STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSE REYES REYES,

PETITIONER

APPELLATE CASE NO 2019-001593

OPINION NO. 2019-UP-214 (S.C. Ct. App. Filed June 12, 2019)

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in refusing to find prejudicial error from the trial judge holding a competency hearing for a minor witness in the presence of the jury when the questioning and finding from the hearing improperly vouched for and improperly bolstered the minor's testimony?

STATEMENT

In March of 2015, the Pickens County Grand Jury indicted Petitioner, Jose Reyes Reyes, for criminal sexual conduct with a minor first degree, indictment #2013-GS-39-3217[1]. On December 12, 2016, Petitioner proceeded to jury trial before the Honorable Perry H. Gravely. Richard Warder represented Petitioner at trial. Brandi Hinton prosecuted the case. The jury returned a verdict of guilty. Judge Gravely sentenced Petitioner to twenty-eight (28) years in prison. A timely notice of intent to appeal was served on December 20, 2016, and the direct appeal perfected. In an unpublished opinion filed June 12, 2019, the South Carolina Court of Appeals affirmed the sentence and conviction. A timely petition for rehearing was filed and then denied on August 22, 2019. A petition for writ of certiorari was filed on September 20, 2019. A return was filed on September 27, 2019. This Court granted the petition for writ of certiorari on February 12, 2020. This brief of petitioner follows.

[1] It is unclear why the indictment number is 2013 when the grand jury true billed the indictment in 2015.

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct.App.2002)." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)

ARGUMENT

The Court of Appeals erred in refusing to find prejudicial error resulting from the trial judge holding a competency hearing for a minor witness in the presence of the jury when the questioning and finding from the hearing improperly vouched for and improperly bolstered the minor's testimony.

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.

(R. p. 15, line 1 – p. 16, p.17, lines 1-22).

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 prosecutor's questioning improperly vouched for the credibility of the minor witness. The questioning and finding in the presence of the jury improperly bolstered the credibility of the minor witness. The trial judge erred in conducting the competency hearing in the presence of the jury. The error requires reversal of the conviction and sentence.

Rule 104, SCRE, is titled "Preliminary Questions" and section (a) provides, "**Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by

the rules of evidence except those with respect to privileges." Rule 104(c) provides, "**Hearing of Jury.** Hearings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests." The trial judge must determine if a witness is competent to testify and the interests of justice require that this determination be made outside the presence of the jury.

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 improperly conveyed to the jury that both the prosecutor and the judge found the minor witness's testimony credible. Conducting the competency hearing of the minor witness in the presence of the jury resulted in improper vouching for the credibility of the minor's testimony and improper bolstering of that testimony.

In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476–77 (2016), the South Carolina Supreme Court discussed improper vouching by a solicitor and 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).

In Tappeiner this Court found that the solicitor improperly vouched for the credibility of the minor witness when, in closing argument, she asserted that the other State's witnesses believed the minor witness. In the present case the solicitor's questioning during the competency hearing, that should have been held outside the presence of the jury, implied to the jury that the solicitor believed the minor witness. The competency hearing questioning in the presence of the jury resulted in the solicitor improperly vouching for 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 grounds[2], 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.

---

2 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.

> 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).

As in Kelly, the questioning by the prosecutor in the present case raises the second concern outlined by the Court in United States v. Walker, 155 F.3d 180 (3d Cir. 1998): the jury could have perceived that the prosecutor held the opinion that the minor witness was, in fact, telling the truth. While the questioning in the present case did not reference a prior conversation with the witness, as the questioning in Kelly did, the questioning included, "Do you know that while you're here, we only talk about things that are the truth?" (R. p. 14, lines 16-17). The questioning also included, "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). The language that "we" are going to talk about the truth and the agreement to tell the truth improperly implies to the jury that the prosecutor believed the witness was telling the truth. As a result, the minor witness's testimony carried with it the imprimatur of the government. As the Court in Kelly noted,

"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." 343 S.C. at 369, 540 S.E.2d at 860–61. If not technically vouching, as stated in Kelly, the questioning followed by the Judge's finding improperly bolstered the testimony of the minor. The improper vouching or bolstering may have induced the jury to trust the prosecutor's judgment and the judge's judgment about the minor witness's credibility. The questioning and finding in the presence of the jury was improper.

There are numerous opinions by this Court addressing the issue of improper bolstering with regard to testimony by forensic interviewers. In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), this Court specifically stated that a forensic interviewer should avoid stating, among other things, that the minor witness was told to be truthful. In State v. Anderson, 413 S.C. 212, 221, 776 S.E.2d 76, 80 (2015), this Court wrote:

> There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted. This type of testimony, which establishes the " particularized guarantees of trustworthiness," necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the defendant's arrest, these charges, and this trial, thus impermissibly bolstering the minor's credibility.

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. The questioning by the prosecutor during the competency hearing in the presence of the jury is analogous to the

improper bolstering discussed in Kromah and Anderson. The prosecutor asked the minor witness, in the presence of the jury, if she knew the difference between the truth and a lie. The prosecutor asked the witness, "Do you know that while you're here, we only talk about things that are the truth?" (R. p. 14, lines 16-17). The prosecutor also asked the witness, "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). The minor witness agreed, in the presence of the jury, to tell the truth. This fact distinguishes the present case from State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), where the interviewer did not testify that the minor agreed to tell the truth. The improper bolstering continued when the judge, in the presence of the jury, found the minor witness competent.

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, about the difference between the truth and a lie and the agreement to tell the truth combined with the judge's finding that the minor witness was competent to testify, also in front of the jury, improperly bolstered the testimony of the minor 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 by the prosecutor during the competency hearing, in the presence of the jury, improperly vouched for the credibility of the minor 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.).

In affirming the conviction the Court of Appeals 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).

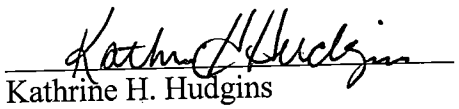
The Court of Appeals erred. The trial judge abused his discretion in failing to determine competency of the minor witness outside the presence of the jury. Conducting the competency hearing in the presence of the jury constitutes an error of law. While Rule 401(c), SCRE, requiring hearings outside the presence of the jury, does not specifically include competency hearings the way the rule includes hearings on the admissibility of statements by the accused and identification of the accused, the rule still requires that the competency hearing be held outside the presence of the jury. The interests of justice provision of the statute requires that competency hearings be held outside the presence of the jury in order to prevent improper vouching and bolstering. The prosecutor's questioning of the minor witness, in the presence of the jury, with regard to competency, a determination to be made by the judge, resulted in improper vouching. 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). The prosecutor then 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." (R. p. 17, lines 19-21). The improper vouching was not harmless.

The trial judge erred by conducting the competency hearing in the presence of the jury. The questioning and finding in regard to competency resulted in improper vouching and improper bolstering. The error was not harmless and requires reversal.

CONCLUSION

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



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSE REYES REYES,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Jose Reyes Reyes, ##370793, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 12th day of March, 2020.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029