

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Pickens County

Honorable Perry H. Gravelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSE REYES REYES,

APPELLANT

APPELLATE CASE NO 2016-002544

RECEIVED

NOV 02 2017

SC Court of Appeals

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in allowing improper bolstering of the minor witness's credibility by allowing the competency inquiry and competency determination to be made in front of the jury rather than outside the presence of the jury and before the minor witness testified?

### STATEMENT OF THE CASE

In March of 2015, the Pickens County Grand Jury indicted Appellant Reyes for criminal sexual conduct with a minor first degree, indictment #2013-GS-39-3217<sup>1</sup>. On December 12, 2016, Appellant proceeded to jury trial before the Honorable Perry H. Gravely. Richard Warder represented Appellant at trial. Brandi Hinton prosecuted the case. The jury returned a verdict of guilty. Judge Gravely sentenced Appellant to twenty-eight (28) years in prison. A timely notice of intent to appeal was served on December 20, 2016. This appeal follows.

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<sup>1</sup> It is unclear why the indictment number is 2013 when the grand jury true billed the indictment in 2015.

## ARGUMENT

The trial judge erred in allowing improper bolstering of the minor witness's credibility by allowing the competency inquiry and competency determination to be made in front of the jury rather than outside the presence of the jury and before the minor witness testified

Prior to trial and outside of the presence of the jury the parties discussed calling the nine-year old witness. The judge asked the prosecutor, "Do we need to go over anything with her before we – outside the presence of the jury?" (Tr. p. 28, lines 8-10). The prosecutor answered, "Your Honor, I'll leave that in your discretion. I'm happy to go through kind of a series of the difference between the truth and a lie, but if you would like to do it prior to - " (Tr. p. 28, lines 11-15). The judge then said, "Is she avail – let's – let me – I think – let's do it when the jury's here." (Tr. p. 28, lines 16-18). Counsel for Appellant asked, "Are you going to – are you going to try and go through the qualification of whether she's able to testify in the presence of the jury?" (Tr. p. 28, lines 22-25). The judge answered, "That's what my intent was. Do you --" (Tr. p. 29, lines 1-2). Counsel for Appellant immediately objected stating, "I object. That's just bolstering just like a forensic interview." (Tr. p. 29, lines 3-4). The judge overruled the objection stating, "Well, I mean, it's a little bit different because it's the difference in the truth and a lie on the stand. I mean, I note your objection. I mean -- " (Tr. p. 29, lines 5-8). The judge erred.

The State called the minor witness to the stand and after asking a few introductory questions asked, "Do you know that while you're here, we only talk about things that are the truth?" (Tr. p. 43, lines 16-17). The minor witness answered, "Yeah." (Tr. p. 43, line 18). Counsel for Appellant objected stating, "Your Honor, just for the record, I want to preserve my objection." (Tr. p. 43, lines 19-20). The judge overruled the objection stating, "All right. As to

the bolstering. Yeah, I think that the person can testify on their own behalf, just not another party.” (Tr. p. 43, lines 21-24). For the next two and a half pages of the trial transcript the prosecutor asked the minor witness various questions about whether she knew the difference between the truth and a lie and about what happens when you tell a lie. (Tr. p. 44, 45, 46, lines 1-10). The prosecutor concluded by asking the minor witness, “Okay. So you understand that when we’re in here, we’re going to talk about the truth. Do you understand that?” (Tr. p. 46, lines 11-13). The Minor nodded her head and answered, “Yes.” (Tr. p. 46, lines 14-16). The prosecutor then stated, “Okay. Judge, at this time, I would move her as qualified to testify.” (Tr. p. 46, lines 17-18). The judge responded, ‘Any – any comments on – I think, under rule 601, she is competent unless otherwise disqualified.’ (Tr. p. 46, lines 19-21). Appellant did not object to the judge’s finding that the minor was competent to testify. (Tr. p. 46, line 22). Appellant’s objection went to the questioning of the minor witness, in front of the jury, with regard to telling the truth and the difference between the truth and a lie. The questioning in regard to competency and the judge’s finding should have been done in camera before the minor witness testified before the jury. The questioning and finding in the presence of the jury improperly bolstered the credibility of the minor witness. The error requires reversal of the conviction and sentence.

Rule 601(a), SCRE, provides, “Every person is competent to be a witness except as otherwise provided for by statute or these rules.” Rule 601(b), SCRE, provides, “A person is disqualified to be a witness if the **court** determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.” (emphasis added). The rule

provides that the **court**, not the jury, make the determination in regard to competency of a witness.

Case law establishes that it is the duty of the court, not the jury, to determine competency of a witness. In State v. Needs, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998) holding modified by State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004), the South Carolina Supreme Court wrote, “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. State v. Camele, 293 S.C. 302, 360 S.E.2d 307 (1987); State v. Green, supra.” In In re Robert M., 294 S.C. 69, 70, 362 S.E.2d 639, 640 (1987), the South Carolina Supreme Court wrote, “In State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971), this Court held that when confronted with a timely objection to witness competency, the trial judge has a *duty* to ‘make such examination as will satisfy [him] as to the competency or incompetency of the person to testify, and thereupon to rule on the objection accordingly.’ Id. at 429, 182 S.E.2d at 743; See also State v. Green, 267 S.C. 599, 230 S.E.2d 618 (1976) (question of witness competency to be determined by trial judge).” In State v. Pitts, 256 S.C. 420, 429–30, 182 S.E.2d 738, 743 (1971), the South Carolina Supreme Court wrote:

In case of timely objection to the competency of a person offered as a witness, it is the duty of the court to make such examination as will satisfy it as to the competency or incompetency of the person to testify, and thereupon to rule on the objection accordingly. This question may not be referred to the jury and it is error to instruct the jury that if they find a witness to be incompetent they are to disregard his testimony. 58 Am.Jur., Witnesses, Sections 211-212, pp. 144-145. On our own case of City Council v. Haywood, 2 Nott & McC. 308, it was held that the competency of a witness is for the court, and not the jury.

We think an apt statement of the applicable rule is set forth in State v. Comstock, 137 W.Va. 152, 70 S.E.2d 648, where it is said:

‘The question of the competency of a witness is a question for the court, and not for the jury, and when a witness is offered in a criminal case, and doubt is raised

as to the competency of such witness, it is the duty of the court to determine that question upon a careful examination of the witness as to age, capacity, and moral and legal accountability.’

The trial judge erred when he allowed the State to question the minor witness in regard to competency in the presence of the jury. Appellant objected to the questioning in the presence of the jury, arguing that it constituted improper bolstering. (Tr. p. 29, lines 3-4; p. 43, lines 19-20). The judge overruled the objection. (Tr. p. 29, lines 5-8). (Tr. p. 43, lines 21-24). The questioning of the minor witness, in front of the jury, with regard to telling the truth and the difference between the truth and a lie and the judge’s finding that the minor witness was competent to testify, also in front of the jury, improperly bolstered the credibility of the minor witness.

The prosecutor’s questions and judge’s finding in regard to competency conveyed to the jury that minor witness’s testimony was believable. The prosecutor specifically asked the minor witness, in the presence of the jury, “Do you know that while you’re here, we only talk about things that are the truth?” (Tr. p. 43, lines 16-17). The prosecutor asked the minor witness various questions about whether she knew the difference between the truth and a lie and about what happens when you tell a lie. (Tr. p. 44, 45, 46, lines 1-10). The prosecutor concluded by asking the minor witness, “Okay. So you understand that when we’re in here, we’re going to talk about the truth. Do you understand that?” (Tr. p. 46, lines 11-13). The prosecutor moved to have the minor witness qualified to testify, and the judge stated, in the presence of the jury, “I think, under rule 601, she is competent unless otherwise disqualified.” (Tr. p. 46, lines 19-21). Based on the questioning and the ruling the jury could easily have concluded that both the prosecutor and the judge believed the minor witness. After finding that the minor witness was competent to testify, the judge did not instruct the jury about the difference between a finding

that the minor witness was competent to testify, an issue for the judge, and a finding as to credibility, an issue for the jury. The jury could have erroneously concluded that if the minor witness was not credible or not believable the judge would not have allowed her testimony.

Recent appellate court decisions address the prohibition against improper bolstering by another witness. In Briggs v. State, No. 2014-000693, 2017 WL 4800009, at \*2 (S.C. Oct. 25, 2017), the South Carolina Supreme Court wrote, “In recent years, we have decided many cases on the question of the permissible limits of a forensic interviewer's testimony in the context of the prohibition against improper bolstering. See e.g., State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015); State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015); State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).” Generally the Court found improper bolstering when the witness directly or indirectly vouched for the minor’s credibility. In State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015), the South Carolina Supreme Court wrote:

Mrs. Griggs's recommendation that Appellant not be around Victim for any reason, can only be interpreted as Mrs. Griggs believing Victim's claim that Appellant sexually abused her. This type of testimony is improper. See e.g., State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding error where there was “no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful”); Kromah, at 360, 737 S.E.2d at 500 (cautioning forensic interviewers to avoid “any statement that indirectly vouches for the child's believability”); State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding admission of therapist's testimony indicating he believed victim's allegations were genuine was improper). This type of bolstering, especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) (“It is axiomatic that the credibility of the testimony of these witnesses is for the jury.”).

The improper bolstering challenged in the present case did not come from the forensic interviewer. Instead, the improper bolstering in this case resulted from the trial judge’s refusal to

conduct the competency hearing outside the presence of the jury. By allowing the jury to hear the minor witness agree with the prosecutor that while we were in court we would only talk about the truth, to hear the questions about the difference between the truth and a lie and consequences and then allowing the jury to hear the judge rule that the minor witness was competent to testify, the prosecutor and the judge vouched for the credibility of the minor witness.

In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476–77 (2016), the South Carolina Supreme Court wrote:

Generally, “[t]he assessment of witness credibility is within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)) (stating that a solicitor improperly vouches for a witness's credibility “by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony”); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

The competency questioning in the present case, in the presence of the jury, is similar to the questioning found improper in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851, (2001), rev'd and remanded, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002). In Kelly the following took place:

[Assistant Solicitor]: What did I tell you that I absolutely required regarding your testimony to this jury today?

[McCormack]: Uh-excuse me?

[Assistant Solicitor]: Did I tell you to tell the truth to this jury-

[McCormack]: Of course.

At that point, Kelly objected on the grounds that the assistant solicitor was bolstering the witness's testimony and was making himself a witness. After the trial court overruled the objection, the assistant solicitor continued:

[Assistant Solicitor]: What did I tell you regarding your testimony to this jury today? The only thing the State wanted from your testimony was what?

[McCormack]: The truth.

343 S.C. at 368, 540 S.E.2d at 860. The Court found the questioning improper writing:


In our opinion, the State's questions served to improperly bolster McCormack's credibility. Id. Although perhaps not technically vouching, the manner of questioning by the State raises the second concern outlined by the Walker court: the jury could have perceived that the assistant solicitor held the opinion that McCormack was, in fact, telling the truth. Thus, McCormack's testimony carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about McCormack. Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.

State v. Kelly, 343 S.C. 350, 369, 540 S.E.2d 851, 860–61 (2001), rev'd and remanded, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002) (n. 12 omitted). In the present case, based on the questioning which led to the minor witness agreeing with the prosecutor that while we were in court we would only talk about the truth in addition to the other questions about truth and lies, the jury could have perceived that the prosecutor believed the minor witness was telling the truth. As a result, the minor witness's testimony carried with it the imprimatur of the government and this bolstering may have induced the jury to trust the prosecutor's judgment about the minor witness. The improper bolstering was made worse when the judge, in the presence of the jury, stated that he found the minor witness competent to testify.

The error in allowing the jury to hear the competency questioning and finding is not harmless. The credibility of the minor witness was a critical determination to be made by the jury. The State's evidence was not overwhelming. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). See also Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016) (Finding prejudicial deficient performance in trial counsel's failure to object to solicitor's improper closing argument that vouched for victim's credibility.).

**CONCLUSION**

Based on the above argument this Court should reverse Appellant's conviction and sentence and remand the case for a new trial.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

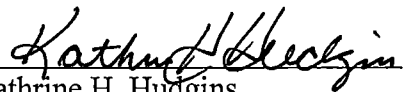
v.

JOSE REYES REYES,


APPELLANT

\_\_\_\_\_  
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 a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jose Reyes Reyes, #370793, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 2nd day of November, 2017.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 2nd day of November, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.