sufficiently specific to bring into focus the precise nature of the purported error so that it can be understood by the trial judge); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (stating the defendant may not argue one ground on appeal and an alternate ground on appeal); State v. Thompson, 355 S.C. 278, 584 S.E.2d 143 (Ct.App. 2003) (same); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct.App. 2003)(same). This Court should decline to consider the issue because it is unpreserved. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995).

Second, Respondent submits the information was properly admitted as an exception to the rule against hearsay. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. The admission or exclusion of evidence is left the sound discretion of the trial judge. State

v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007). The trial court's ruling on the admissibility of evidence will not be reversed on appeal absent abuse of discretion or the commission of legal error which results in prejudice to the defendant. Id. An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

"Hearsay is an out of court statement offered to prove the truth of the matter asserted therein." State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. Id., citing Rules 801(c) and 802, SCRE; State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). Pursuant to Rule 801(d)(1)(D), SCRE, "[i]n South Carolina, a sexual assault victim's prior statements limited to time and place of the alleged incident are not hearsay if the victim testifies at trial and is subject to cross-examination." State v. Jeffcoat, 350 S.C. 392, 395, 565 S.E.2d 321, 323 (Ct.App. 2002). The rule "allows other witnesses to testify the victim complained of the assault, but only as to 'time and place,' it specifically circumscribes such testimony by 'excluding details and particulars,' including the identity of the alleged perpetrator." Id. at 395, 565 S.E.2d at 323. However, as an exception to hearsay, Rule 803(4), SCRE, provides that "[s]tatements made for the 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" are not excluded at trial by the hearsay rule. To be admissible, the declarant's motive in making the statement must be consistent with the purpose of promoting diagnosis or

treatment and the content of the statement must be such as is reasonably relied upon by a medical care provider in making a diagnosis or providing treatment. Willingham v. Crooke, 412 F.3d 553 (4th Cir. 2005). Respondent submits that the statements in question were "reasonably pertinent" to diagnosis or treatment, fall under the exception to the hearsay rule, and were properly admitted as evidence at trial. Alternatively, the statements were properly admitted pursuant to Rule 801(d) (1) (B), SCRE as evidence rebutting a charge against the Victims of recent fabrication or improper influence.

In State v. Burroughs, the Court stated that "certainly, 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." State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct.App.1997). Statements of how and when abuse occurs provide the medical care examiner with specific areas and conditions to focus on for diagnosis and treatment.

The statements in question were made by Victim 1 to his pediatrician in the pediatrician's office for the purpose of obtaining medical treatment for physical and emotional trauma and on-going behavioral symptoms experienced by the Victims. The pediatrician had been treating the Victims' physical and emotional manifestations for a number of years. In fact, it was the reoccurrence of behavior issues and acting out at school in a sexually related way that prompted the inquiry, disclosure, and examination by the pediatrician. The purpose of the report from Victim 1 was for medical diagnosis and to provide pertinent medical treatment and on-going care. The statements were critical to medical diagnosis because it enabled the pediatrician to know the areas of the Victims' bodies to explore. The statements also were critical to assess the source and

cause of emotional and behavioral symptoms and to address the measure of intervention necessary to remove the possible threat of continued assaults and to assess the impact and extent of the abuse for diagnostic purposes – not only physical trauma but emotional trauma as well. See United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (a doctor must be able to identify physical and emotional problems that accompany child sexual abuse). The pornography and "pact" not to report the ongoing sexual abuse reflected grooming, betrayal of trust by a parent, and possible long-term emotional abuse that accompanied the physical assaults suffered by the Victims which would direct the type of emotional treatment that might be necessary. The exposure to pornography and the "pact" were possible explanations of the external sources of the Victims inappropriate behavior with other students at school and were reasonably pertinent to treatment of the Victims on-going behavioral issues. State v. Aguallo, 350 S.E.2d 76 (N.C. 1986).

Appellant compares the inadmissible testimony in State v. Burroughs to the testimony in the present case. However, the two testimonies are strikingly different. In Burroughs, the nurse testified that the alleged victim of a sexual assault told the nurse that her assailant "asked for a hug" before the assault. Burroughs, 328 S.C. at 501, 492 S.E.2d at 414. The Court stated the testimony "in no way can be viewed as 'reasonably pertinent' to the victim's diagnosis or treatment." Id. In contrast, the pediatrician in the present case testified that Victim 1 told him that Appellant had been watching pornography, had touched Victim 1's penis, and told Victim to keep it a secret. (R. 30, lines 4-24). As stated above, the information was given for the purpose a medical diagnosis. The pediatrician's testimony would be reasonably pertinent to the diagnosis of

physical and emotional damage and treatments necessary to address these issues. Therefore, the testimony was a proper exception to the hearsay rule.

The testimony was also proper pursuant to Rule 801(d) (1) (B), SCRE, to rebut Appellant's charge of recent fabrication, coaching, or influence suggested by Appellant's cross-examination of the Victims. Both Victims were cross-examined about coaching or practicing their testimony with the prosecutor. State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002); see also Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (2013). (R. p. 136; 145; 150; 159; 162-63; 167).

Nevertheless, any error in the admission of the testimony was harmless, first, because it was cumulative to other evidence properly admitted at trial and, second, because the testimony was insubstantial in view of the evidence presented of Appellant's guilt such that it could not reasonably have affected the result of the trial. See State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct.App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

The testimony of the pediatrician respecting the identity of the perpetrator was cumulative to testimony offered without objection from Officer Fraser indicating that, based upon his investigation and interviews, Appellant was identified as the suspect. Appellant's identity as the perpetrator was also explored by Appellant on cross-examination of Fraser. (R. pp. 54 – 55; 61 – 62; 78). It is also cumulative to the testimony of the pediatric nurse practitioner which was elicited without objection on direct examination and by Appellant on cross-examination. (R. pp. 226; 228; 235; SROA. p.1). The fact that Appellant exposed the Victims to pornography was also elicited without objection from Appellant and also explored by Appellant during his

cross-examination of the pediatric nurse. (R. pp. 226; 228; 236). Any error in admitting the pediatrician's testimony was harmless because it was merely cumulative to other testimony either un-objected to or specifically elicited by Appellant at trial. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence in harmless when it is cumulative to other, unobjected-to testimony); State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983)(stating that when another witness testified to what victim related about the incident, admission of testimony about the same facts is harmless as cumulative); see also State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006)(inadmissible evidence was harmless because it was cumulative to other evidence presented during trial); State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). Appellant's reliance on Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), is misplaced in light of State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) in which our supreme court abandoned the theory upon which Appellant relies.

Even if improperly admitted, Appellant has not shown the requisite prejudice to support reversal of the convictions. State v. Price, 368 S.C. at 499, 629 S.E.2d at 366. The evidence in question was not sufficiently significant to have had an impact on the verdict. The identity of the perpetrator was never in question. Appellant defended the claims, not by pointing to another possible perpetrator, but by suggesting the assaults never occurred but were the product of the Victims' imaginations. Second, the brief reference to pornography and a "pact," without more, are not critical facts. The evidence might have played a significant role had the Victims suggested they were exposed to pornography each time an assault occurred so as to establish a pattern of conduct; however, that is not the evidence in this case. Moreover, the Victims never said they had

a "pact" with Appellant. The Victims testified that Appellant threatened harm if they revealed the sexual assaults. In view of the very specific, detailed account of the sexual assaults and resulting in documented behavioral difficulties, any possible errors arising from the admission of this testimony was harmless and did not have had an impact on the verdict.

II.

The trial court did not abuse its discretion in finding Victim 1 competent to testify at trial when the record established that Victim 1 understood the duty to tell the truth and possessed the ability to perceive and accurately communicate the events at issue at trial to the jury?

Appellant argues the trial court erred in finding Victim 1 competent to testify contending he lacked the ability to perceive the events with a substantial degree of accuracy, remember the events, communicate about it intelligibly, and be mindful of telling the truth. Appellant contends that Victim 1 lacked the ability to distinguish between reality and fantasy because he heard voices. The State submits that the trial court fully explored the issue of Victim 1'a competency in an *in camera* hearing and properly determined that Appellant failed to meet his burden of establishing that Victim 1 was not competent to testify. Appellant's argument is without merit.

The record reflects that Appellant made a pre-trial request for a hearing to determine the competency of the child victims. Appellant offered that "it's customary with children of this age that your Honor would need to have a competency hearing." (R. 2, lines 20 – 23). Appellant also offered as support for the motion that the children were seeing a mental health counselor, were prescribed medication for behavioral problems, and that the mother of the victims is schizophrenic which calls their competency into question. (R. p. 3, line 8 – p. 6, line 4). On appeal, Appellant argues that evidence established Victim 1's inability to distinguish reality from fantasy due to his youth and what Appellant speculates are mental disorders, which diminished Victim 1's ability to perceive and remember the events with a substantial degree of accuracy. Appellant also argues that the history of mental illness in Victim 1's family and attention deficit disorder limited his ability to appreciate the importance of telling the truth. However, other than

through pure speculation, Appellant failed to establish that anything interfered with Victim 1's ability to distinguish a lie from the truth or the ability to properly perceive and accurately communicate about the matter in litigation.

The record before this Court reveals that a competency hearing was held out of the presence of the jury before Victim 1 testified at trial. During the hearing, Victim 1 testified that he is twelve years old, is a rising sixth grader, and is home-schooled. (R. p. 104, line 10 – p. 105, line 2). He provided information about the street and county in which he lives. (R. p. 105, lines 9 - 12). The following colloquy also occurred:

> Q: Do you know what it means to tell a lie?
>
> A: Yes, Ma'am.
>
> Q: So if I said that the Judge is a man, would that be the truth or a lie?
>
> A: That's a lie.
>
> Q: That's right. And . . . , is it right or wrong to tell a lie?
>
> A: It's wrong.
>
> Q: And do you promise that everything you tell will be the truth
>
> A: Yes. Ma'am.
>
> (R. 105, line 13 – 24).

On cross-examination, the following occurred:

> Q: .... have you ever lied?
>
> A: I have to my – my mother now. . . . . I've been telling some lies to them, most times about what time that I'd get up in the morning.
>
> Q: Have you ever lied at school?
>
> A: At school? I have lied to some teachers, yes, Ma'am . . .

****

Q. Was it right to lie to your teachers?

A: No, ma'am.

Q: Okay. Why did you lie to your teachers?

A: I figured I could get away with some things that I - - that, when I - - I don't think that I could get into trouble for.

Q: So, it's okay to lie if you're probably not going to get into trouble for it, right?

A: It's not good to lie at all.

Q: It's not good to, but if you can get away with it, lying might be okay?

A: No, ma'am.

Q: Is it ever okay to lie?

A: No, ma'am.

(R. p. 106, line 11 – p. 107, line 23). When asked whether he had imaginary friends when he was younger, Victim 1 testified that he played with "some animals around the yard and sometimes (he would) make things on like a piece of paper and . . . play with them . . . (such as a) kite. (R. p. 108, lines 2 – 8). When asked about imaginary friends, Victim 1 stated that he caught a frog the previous night and talked to it. When asked if the frog talked back, Victim 1 responded, "He just croaked, ribbet." (R. p. 108, lines 13 – 16). When pressed about playing with imaginary friends, Victim 1 stated that he does not hear the friends actually say anything but only in his imagination. (R. p. 108, lines 17 – 21). When asked whether he listens to what "they" tell him, Victim 1

explained that sometimes they tell him not to do things that are wrong and sometimes tell him to do something wrong. He explained that he doesn't want to do something wrong but might feel a lack of control. (R. p. 108, line 17 – p. 109, line 13).

The following colloquy between Victim 1 and the trial judge thereafter occurred:

> Q: . . . do you go to church with your grandma – or parents?
>
> A: I go on Saint Helena's Gospel Baptist Church.
>
> Q: Okay. Do you go to Sunday School, or do you actually go in to church.
>
> A: Well, sometimes I used to go to Sunday School when I was over here. .... So we go to real church . . . instead of doing Sunday School . . . . But we hear what they discuss in Sunday School, because they discuss everything before we go into preteen and all that.
>
> *****
>
> Q: And do you understand that what you're doing here today is important, right?
>
> A: Yes, ma'am.
>
> Q: And you understand that you cannot tell a lie. Is that correct?
>
> A: I understand.
>
> Q: And not in this circumstance, necessarily, but what happens to you if you tell a lie?
>
> A: I get punished, and God, he will – he will write that in his Book of Life, and that'll be met at the Judgment when I go.

Q: Does it hurt you when you tell a lie, too, just in your heart?

A: It hurts me, but most times when I tell a lie, it probably hurts someone else, but mostly it hurts me.

Q: Okay. And I want to make sure. You're going to tell me everything today that's only the truth. You understand that?

A: Yes, ma'am.

Q: And if you don't remember something, and someone asks you a question, I want you to say I don't remember. Okay? You understand that, right?

A: Yes, ma'am.

Q: Because if you can't remember, you can't remember, right?

A: Yes, ma'am.

(R. p. 110, line 5 – p. 1127, line 2).

Appellant objected to Victim 1's competency contending he has imaginary friends, hears voices and sometimes listens to the voices and allows the voices to overcome his will. (R. p. 113, line 13 – 114, line 7). Appellant further objected because Victim 1 equivocated about lying and getting away with it and did not understand the difference between telling the truth and a lie. (R. 114). Appellant questioned Victim 1's mental capacity and requested an examination to determine Victim 1's mental health. (R. 114, line 8 – p. 115, line 7).

The trial court ruled that Victim 1 was a thoughtful, smart child and that Appellant's interpretation of Victim 1's testimony was "completely the opposite of what (the court) saw." (R. p. 114, lines 9 – 12). The trial court, who heard and observed Victim 1, determined that Appellant put words in his mouth that were simply not there."

(R. p. 114, lines 11 – 15). See South Carolina Dep't of Social Servs. v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct.App. 1987)(stating that in making a determination respecting competency of a witness, the trial judge must rely on personal observation of the child's demeanor and responses to questions posed). The trial court concluded:

> I think he was more than competent. I think he certainly understands right from wrong. He explained that he gets punished when he speaks or tells a lie. The fact that they've put the fear of God in him, if he does tell a lie, that it's going to be written in the Judgment Book, I think just adds that much more credence to the boy understanding the difference between the truth and a lie. I think he's more than competent, and very bright, and very thoughtful. (R. p. 114, lines 9 - 24).

Victim 1 testified following the competency hearing during which he clearly demonstrated an accurate recollection of the sexual assaults perpetrated upon him by Appellant and clearly demonstrated the ability to express himself concerning the matter in question in a manner as to be understood by the jury. (R. 130-135). He fully recounted the details, including the place, time periods and time of day the sexual encounters occurred, the identity of the perpetrator and described in detail the sexual acts perpetrated by Appellant. Id. During Appellant's cross-examination during his trial testimony, Victim 1 admitted to having imaginary friends when he was "little," that he still has one, and that he sometimes hears voices in his head telling him things. He stated that he listens to the right voice and ignores the wrong one. (R. p. 145).

At the close of the State's case, Appellant again questioned Victim's 1's mental capacity and ability to accurately recall the events and suggested that the trial court could strike his testimony. The trial court again found Victim 1 to be well-mannered, mature,

appropriate in conduct and competent to testify. (R. p. 240). The matter was revisited in a post-trial motion and the trial court ruled similarly. (R. p. 364 -366).

Every person in South Carolina is presumed competent to be a witness except as otherwise provided by statute or rule. Rule 601(a), SCRE; Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). "A witness must have personal knowledge of the matter and must swear or affirm to tell the truth." State v. Needs, 333 S.C. at 142, 508 S.E.2d at 861. A person will be disqualified as a witness if the court determines that (1) the proposed witness is incapable of expressing himself to the judge or jury concerning the matter or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth. SCRE 601(b), SCRE; see also South Carolina Dep't of Social Servs. v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct.App. 1987).

In State v. Needs, our supreme court determined that a "proposed witness understands the duty to tell the truth when he states that he knows that it is right to tell the truth and wrong to lie, that he will tell the truth if permitted to testify, and that he fears punishment if he does lie, even if that fear is motivated solely by the perjury statute." State v. Needs, 333 S.C. at 134, 143, 508 S.E.2d at 861. 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. at 143, 508 S.E.2d at 861, citing Commonwealth of Pennsylvania v. Goldblum, 447 A.2d 234 (Pa. 1982). The party opposing a witness has the burden of proving the witness is incompetent. Id. 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. Id.; see also TNS Mills, Inc. v. South Carolina Dep't of Rev., 331 S.C. 611, 503 S.E.2d 471 (1998); State v. Green, 267 S.C. 599, 230 S.E2d 618 (1976). After the trial court has properly determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury. Id. at 144,508 S.E.2d at 862.

The record fully supports the trial judge's findings and conclusions. The inquiry conducted and answers provided during the competency hearing illustrate Victim 1's ability to distinguish the truth from a lie, that it is wrong to tell a lie and right to tell the truth, that adverse consequences arise if he does not tell the truth, and that he will tell the truth if permitted to testify. Victim 1's detailed account of the sexual assaults reveals that he was able to perceive and remember specific details and communicate about the matter intelligently. He clearly understood the duty to tell the truth.

Appellant provides nothing but speculation in support of his contention that Victim 1 was not a competent witness. Appellant fails to develop a link between Victim 1's ability to testify and his mother's schizophrenia. He also fails to establish that attention deficit disorder prevented Victim1from understanding his duties as a witness, including the necessity to tell the truth, or interfered with his ability to perceive and relate the facts as needed. Nevertheless, our Supreme Court has determined that mental illness is insufficient to rebut the presumption of competency. Sellers v. State, 362 S.C. 182, 192, 607 S.E.2d 82, 87 (2005). In this case, Victim 1 understood the duty to tell the truth, swore to do so, had personal knowledge of the matter, and effectively communicated the knowledge and matters he experienced in a cogent manner. As in Sellers v. State, 362 S.C. 182, 192, 607 S.E.2d 82, 87 (2005), the jury was fully aware Victim 1 suffered from

attention deficit disorder and possible oppositional defiance disorder that accompanies attention deficit disorder. The jury was also aware of his mother's mental illness. While Appellant failed to explore the symptoms of these conditions or establish any link between the disorders and the ability to properly serve as a witness, the information was developed at trial and it was for the jury to decide to believe all or none of Victim 1's testimony. Thus, the trial court did not abuse its discretion in finding Victim 1 competent to testify. See State v. Givens, 267 S.C. 47, 225 S.E.2d 867 (1976) (stating trial court did not abuse its discretion in finding a child witness competent when the witness testified that he attended school to the seventh grade, had a belief in God, and that he believed he would be punished if he did not tell the truth and was rational and responsive to questions asked).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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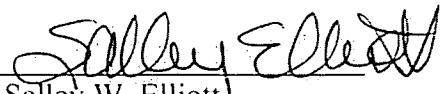
BY: 
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Columbia, South Carolina
February 24, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2013-002389

THE STATE,.....RESPONDENT

v.

JAMES SIMMONS, JR.,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211 (b), SCACR.

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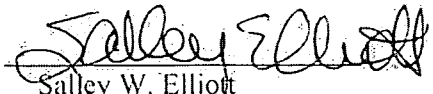
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated February 24, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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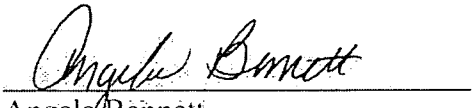
I further certified that all parties required by Rule to be served have been served. This 24th, day of February, 2015.



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