STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

Honorable William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PRESTON MOZEAK,

APPELLANT

APPELLATE CASE NO 2015-002530

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 5, 2014, the Marion County Grand Jury indicted Appellant Preston Mozeak for one count of first-degree criminal sexual conduct with a minor and one count of third-degree criminal sexual conduct with a minor. R. * (indictments). The offenses were alleged to have occurred against Mozeak's then seven-year-old granddaughter ("the Minor Child"), between August 1, 2014 and November 21, 2014.

On November 18-19, 2015, Mozeak appeared for trial before the Honorable William H. Seals, Jr. and a jury. Mozeak was represented by Thurmond Brooker, and the state was represented by assistant solicitors David Richardson and John Holt. Tr. 1.

The jury found Mozeak guilty of both offenses. Tr. 240 – 241. Judge Seals sentenced him to concurrent terms of twenty-five years for first-degree CSC and fifteen years for third-degree CSC. Tr. 246.

This appeal follows.

STATEMENT OF FACTS

Mozeak and his wife, Lillie, were the parents of two adult sons, Tony and Preston, Jr.[1] Tr. 161, l. 17 – 162, l. 10. Tony and his wife, Latasha, have a daughter ("the Minor Child") and son, who the Mozeaks (collectively referring to Preston and Lillie Mozeak) cared for after school from the time the children got off of the school bus until their parents picked them up at approximately 6:00 p.m. Tr. 162, l. 17 – 165, l. 5. The jury saw the recorded pre-trial interview with the Minor Child and heard her live testimony at trial. She claimed both that Mozeak digitally penetrated her and that she stroked Mozeak's penis with her hand. She alleged that the acts took place in Mozeak's car on the way to or from the grocery store and park and in the Mozeak's living room, all in the presence of her younger brother, though she said he did not see anything. She further alleged that her grandmother was in the kitchen during the instance at the house. Tr. 72 – 110; see State's Ex. 1 (DVD Forensic Interview), on file with this Court. Neither the Minor Child's brother nor her grandmother testified. The Minor Child's mother, Latasha Mozeak, alleged seeing some behavioral changes in the Minor Child after she disclosed the alleged abuse but admitted that she had no suspicions prior to the Minor Child's disclosure. Tr. 124, l. 12 – 125, l. 7; Tr. 134, l. 21 – 140, l. 21. The "forensic interviewer" did not testify beyond authenticating the recording of her interview with the Minor Child. Tr. 147 – 151. No physical examination was ever performed on the Minor Child. Tr. 125, l. 25 – 126, l. 19.

In Camera Hearing on Admissibility of "Forensic Interview"

A pre-trial hearing was conducted on the admissibility of the recording of the Minor Child's interview at the Care House child advocacy center pursuant to S.C. CODE ANN. § 17-23-175. In addition to hearing testimony from Sally Williamson, who conducted the interview of

[1] Lillie was pregnant with Tony when they were married, but he is not Mozeak's biological son. Tr. 244, l. 16 – 245, l. 2.

the Minor Child, the trial court reviewed the recording of the November 25, 2014 interview itself. Tr. 34 – 53. On the video, the Minor Child described falling asleep while the alleged abuse took place. She also described hearing her grandma and grandpa talking about grandpa going to jail and her grandma telling her to stay away from grandpa. Then she said that her grandma did not know about grandpa touching her. The Minor Child could not answer questions about whether the incident at her grandparent's home was before or after the incident in the car on the way to Food Lion, except to say they were on different days while she was in second grade. State's Ex. 1 (DVD Forensic Interview).

After describing those two occasions of alleged abuse, Williamson said "tell me about another time." The Minor Child responded: "Well, I – it did happen to me, but I keep on forgetting these kind of times because – because everything when I blink, um, it – it takes pictures, um, where I was, I think." State's Ex. 1 (DVD Forensic Interview). On cross-examination at the *in camera* hearing, Williamson admitted that she never asked the Minor Child to clarify what she meant when she said she would fall asleep during the alleged abuse or that when she blinks it takes a picture. Tr. 43, l. 8 – 46, l. 6.

When asked how many times grandpa had touched her "pee-hole," the Minor Child held up ten fingers. Williamson asked her to tell her about another one of those times and the Minor Child said "well, that's all I can remember." When asked to tell her about any other places it happened, the Minor Child said she would do the same thing to "him," again claiming that they were in the car, that time on the way to the park, and falling asleep. Throughout the interview, the Minor Child referred to "dad," "daddy," and "grandpa." When asked if she ever calls grandpa "daddy," the Minor Child shook her head in the affirmative. State's Ex. 1 (DVD Forensic Interview).

Williamson asked the Minor Child if anything happened before she was in second grade and if it ever happened when she was in first grade. The Minor Child shook her head in the negative. Williamson then asked if it ever happened before first grade, to which the Minor Child again said "no." Williamson responded: "So, were you seven all the times it happened or a different age?" The Minor Child said "a different age" and Williamson asked "What age?" Then the Minor Child perked up and said: "Okay, six, five, and four." Williamson asked: "So did it happen when you were six, five, and four, or only when you were seven?" Then the Minor Child said "seven." State's Ex. 1 (DVD Forensic Interview). Williamson admitted that her presentation of only two alternatives was "poor" questioning. Tr. 46, l. 7 – 47, l. 24.

Following the *in camera* testimony and review of the video, defense counsel argued that the statement lacked internal coherence, citing the responses of the Minor Child that did not make sense. He specifically referenced her claims that she fell asleep during the alleged abuse and that her eyes took pictures when she blinks. Defense counsel noted that the Minor Child was only seven years old at the time of the interview, making her more prone to "flowing between reality and fantasy" and more susceptible to direct and indirect influence. Tr. 51, l. 5 – 52, l. 16.

The solicitor made no argument. The trial judge ruled that the questions were not leading, the statement was detailed enough, and that it was coherent and made sense "when you take into account that it's a seven-year-old child." He accordingly ruled that the recording of the interview was "trustworthy enough" to be admitted at trial. Tr. 53, ll. 11-23.

Minor Child Admits Coaching

During the leading direct examination conducted by the solicitor, the Minor Child repeated many of the allegations made during the Care House interview, though with surprisingly more clarity. Tr. 76, ll. 15-23; Tr. 79, l. 24 – 88, l. 21. On cross-examination, the following exchange occurred between defense counsel and the Minor Child:

DEFENSE COUNSEL:	All right. Now, first of all, let me ask you did you prepare for your testimony today?
MINOR CHILD:	Yes, sir.
DEFENSE COUNSEL:	How did you prepare for your testimony today?
MINOR CHILD:	With my mom every time when she comes from work we practice.
DEFENSE COUNSEL:	Okay. You practice your testimony?
MINOR CHILD:	(Shook head)
DEFENSE COUNSEL:	Okay. How long do you practice your testimony?
MINOR CHILD:	Like until it's my bedtime.
DEFENSE COUNSEL:	All right. How long is that?
MINOR CHILD:	Some minutes because I go to bed at eight o'clock. It be a little later than that.
DEFENSE COUNSEL:	Okay. Is that an hour or two hours? How long do you think it is? I know that you said when you get home from work until you go to bed, just roughly how long that is do you think?
MINOR CHILD:	Like two hours or three.
DEFENSE COUNSEL:	Two hours or three. And how long have you been practicing your testimony?
MINOR CHILD:	Until like it's my bedtime or like I want to be finish with my testimony.

DEFENSE COUNSEL: Okay. And when I said how long have you been doing it and I'm sorry I didn't ask the right question. If you been –

MINOR CHILD: How long I been preparing?

DEFENSE COUNSEL: Well, have you been practicing for – when I say how long, I'm talking about the length of time has it been weeks or months this is –

MINOR CHILD: Some days 'til today.

DEFENSE COUNSEL: I'm sorry.

MINOR CHILD: Some days 'till today.

DEFENSE COUNSEL: Some day 'till day. Do you remember when you first started practicing?

MINOR CHILD: (Nod head)

DEFENSE COUNSEL: More than a week?

MINOR CHILD: You can say that. Me and my mom we been ready Wednesday, so we kept practicing.

DEFENSE COUNSEL: You kept practicing. Okay. All right. And what parts of your testimony did you practice?

MINOR CHILD: Like when someone going to ask me about what happened, where was it, how did it happen and something like that.

DEFENSE COUNSEL: Okay. So you all practice you know what you would say?

MINOR CHILD: (Nod head)

DEFENSE COUNSEL: Okay. Did you practice hard to try to remember everything?

MINOR CHILD: Yes, sir.

Tr. 90, l. 10 – 92, l. 8. Defense counsel then asked to make a motion outside of the presence of the jury and the judge sent the jury out. Tr. 92, ll. 9-15.

Defense counsel argued that the Minor Child's testimony disqualified her from testifying due to a lack of competency and personal knowledge. He argued that the coaching of the Minor Child made it such that it was impossible to distinguish what testimony was based upon her actual recollection of events and what was "drilled" into her by her mother. Tr. 92, l. 16 – 95, l. 12. The solicitor responded that the Minor Child never said she was told what to say and the mother was acting as any parent would in trying to make their child comfortable on the witness stand. He further argued that the jury could compare the testimony to the taped interview and determine the Minor Child's credibility. Tr. 95, ll. 14-23.

The trial judge ruled:

> I agree [with the solicitor]. I think considering her age, the sensitive [nature] of the testimony that she has to give in court, the seriousness of court, the importance of court. The fact that it involves a family member. The idea that a parent will practice a little bit with their child I think is appropriate, most lawyers practice with their witnesses anyway. I'm going to overrule it. I think she's very capable of telling the truth. **I think she is telling the truth.** That's for the jury to decide, that's for the jury to decide, that's for your cross-examination. You may cross-examine her in that regard.

Tr. 95, l. 24 – 96, l. 9 (emphasis added).

When the jury returned, the Minor Child testified that she and her mother "talked about what I was going to say like what we thought they was going to say." Tr. 96, l. 18 – 97, l. 1. When asked if she "testif[ied] about what [she] was going to say," the Minor Child responded: "Yes, sir, my mom she was the one acting like who was going to ask me the questions and I was the one who was going to answer them." Tr. 97, ll. 4-7. Not surprisingly, the Minor Child's mother denied telling the Minor Child what to say or planting anything in her head. Tr. 128, ll. 4-19. The jury, obviously troubled by the coaching, sent a note out during their deliberations asking if the Minor Child's mother and father had access to the DVD. Tr. 239, ll. 13-15.

Jury Charge and Objection

At the close of the jury charge, the trial judge instructed the jury:

> **It is your duty by your joint deliberations to determine the truth in this case** giving to the defendant the benefit of every reasonable doubt on each and every issue. Then to the facts which you determine to be **true**, you should take and apply the law which has been given to you by this court **and thus arrive at a verdict which speaks the truth. In fact, the word verdict, which has a Latin derivative, means a true saying.** Thus, when you have accomplished these responsibilities, you will have satisfied your oath as jurors and you will have discharged your duty to this Court.

Tr. 235, ll. 10-20. Following the charge, defense counsel objected to the portion of the charge instructing the jury to seek the truth. Counsel recalled that the appellate courts had admonished trial judges against using such language because it detracts from the state's burden to prove the elements of the offense. Tr. 237, l. 15 – 238, l. 13. The solicitor declined to respond. Tr. 238, ll. 14-15. The trial judge ruled that he would "leave [the charge] like it is." Tr. 238, ll. 16-17.

ARGUMENT

I. The trial court erred in charging the jury that it was their "duty . . . to determine the truth in this case," "arrive at a verdict which speaks the truth," and that "the word verdict, which has a Latin derivative, means a true saying" where such instructions improperly detracted from the state's burden to prove the elements of the charged offenses beyond a reasonable doubt.

Introduction

Mozeak was convicted solely on the word of the alleged victim in this case. Her scattered responses during the forensic interview were remarkably more coherent under the leading examination of the solicitor. Neither her videotaped interview nor her in-court testimony should have been admitted. The former did not comply with the statutory requirements for admission due its lack of internal coherence, lack of detail, and the use of leading questions. The latter was rendered inadmissible when the Minor Child admitted that her mother had been coaching her for at least one week. In addition to those errors in the admission of evidence, the trial court erred in instructing the jurors that it was their "duty . . . to determine the truth in this case," "arrive at a verdict which speaks the truth," and that "the word verdict, which has a Latin derivative , means a true saying."

Discussion

Eighteen years ago, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), our Supreme Court strongly urged trial judges to avoid using any "seek" language in their charges to the jury. The Court noted that such "in search of the truth" language was unnecessary and ran the risk of unconstitutionally shifting the burden of proof to the defendant. 333 S.C. at 151-56, 508 S.E.2d at 865-68.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), our Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the court in Aleksey noted that in that case the "seek" language was used in the instruction on witness

credibility. 343 S.C. at 27, 538 S.E.2d at 251-52. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. Id. Thus, the Aleksey Court found that there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. Id. at 28-29, 538 S.E.2d at 252-53.

In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), our Supreme Court considered a jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, the Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." 401 S.C. at 256, 737 S.E.2d at 475.

Despite our Supreme Court's repeated admonitions regarding the dangers of "seek the truth" language in the court's jury charge, trial judges have continued to employ new derivatives of this burden shifting language. Recently, in State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13), our Supreme Court reviewed the trial court's preliminary remarks to the jury, which included use of the terms "search[ing] for the truth," "true facts," and "just verdict." The Court ruled:

> [W]e agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the

evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Beaty, at 15-16. Even so, the Beaty Court found no prejudice sufficient to warrant reversal from the comments in light of its review of the entirety of the opening comments and the trial record. Id. at 16.

A recent empirical study reveals the practical reality of the problems with truth-related language in jury charges. Michael D. Cicchini & Lawrence T. White, Truth or Doubt? An Empirical Test of Criminal Jury Instructions, 50 U. Rich. L. Rev. 1139 (2016). Two-hundred ninety-eight mock jurors were presented with the same fact pattern of a hypothetical sexual assault case, which included an instruction on the elements of the crime charged; a synopsis of testimony from the minor child, the child's mother, and the defendant; and closing arguments from the prosecution and defense. Cicchini, at 1150-51. The mock jurors were randomly given one of three jury charges – a "to search for the truth" instruction, a "doubt-only" instruction, or a "combination" truth and doubt instruction. Cicchini, at 1152-53. The study provided strong empirical data that "the truth-related language at the end of an otherwise proper reasonable doubt instruction actually diminishes the government's burden of proof." Cicchini, at 1155. The authors opined that their study reflects the invalidity of the judicial perception that the remainder of a jury charge can render the "truth" language harmless. Cicchini, at 1156-57.

Here, **the final substantive instruction from the trial judge** to the jury was that it was their duty to determine the truth, decide the facts that were true, arrive at a verdict which "speaks the truth" and that verdict means "true saying." Tr. 235, ll. 10-20. The jury's questions regarding a description of Asperger's syndrome, from which the Minor Child's younger brother suffered, and whether the Minor Child's parents had seen her recorded interview, are evidence of their

focus on determining the "truth" rather than evaluating the evidence that was presented. Tr. 239, ll. 10-15.

It is simply not the jury's function to search for the truth. A jury's function is to determine whether the state has proven the defendant's guilt *beyond a reasonable doubt.* See Francis v. Franklin, 471 U.S. 307, 313 (1985) ("The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (citing In re Winship, 397 U.S. 358, 364 (1970)). The trial judge's refusal to rectify his erroneous charge was not harmless in this case because there is evidence that the jury sought information outside of the record, ostensibly to fulfill their truth-finding mission and empirical data suggests that the inclusion of truth-finding language diminishes the state's burden of proof. Mozeak is accordingly entitled to a new trial.

II. The trial court erred in admitting the out-of-court interview of the minor child where it did not possess particularized guarantees of trustworthiness due to the interviewer's use of leading questions, the lack of details regarding the alleged offenses, and the lack of internal coherence.

"Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence." State v. Russell, 383 S.C. 447, 450, 679 S.E.2d 542, 543–44 (Ct. App. 2009). "In CSC cases, such hearsay statements are admissible, but only to the extent they are limited to the time and place of the assault." Id. at 450-51, 679 S.E.2d at 544. S.C. CODE ANN. § 17-23-175 provides a further exception for the admission of an out-of-court statement for a child under twelve, provided the following:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child; (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F); (3) the child testifies at the proceeding and is subject to cross- examination on the elements of the offense and the making of the out-of-court statement; and **(4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.**

S.C. CODE ANN. § 17-23-175(A) (emphasis added). In determining "whether a statement possesses particularized guarantees of trustworthiness," the court considers:

> (1) whether the statement was elicited by **leading questions**; (2) whether the interviewer has been trained in conducting investigative interviews of children; (3) whether the statement represents a **detailed account of the alleged offense**; (4) whether the statement has **internal coherence**; and (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. CODE ANN. § 17-23-175(B) (emphasis added).

Here, defense counsel challenged the trustworthiness of the out-of-court statements based on the leading questions asked by the interviewer, the lack of detail articulated by the Minor Child, and the lack of internal coherence in the Minor Child's statements. While the interviewer did not lead with every question, she asked two leading questions on important points. First, she

asked if the Minor Child ever calls grandpa "daddy." In the context of the interview, it was clear the interviewer was dissatisfied with the Minor Child's use of "grandpa" and "daddy" and wanted the minor child to pick one. She provided the Minor Child with a convenient explanation of why she would have said "daddy" when she meant "grandpa." Additionally, the Minor Child's responses regarding how old she was when the alleged abuse occurred where inconsistent. When her age and year in school did match, the interviewer prompted her to change her response by asking "So did it happen when you were six, five, and four, or only when you were seven?" Again, the interviewer's tone implied to the Minor Child which answer was "correct" in the mind of the interviewer. State's Ex. 1 (DVD Forensic Interview).

The Minor Child also made several statements about falling asleep while the alleged abuse took place. While that may have made sense were the allegation that the abuse occurred while she was napping or laying down for the night, the abuse in this case allegedly took place after school in the car and in her grandparent's living room. While the Minor Child said that her grandmother did not know about her grandpa touching her, the Minor Child inexplicably said that her grandma told her to stay away from grandpa. She also alleged hearing her grandparents talk about her grandpa going to jail. She provided no detail on when this alleged conversation took place. Most curiously, the Minor Child said that she had difficulty remembering what happened, despite the fact that the abuse was alleged to have occurred in only the few months prior to the interview. She said: "Well, I – it did happen to me, but I keep on forgetting these kind of times because – because everything when I blink, um, it – it takes pictures, um, where I was, I think." State's Ex. 1 (DVD Forensic Interview). While the Minor Child made allegations of improper touching and digital penetration, she was unable to relay the sequence of the alleged offenses or provide any specificity regarding how long the incidents lasted.

Thus, the trial judge erred in finding that the questions were not leading. While not every question was leading, the interviewer used leading questions in two specific instances pertinent to important details – the identity of the perpetrator and the timing of the alleged abuse. Moreover, the interviewer's tone during portions of her questioning indicated to the Minor Child when the interviewer was dissatisfied with the information provided. The trial court excused the lack of coherence in the statement by citing the Minor Child's age. However, it is the young age of the minors whose statements are being admitted that necessitates an examination of their coherence to determine the trustworthiness of their prior statements. The trial judge further erred in finding that the statement was "detailed **enough**" and "trustworthy **enough**." The state's burden was much higher than that, as it was required to show "that the totality of the circumstances surrounding the making of the statement provides **particularized guarantees** of trustworthiness." S.C. CODE ANN. § 17-23-175. Here, the trial judge's findings were inaccurate and his comments reflect a dilution of the standard for the admissibility of the Minor Child's out-of-court statement. Thus, the trial judge erred in admitting the recording of the Minor Child's interview and Mozeak is accordingly entitled to a new trial.

III. The trial court erred in finding the minor child competent to testify where she testified that she had practiced her testimony with her mother every night for over a week from the time her mother came home from work until her bedtime and such blatant coaching made the minor child incapable of understanding her duty to tell the truth and testify only based upon her personal knowledge.

The initial testimony regarding the Minor Child's competency was presented *in camera* and focused on her understanding of the difference between the truth and a lie and the consequences of lying. Tr. 54, l. 22 – 57, l. 23. When asked what the truth is, the Minor Child responded: "The truth is something good that you need really to tell to people that they really need to know." Tr. 57, ll. 9-12. She said that a lie is: "You're like acting out the word while you're actually telling a lie, when you're actually telling a lie." Tr. 57, ll. 17-19.

At beginning of her cross-examination before the jury, the Minor Child admitted that she had essentially rehearsed her testimony for at least one week, practicing with her mother for hours every night. Tr. 90, l. 10 – 92, l. 8; Tr. 96, l. 18 – 97, l. 7. Defense counsel objected to the competency of the Minor Child, arguing that the coaching rendered the Minor Child incapable of understanding her duty to tell the truth and incapable of testifying based upon her personal knowledge. Tr. 92, l. 16 – 95, l. 12.

The trial judge ruled that the Minor Child was "very capable of telling the truth" and "I think she is telling the truth." Tr. 96, ll. 5-7. Though the judge then said that whether the Minor Child was telling the truth was for the jury to decide, the true basis for his ruling on her qualification to testify was evident – he believed her. Thus, just as the mother intended, the Minor Child's rehearsed testimony was effective at convincing the trial judge of her credibility. While the Minor Child's mother, as expected, denied telling the Minor Child what to say, she did not deny engaging in such "preparations." Tr. 128, ll. 4-19.

A witness must have personal knowledge of the matter and must swear or affirm to tell the truth. Rules 602 and 603, SCRE. "A person is disqualified to be a witness if the court

determines that ... the proposed witness is incapable of understanding the duty of a witness to tell the truth." Rule 601(b)(2), SCRE. The purpose of Rule 601(b) is to provide a minimum standard for the competency of a witness. Notes to Rule 601, SCRE.

"A child's competency to testify depends on showing to the satisfaction of the trial judge that the child is substantially rational and responsive to the questions asked and is sufficiently aware of the moral duty to tell the truth and the probability of punishment if he lies." S.C. Dep't of Soc. Servs. v. Doe, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987). "If the child is mature enough (1) to understand questions and narrate answers, (2) to perceive facts accurately through the medium of the senses, (3) to recall them correctly, (4) to relate a true version of the facts perceived, (5) to know the difference between right and wrong, good and bad, (6) to understand it is right or good to tell the truth and wrong or bad to lie, (7) to be willing to tell the truth, and (8) to fear punishment if he lies, then [she] is competent to testify." Id.

Other state courts have held that coaching and rehearsing of testimony is a relevant factor in determining the competence of a child-witness. See Commonwealth v. Delbridge, 855 A.2d 27 (Pa. 2003); English v. State, 982 P.2d 139, 142–43, 145-47 (Wyo. 1999); Matter of Dependency of A.E.P., 956 P.2d 297, 307–08 (Wash. 1998); Lanoue v. State, 661 P.2d 874, 875 (Nev. 1983); Brandau v. Webster, 382 A.2d 1103, 1106 (Md. Ct. Spec. App. 1978) (citing 81 Am. Jur. 2d Witnesses § 92). "The essential questions of competency can be answered only through an in-person hearing: The child's appearance, fear or composure, general demeanor and manner of answering, and **any indication of coaching or instruction as to answers to be given are as significant as the words used in answering during the examination, to determine competency**." State v. Said, 644 N.E.2d 337, 340 (Ohio 1994) (internal quotations and citations omitted) (emphasis added). In New Jersey, where potential coaching of a child-witness'

testimony is not addressed as part of the competency hearing, there are separate provisions for a pre-trial "taint hearing" if the defense raises "some evidence" that the victim's statements were the product of suggestion or coercion. See State v. Michaels, 642 A.2d 1372, 1383-84 (N.J. 1994).

Both Washington and Wyoming have rejected the New Jersey model of holding a separate "taint hearing," finding their existing procedures adequate to address the problem of "taint." Both states utilize a five-part test to determine the competency of child witnesses:

> The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) **a memory sufficient to retain an independent recollection of the occurrence**; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Matter of Dependency of A.E.P., 956 P.2d 297, 304, 306-08 (Wash. 1998) (citing State v. Allen, 424 P.2d 1021 (Wash. 1967) (emphasis added); English v. State, 982 P.2d 139, 146 (Wyo. 1999) (citing Larsen v. State, 686 P.2d 583, 585 (Wyo. 1984)). In Matter of Dependency of A.E.P., the Washington Supreme Court ruled: "As to the reliability of a child's testimony, a defendant can argue memory taint at the time of the child's competency hearing. If a defendant can establish a child's memory of events has been corrupted by improper interviews, it is possible the third *Allen* factor, 'a memory sufficient to retain an independent recollection of the occurrence' may not be satisfied." 956 P.2d at 307.

The Wyoming Supreme Court similarly ruled that taint should be considered in evaluating the *Larsen* factors during the competency hearing. English v. State, 982 P.2d at 145-46 (Wyo. 1999). The Court further "endorse[d] the use of the following factors as they relate to the question of independent recollection":

> (1) the age of the victim; (2) circumstances of the questioning; (3) the victim's relationship with the interrogator; and (4) the type of questions asked. Undue suggestiveness can occur when an interviewer has a preconceived notion of what has happened to a child, the interviewer uses leading questions, the interviewer is a trusted authority figure, the person accused of wrongdoing is vilified during the interview, or the interviewer uses threats or rewards to pressure the child.

Billingsley v. State, 69 P.3d 390, 395–96 (Wyo. 2003) (citing English).

In Commonwealth v. Delbridge, 855 A.2d 27 (Pa. 2003), the the Pennsylvania Supreme Court likewise rejected the New Jersey model and found taint should be considered in determining competency. The Delbridge Court first defined "taint":

> The core belief underlying the theory of taint is that a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy. Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.

855 A.2d at 34-35 (internal citation omitted).

The Pennsylvania test for competency of immature witnesses requires: (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering *what it is* that she is called to testify about and (3) a consciousness of the duty to speak the truth." 855 A.2d at 39 (emphasis in original). The Delbridge Court noted that "[t]he capacity of young children to testify has always been a concern as their immaturity can impact their ability to meet the minimal legal requirements of competency." Id. "Common experience informs us that children are, by their very essence, fanciful creatures who have difficulty distinguishing fantasy from reality; who when asked a question want to give the "right" answer, the answer that pleases the interrogator; who are subject to repeat ideas placed in their heads by others; and who have limited capacity for accurate memory." Id. The Court found that "[a]n

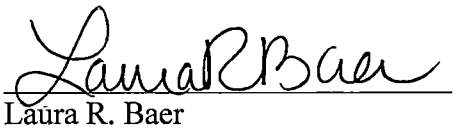
allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility." Id. at 40. "Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation." Id.

The Delbridge Court was persuaded by the reasoning expressed in English that "taint is a matter properly examined during a competency determination as it goes to the question of whether the child has the memory capacity to retain an independent recollection of the occurrence." Id. The Court found that competency proceedings in Pennsylvania similarly required the trial court to determine if the child possesses an independent memory of an actual event such that "a competency hearing is the appropriate venue to explore allegations of taint." Id.

Much like the competency factors relevant in In re A.E.P., English, and Delbridge, South Carolina's eight-factor test for competency of a child witness includes the requirements that the child be mature enough "to recall [facts] correctly" and "to relate a true version of the facts perceived." S.C. Dep't of Soc. Servs. v. Doe, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987). Here, despite defense counsel's cogent argument as to how coaching related to the witness' competency, the trial judge excused it as expected in light of the "sensitive" nature of the testimony and "seriousness of court." Tr. 95, l. 24 – 96, l. 5. While evidence of coaching and taint can be matters for cross-examination, that determination can only be made after fully exploring whether the taint was "sufficiently attenuated to permit a finding of competency." Delbridge, 855 A.2d at 41. The trial judge's failure to meaningfully consider how the Minor Child's practiced rehearsal of her trial testimony affected her competency to testify was error. Mozeak is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant Preston Mozeak respectfully requests that this Court reverse his convictions and remand his case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of January, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
Honorable William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PRESTON MOZEAK,

APPELLANT

APPELLATE CASE NO 2015-002530

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Preston Mozeak, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of January, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of January, 2017.

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