

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

RECEIVED

v.

JUN 27 2019

JOSE REYES REYES,

SC Court of Appeals

PETITIONER

APPELLATE CASE NO 2016-002544

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

Opinion No. 2019-UP-214

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Jose Reyes Reyes petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that because the competency hearing was held in the presence of the jury, the prosecutor's questioning improperly vouched for the credibility of the child witness. The improper vouching was made worse by the fact that the judge ruled, in the presence of the jury, that the child witness was competent to testify. The competency questioning by the prosecutor and finding by the judge, in the presence of the jury, improperly bolstered the child witness's credibility. The competency hearing should have taken

place outside the presence of the jury to avoid the improper bolstering. The improper bolstering was not harmless.

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?” (R. p. 5, 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 - ” (R. p. 5, 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.” (R. p. 5, lines 16-18). Counsel for Petitioner 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?” (R. p. 5, lines 22-25). The judge answered, “That’s what my intent was. Do you --” (R. p. 6, lines 1-2). Counsel for Petitioner immediately objected stating, “I object. That’s just bolstering just like a forensic interview.” (R. p. 6, 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 -- ” (R. p. 6, lines 5-8). The judge erred.

The State called the minor witness to the stand and after asking a few introductory questions asked, in the presence of the jury, “Do you know that while you’re here, we only talk about things that are the truth?” (R. p. 14, lines 16-17). The minor witness answered, “Yeah.” (R. p. 14, line 18). Counsel for Petitioner objected stating, “Your Honor, just for the record, I want to preserve my objection.” (R. p. 14, 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.” (R. p. 14, lines 21-24).

The following questioning took place in the presence of the jury:

Q. Minor, do you know the difference between the truth and a lie?

A. (Nods head.)

Q. Do you know what a lie is?

A. Yeah.

Q. What'd you say?

A. Yes.

Q. Okay. What happens when you tell a lie?

A. That he can't – he won't – he will not go to jail.

Q. What happens if you tell a lie?

A. (No audible response.)

Q. If you go to school and you tell a lie, what happens?

A. (No audible response.)

Q. Let me ask you another - -

Mr. Warder: Objection. Let the witness answer.

The Court: All right.

Ms. Hinton: Can I rephrase, Judge?

The Court: Yeah, you may rephrase.

By Ms. Hinton:

Q. Minor, is it a good thing or a bad thing to tell a lie?

A. Bad thing.

Q. Okay. And if you get – if you tell a lie, do you get in trouble for that lie?

A. Yes.

Q. Okay. And is telling the truth a good thing or a bad thing?

A. Good thing.

Q. Okay. Do you know what it means to tell the truth?

A. No.

Q. Do you know what the word truth means?

A. (No audible response.)

Q. Do you know what it means to be honest about something?

A. (Nods head.)

Q. Is that a yes?

A. Yes.

Q. Is it good to be honest about things?

A. Yes.

Mr. Warder: Your Honor, this is too lenient. This is –

Ms. Hinton: Judge, she's a child witness. I get a little bit of leeway.

The Court: I'm going to give – I'm going to give her some latitude.

By Ms. Hinton:

Q. Minor, let me ask you this, if I told you that my shirt was red, would that be the truth or a lie?

A. Lie.

Q. Okay. And if I told you that your shirt had pink in it, would that be the truth or a lie?

A. Truth.

Q. Okay. And if I told you that I was a boy, would that be the truth or a lie?

A. Lie.

Q. Okay. So you understand that when we're in here, we're going to talk about the truth. Do you understand that?

A. (Nods head.)

Q. Is that a yes?

A. Yes

Ms. Hinton: Okay. Judge, at this time, I would move her as qualified to testify.

The Court: Any – any comments on – I think, under Rule 601, she is competent unless otherwise disqualified.

Mr. Warder: No objection.

Petitioner did not object to the judge's finding that the minor was competent to testify. (R. p. 17, line 22). Petitioner's objection was 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 was only proper for a determination of competency, made by the judge, outside the presence of 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.

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 competency hearing and the finding by the judge should have been conducted outside the presence of the jury before the witness testified. 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 improperly vouched for the witness by asking her, "Do you know that while you're here, **we** only talk about things that are the truth?" (R. p. 14, lines 16-17)(emphasis added). The prosecutor improperly vouched for the witness by asking if she knew the difference between the truth and a lie, asked about what happens when you tell a lie and asked if it was good to be honest. The prosecutor improperly vouched for the witness by again asking, "Okay. So you understand that when **we're** in here, **we're** going to talk about the truth. Do you understand that?" (R. p. 17, lines 11-13)(emphasis added).

Based on the questioning by the prosecutor and the ruling by the judge, 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. 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 competency questioning in the present case is similar to the questions phased in the first person and found improper in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851, (2001), rev'd on

other grounds¹, 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

¹ The case was reversed for failure to instruct the jury in a capital case that the defendant would be ineligible for parole if sentenced to life in prison.

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.

In affirming the conviction this Court wrote:

Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) ("The conduct of a criminal trial is left largely to the sound discretion of the trial [court, which] will not be reversed in the absence of a prejudicial abuse of discretion."); id. ("An abuse of discretion occurs when a trial court's decision is unsupported by evidence or controlled by an error of law."); State v. Kelly, 343 S.C. 350, 368-69, 540 S.E.2d 851, 860 (2001) ("Vouching constitutes an assurance by the prosecuting attorney of the credibility of a [g]overnment witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the [g]overnment and may induce the jury to trust the [g]overnment's judgment rather than its own view of the evidence." (omission by court) (quoting United States v. Walker, 155 F.3d 180, 184 (3d Cir. 1998))), rev'd on other grounds, 534 U.S. 246 (2002).

As discussed, the questioning by the prosecutor in regard to competency, in the presence of the jury, constituted the vouching referenced in this Court's opinion above and found improper in Kelly. While the questioning in the present case did not reference a prior conversation with the witness, as the questioning in Kelly did, the questioning referenced that "we" are going to talk about the truth, implying that the prosecutor believed the witness was telling the truth and raising the concerns discussed in Kelly and Walker. The concern was compounded by the judge finding the witness competent, in the presence of the jury, without any special instruction regarding competency to testify as opposed to the determination of credibility. By conducting the competency hearing in the presence of the jury, the jury may have believed

that both the prosecutor and the judge found the witness credible. The jury may have improperly accepted the prosecutor and judge's credibility determination rather than making their own determination as to credibility. The questioning during the competency hearing and finding by the judge, in the presence of the jury, improperly bolstered the credibility of the witness.

In State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), the South Carolina Supreme Court found that the prosecutor's questioning the witness, on re-direct examination, about whether the plea agreement under which the witness was testifying required him to tell the truth did not constitute impermissible bolstering or vouching. The Court wrote:

Most courts generally recognize the prosecution can introduce evidence of a plea agreement during direct examination of a State witness. However, the Fourth Circuit Court of Appeals has found this freedom is not unlimited. United States v. Romer, 148 F.3d 359 (4th Cir.1998) cert. denied, 525 U.S. 1141, 119 S.Ct. 1032, 143 L.Ed.2d 41 (1999). The Fourth Circuit Court of Appeals allows the government to elicit testimony regarding a plea agreement on direct examination only if the prosecutor's questions do not imply the government has special knowledge of the witness' veracity, the trial court gives a cautionary instruction, and the prosecutor's closing argument contains no improper use of the witness' promise of truthful cooperation. Id. at 369.


Shuler, 344 S.C. at 629, 545 S.E.2d at 817-18. (n #2 omitted).

The present case is distinguished from Shuler in four ways. First, the present case does not involve a plea agreement but rather a competency determination that should have been made outside the presence of the jury. Second, the prosecutor's questions implied that she believed the witness. Third, the judge's competency finding, in the presence of the jury, implied that he believed the witness. Fourth, the judge failed to give a cautionary instruction. The questioning during the competency hearing, in the presence of the jury, and finding by the judge, in the presence of the jury, improperly bolstered the credibility of the witness.

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.). Petitioner respectfully seeks rehearing and a finding that the trial judge abused his discretion in conducting the competency hearing in the presence of the jury because the questioning and finding in regard to competency improperly bolstered the credibility of the witness.

Respectfully Submitted,


KATHRINE H. HUDGINS
Appellate Defender

This 27th day of June, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Perry H. Gravelly, Circuit Court Judge

THE STATE,

RESPONDENT,

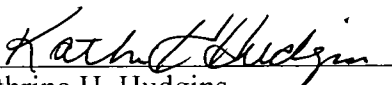
V.

JOSE REYES REYES,

PETITIONER

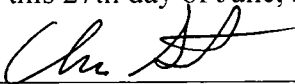
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blicht, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jose Reyes Reyes, ##370793, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 27th day of June, 2019.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of June, 2019.



(L.S)

Notary Public for South Carolina
My Commission Expires: October 26, 2019