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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of General Sessions

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-002544

THE STATE,

Respondent,

v.

JOSE REYES REYES,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not err in conducting Victim's competency determination in the presence of the jury where he was under no obligation to make his determination regarding the competency of Victim *in camera* and the competency hearing did not result in improper bolstering. Further, any error in this case was rendered harmless due to the overwhelming evidence of Appellant's guilt and the trial judge's charge to the jury regarding the credibility of child witnesses.

STATEMENT OF THE CASE

Appellant was indicted during the March 2015 term of the Grand Jury for Pickens County for criminal sexual conduct with a minor in the first degree (2013-GS-39-3217). Appellant proceeded to a trial by jury from December 12-13, 2016, in Pickens, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable Perry H. Gravely to imprisonment for a term of twenty-eight years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On August 29, 2013, Deputy Billy Trotter of the Pickens County Sheriff's Office responded to a call involving an alleged sexual assault. R. Vol. 1. p. 43. Deputy Trotter spoke with Mother and Victim at the residence regarding what happened. R. Vol. 1. p. 44. Victim disclosed she was sexually abused. R. Vol. 1. p. 44.

Victim was nine years old at the time of trial. R. Vol. 1. p. 14. Victim lived with her mother and father but would occasionally stay with a relative, Megan.[1] R. Vol. 1. p. 19. When asked whether anyone ever touched her in a manner she did not like, Victim replied that an individual named "Fernando" had. R. Vol. 1. p. 20. Victim identified Appellant in court as the man she knew as "Fernando." R. Vol. 1. p. 25. Victim testified Appellant abused her every time she stayed at Megan's house. R. Vol. 1. p. 21. Victim stated the abuse occurred when she was six years old. R. Vol. 1. p. 23. Victim stated Appellant touched her "private" every time she went to stay at Megan's house. R. Vol. 1. pp. 20-21. Victim testified Appellant touched her private with both his hand and his penis. R. Vol. 1. pp. 22-23. Appellant would also kiss Victim on the mouth during the instances of abuse. R. Vol. 1. p. 22.

Victim eventually disclosed to her mother (Mother) and aunt that Appellant sexually abused her on a couch at Megan's house. R. Vol. 1. pp. 34-36. Mother and Victim's aunt immediately contacted the police. R. Vol. 1. p. 36, 40. Mother testified that prior to Victim's disclosure of sexual abuse, she was complaining of painful urination. R. Vol. 1. p. 40. When Victim complained of painful urination, Mother took her to the emergency room at Cannon Memorial Hospital. R. Vol. 1. p. 40.

Captain Marvin Nix of the Pickens County Sheriff's Office became involved in Appellant's case. R. Vol. 1. p. 46-47. Captain Nix determined the individual Victim identified as

[1] Megan is a cousin of Victim's mother. R. Vol. 1. p. 38.

"Fernando" was Jose Reyes Reyes (Appellant). R. Vol. 1. p. 48. Captain Nix testified that Victim was six years old at the time of the abuse and Appellant was either 25 or 27. R. Vol. 1. p. 47. Captain Nix determined the time frame of the abuse ranged from January 2013 to June 2013. R. Vol. 1. p. 51.

Mary Fran Crosswell, a child abuse pediatrician with the Greenville Hospital System, met with Victim at the Julie Valentine Center in Greenville. R. Vol. 1. pp. 55-56, 59. As part of her evaluation, in determining whether Victim had any sexually transmitted diseases, Dr. Crosswell reviewed Victim's prior medical records, including a lab report from Cannon Memorial's emergency room. R. Vol. 1. p. 69. The lab report from Cannon Memorial indicated Victim has herpes simplex virus- type 1. R. Vol. 1. pp. 69-70. Victim was diagnosed as having herpes in her genital area. R. Vol. 1. p. 70. Subsequent testing of Appellant's blood showed he was also positive for herpes simplex virus-type 1. R. Vol. 2. p. 95.

ARGUMENT

The trial judge did not err in conducting Victim's competency determination in the presence of the jury where he was under no obligation to make his determination regarding the competency of Victim *in camera* and the competency hearing did not result in improper bolstering. Further, any error in this case was rendered harmless due to the overwhelming evidence of Appellant's guilt and the trial judge's charge to the jury regarding the credibility of child witnesses.

Relevant Facts

Prior to trial, after the solicitor noted the Victim was now nine years old, the trial judge asked, "do we need to go over anything with her before we - - outside the presence of the jury?" R. Vol. 1. p. 5. The solicitor responded she would leave it in the trial judge's discretion whether he wanted her to question the witness in the jury's presence or while the jury was outside of the courtroom. R. Vol. 1. p. 5. The trial judge replied, "Is she avail - - let's - - let me - - I think - - let's do it when the jury's here." R. Vol. 1. p. 5. Defense Counsel asked for clarification regarding whether the trial judge was going to go through the witness qualification in front of the jury and the trial judge replied that his intent was to conduct it in the jury's presence. R. Vol. 1. pp. 5-6. Defense Counsel then objected, stating, "that's just bolstering just like a forensic interview." R. Vol. 1. p. 6. The trial judge found, "Well, I mean, it's a little bit different because it's the difference in the truth and a lie on the stand." R. Vol. 1. p. 6.

At the beginning of the solicitor's direct examination of Victim, the solicitor asked, "Do you know that while you're here, we can only talk about things that are the truth." R. Vol. 1. p. 14. Victim replied, "Yeah." R. Vol. 1. p. 14. Defense Counsel then renewed his objection and the trial judge ruled, "All right. As to the bolstering. Yeah, I think that the person can testify on their own behalf, just not another party." R. Vol. 1. p. 14. The solicitor then asked Victim a series of questions about whether she understood the difference between a truth and a lie. R. Vol. 1. pp.

15-17. The solicitor then moved Victim as competent to testify, R. Vol. 1. p. 17. The trial judge ruled, "I think, under Rule 601, she is competent unless otherwise disqualified." R. Vol. 1. p. 17.

Discussion

Appellant contends the trial judge erred in allowing Victim's competency determination to be made in front of the jury because it resulted in the solicitor improperly bolstering Victim's credibility. Specifically, Appellant avers the solicitor's questions regarding whether Victim understood the difference between a truth and a lie and whether she was going to tell the truth amounted to improper bolstering. To the contrary, the trial judge was under no obligation to make his determination regarding the competency of Victim outside the presence of the jury and the competency hearing did not result in improper bolstering. Victim was incapable of improperly bolstering her own testimony and the solicitor's questioning was not tantamount to a statement on the solicitor's part that she believed Victim was telling the truth. Indeed, when the State is required to question a witness about her ability to tell the difference between a truth or a lie it could just as easily suggest the solicitor does not believe the witness.

Rule 601(a), SCRE, provides the general rule that, "Every person is competent to be a witness except as otherwise provided for by statute or these rules." Rule 601(b), SCRE, states, "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." It is the duty of a trial judge to determine competency of a witness to testify and to make an appropriate examination of the witness upon timely motion of counsel that will reveal to the trial judge's satisfaction the witness's ability to give competent testimony. State v. Pitts, 256 S.C. 420, 182

S.E.2d 738 (1971). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

It is improper for an expert witness to testify as to his opinion about the credibility of a child victim in a sexual abuse matter. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). "Even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." Id. at 358, 737 S.E.2d at 499. See also State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 ("There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful."); State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2005) (finding the expert's recommendation that the defendant not be around Victim for any reason, could only be interpreted as the expert believing Victim's claim that the defendant sexually abused her).

Similarly, it is improper for a solicitor to vouch for a witness's credibility. In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476-77 (2016), the South Carolina Supreme Court explained:

> Generally, "the 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, 656 S.E.2d 766, 768 (2002).

In Appellant's case, the competency hearing did not improperly bolster Vitim's credibility, as neither the trial judge nor the prosecutor indicated they believed Victim at any time. The above-cited cases emphatically establish that an expert witness or solicitor cannot vouch for a witness's credibility because it usurps the jury's role and places the prestige of either the expert witness or the government behind the witness. However, the current situation is distinguishable because no party offered any sort of commentary through which the jury could infer the solicitor or trial judge believed the Victim. Instead, the questions were entirely neutral. The colloquy merely established that the Victim herself was asserting she was telling the truth. A witness being questioned as to whether they are being truthful presents no vouching problem, as no other party is indicating they believe the Victim. It is elementary that a witness, through their testimony, is either expressly or impliedly telling the truth.[2] For a witness to state they are being truthful, then, does not give rise to improper bolstering. See State v. Sanchez-Jacobo, 282 P.3d 880 (Or. Ct. App. 2012) ("A witness's assertion under oath that he or she is being truthful simply is not the type of evidence that a jury might improperly view as a 'guarantee of the witness's veracity.' Stated differently, a witness does not impermissibly 'vouch for' or bolster his or her own testimony by proclaiming truthfulness.") (internal citations omitted).

Appellant's comparisons of the case to State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) rev'd on other grounds, 534 U.S. 246 (2002), are inapposite. In Kelly, the solicitor asked the victim various questions based on apparent prior conversations he had with the witness. Id. at 368, 540 S.E.2d at 860. Specifically, the solicitor asked the victim, "What did I tell you that I

[2] While some witnesses will expressly state they are being truthful, it is implicit in the testimony of all witnesses that they are telling the truth where all witnesses swear an oath to be truthful before taking the stand. Here, the record indicates each witness swore an oath when taking the stand.

absolutely required regarding your testimony to this jury today?" Id. The solicitor then asked, "Did I tell you to tell the truth to this jury?" The victim replied, "of course." Id. The South Carolina Supreme Court found the solicitor's questions improperly bolstered the victim's testimony, as the jury could have perceived the solicitor held the opinion the victim was telling the truth. Id. at 360, 540 S.E.2d at 860-61. The present case is immediately distinguishable from Kelly, as the solicitor made no references to prior conversations with Victim. The harmful aspect of the questioning in Kelly was that the solicitor referenced prior conversations with Victim where the solicitor could have made a threshold determination the Victim was credible. There was no such testimony in this case. The solicitor asked basic questions about the Victim's ability to tell the difference between a truth and a lie in order to determine if she was competent to testify. While the trial judge certainly **could have** conducted the competency hearing outside the presence of the jury, he was under no obligation to do so, as Victim could not improperly bolster her own testimony. Further, the conduct of a trial is within the discretion of the trial judge and if the trial judge decided it was expeditious or proper to conduct the competency inquiry in front of the jury rather than *in camera*, he certainly had the discretion to do so. The judge's finding that Victim was competent was in no way tantamount to a credibility finding, and the jury could not have recognized it as such.[3]

Finally, any alleged error in this case is harmless due to overwhelming evidence of Appellant's guilt. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v.

[3] Critically, Defense Counsel objected only to Victim's testimony as improper bolstering. Defense Counsel did not allege the trial judge's competency determination in itself improperly bolstered Victim's testimony.

Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (citations and internal quotations are omitted). Victim's testimony about the abuse she suffered at the hands of Appellant was directly corroborated by the laboratory test confirming she had herpes simplex virus-type 1 in her genital area, a disease Appellant also has. The State's theory of the case was the only logical chain of events and Appellant was unable to offer any alternative explanation for how a six-year-old child in his care and custody became afflicted with herpes.

Furthermore, any error was further rendered harmless by the trial judge's admonition concerning the elevated scrutiny with which a jury must analyze the credibility of children. In the trial judge's charge to the jury, he instructed them:

> Now this case we've had testimony, uh, of a child, uh, during the, you've heard the testimony from, well from a child and where witness is a child you must determine as with any other witnesses whether that testimony is believable. In deciding believability you may consider not only matters that I have already discussed with you but you may also consider the age of the child, the child's ability to observe and remember facts and the child's ability understand and answer questions because young children may not fully understand what is happening here, it's up to you to decide whether the child or children understood the seriousness of appearing as a witness at this criminal trial, whether the child, or, uh, understood the questions, whether the child has a good memory and whether child understands the difference between lying and telling the truth; in addition, young children may be influenced by the way questions are asked, is up to you as the jury to decide whether child understood the questions asked.

Tr. Vol. 2. p. 89-90. This charge suggests juvenile witnesses are less likely to remember things accurately, to know the difference between a truth and a lie, and to appreciate the seriousness of the proceedings. The charge also indicates children are more easily led by counsel.[4] Any

[4] Like the no-corroboration charge, this charge similarly constitutes a comment on the facts and unnecessarily highlights concerns which could potentially plague any witness regardless of her age. When considering the erroneous charge in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), the Supreme Court noted that "[b]y addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Stukes, 416 S.C. at 499, 787 S.E.2d at 483. Similarly, the lengthier charge addressed solely to child witnesses specifically undermines their testimony by instead instructing the jury that whenever a child speaks, her words are inherently suspect. Accordingly, it is

incidental bolstering of Victim's testimony during the competency hearing was eliminated when the trial judge essentially charged the jury that Victim was less credible than other witnesses and they should exercise scrutiny in assessing her testimony. The boon received by the improper instruction on children eliminated any prejudice emanating from the on-the-record competency determination and rendered the error harmless. Appellant's conviction and sentence should be affirmed.

unconstitutional and should likewise be prohibited. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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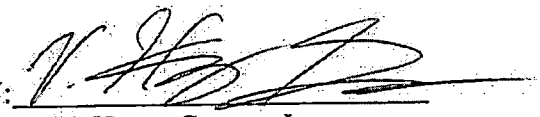
BY: 
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April 5, 2018

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The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-002544

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CERTIFICATE OF COUNSEL

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

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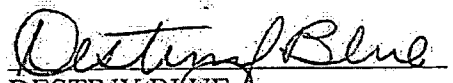
PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Katherine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 5th day of April, 2018.



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