

IN THE COURT OF APPEALS OF IOWA

No. 3-890 / 12-1633
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW EUGENE BROWN,
Plaintiff-Appellant.

Appeal from the Iowa District Court for Cedar County, Mark D. Cleve,
Judge.

Matthew Eugene Brown appeals from his conviction of second-degree
sexual abuse. **REVERSED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, and Jeff L. Renander, County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Matthew Eugene Brown appeals from his conviction of second-degree sexual abuse. Because we conclude Dr. Barbara Harre's report improperly vouched for the credibility of the complaining witness, we reverse and remand for a new trial.

I. Background Facts and Proceedings.

A.T. is the daughter of Jayme and Allen. A.T. has a brother, an older sister, and an older step-sister, Tabitha. Defendant Matthew Brown is Tabitha's fiancé. During the summer of 2011, A.T. was seven years old.

On the morning of August 26, 2011, A.T.'s older sister was with A.T. and Jayme when A.T. told them that Brown had rubbed her vaginal area with his fingers, saying it hurt. A.T. said it had happened twice at Tabitha's house—one time in the living room and one time in Brown and Tabitha's daughter's room. In the kitchen that evening, A.T. whispered to Jayme that "he also made me touch him." Jayme was not talking about Brown or anything sexual either time A.T. made statements about Brown. Jayme and Allen contacted the department of human services for advice.

Michele Mattox interviewed A.T. at the Child Protection Response Center three days after A.T. told her mother and sister about the touching. Although A.T. initially denied that anyone had touched her "potty spot," Mattox noticed A.T. shake her head yes and motion to her crotch while appearing to hold her breath. After Mattox assured A.T. of her safety, A.T. paused and then said, "Tabitha's boyfriend was rubbing me right here," putting her hand on her crotch area. She

said it happened at Tabitha's house and that "Matt" rubbed her "potty spot"; it was in the morning while she was sleeping on the living room floor near her brother. A.T. first said her underwear was pulled down when Brown touched her, but later said his hand was underneath her clothes. A.T. said Brown was wearing underwear, and denied that she had touched or seen his penis or been asked to touch it.

Cedar County Deputy Tom McGuinty observed Mattox's interview of A.T. and interviewed Brown the same day. Brown explained that he lies down with his daughter in an effort to get her to calm down and go to sleep; when she gets to sleep he goes back to bed. Brown admitted he wore boxer shorts to bed. He denied he touched A.T. Brown said "[h]e had no idea why she would [say] this" happened.

Dr. Barbara Harre (a pediatrician specializing in child abuse) was "asked to complete a medical assessment for [A.T.]." On September 20, 2011, Dr. Harre interviewed and examined A.T. During the examination, Dr. Harre asked A.T. "if anybody had ever touched her in her genital area in a way that hurt her or made her feel funny or that she didn't like." A.T. responded, "Matt." Other questions led to A.T. responding with "[h]is hand," "[u]nder clothes," and it happened "[a]t Tabitha's house" "[i]n the living room and in my niece's room." A.T. told Dr. Harre that Brown put his hand under her clothing and touched her "front bottom area,"¹ pointing to her genitalia area.

¹ At trial, Dr. Harre explained that A.T. touched her genital area.

Dr. Harre wrote a lengthy consultation report addressed to “Investigator Tom McGuinty” in which she outlines the presenting concerns; A.T.’s mother’s concerns; A.T.’s medical history and concerns; the numerous statements made by A.T. during the examination; observations from the examination; and an “assessment,” which included a summary of the examination and this paragraph:

[A.T.’s] history is detailed and clear. She has been consistent in what she has reported to her mother and to this examiner. She was clear about where the touching occurred and confidently demonstrated that. This examiner agrees that the disclosure is significant and that an investigation is clearly warranted.

Dr. Harre also noted “additional concerns” of intermittent abdominal pain and family disruption.

Brown was charged with second-degree sexual abuse. Brown filed numerous motions in limine seeking to exclude A.T.’s statements to others. Brown’s second motion in limine sought to exclude A.T.’s statements to Dr. Harre on hearsay grounds. His fifth motion in limine sought to exclude A.T.’s statements to Dr. Harre on grounds such statements would violate his confrontation rights. At the motion hearing, the court ruled that if Dr. Harre testified after A.T., there would be no confrontation problem.

During trial, Brown sought exclusion or redaction of three portions of Dr. Harre’s report, including the paragraph above, which he argued was an implied opinion on A.T.’s credibility. While the district court granted Brown’s objections as to “any opinions by Dr. Harre that the victim is credible or that she is to be believed or that the doctor has an opinion that she has been sexually abused,” the court denied the request to strike out the paragraph noted above from the

report. The court overruled Brown's subsequent objections to the paragraph in Dr. Harre's report.

At trial, A.T. recalled visiting her three-year-old niece at Tabitha's house the prior summer and swinging and playing Barbies. A.T. testified that night Brown rubbed her "private" or "potty spot" with his hand when she was on the living room floor along with her brother, her niece, and Brown. She thought it happened in the morning and that Tabitha was awake and on the computer. Her brother and niece were asleep. A.T. testified she was lying near the T.V., Brown was behind her, and then her brother and niece were behind him. Afterwards she remembers getting up and having breakfast.

On cross-examination A.T. denied that she had seen or touched Brown's privates or that he had asked her to touch him, and A.T. did not remember saying that he had. A.T. also denied that the touching hurt, and said she did not remember Brown touching her another time, or remember saying it had happened two times. Nor did she remember telling her mother that Brown was asleep at the time.

Jayne recalled that A.T. and her brother had spent two nights at Tabitha's house that summer, and A.T. had spent the night there one other time. Brown, Tabitha, and their child had spent a number of nights at A.T.'s house where Brown had also slept in the living room, some nights on the floor with the kids. A.T.'s father, Allen, recalled seeing Brown sleep on the floor with the kids while Tabitha slept on the couch.

Karla Miller, director and trauma therapist at the rape victim advocacy program, generally testified that sexual abuse victims typically delay reporting the abuse. Reasons given for the delay include the fear that no one will believe them, fear of harm from the abuser, worry about getting in trouble, an attempt to forget, or being too young to understand what had happened or how to talk about it.

Brown again asked the court not to allow Dr. Harre to opine as to A.T.'s credibility and sought to redact three portions of Dr. Harre's report, including the paragraph quoted above, which he argued was an implied opinion on A.T.'s credibility. While the district court granted Brown's objections as to "any opinions by Dr. Harre that the victim is credible or that she is to be believed or that the doctor has an opinion that she has been sexually abused," the court denied the request to strike the paragraph from the report. The court overruled Brown's subsequent objections to the paragraph in Dr. Harre's report, which Dr. Harre read out loud during her testimony.

Tabitha testified on Brown's behalf, explaining that Brown is her fiancé; they had been together six years; and they shared a daughter, now four years old. Tabitha said she had a close relationship with A.T. prior to the allegation against Brown. She recalled the day A.T. and her brother spent the night was the day they had gone fishing and got home late. The children got ready to sleep in the living room, putting on t-shirts and underwear, and each had a pillow and blanket. Brown lay down with his daughter because she has trouble falling asleep. Brown wore boxer shorts as pajamas and also had a blanket. Tabitha

went to the bedroom and played on her “iPad,” leaving the door open. Tabitha said she checked on the group after 11:00 p.m. and saw A.T. and her brother sleeping, but Brown and their daughter still awake. The next time she checked everyone was asleep, including Brown, who was snoring. The next morning Tabitha recalled A.T. and her daughter woke her up; Brown was sleeping next to her. Tabitha then woke up Brown and he left for work a short time later. Tabitha described A.T. as “chipper” that morning and excited to go on an outing. A couple weeks later A.T. asked to spend the night at their house and did not act any differently around Brown.

On cross-examination Tabitha admitted she could not see the living room from their bedroom. She noted Brown slept against the wall and had to crawl over her to get in or out of bed.

Brown testified that he had a good relationship with A.T. and had spent time with her watching fireworks, swimming, camping, and fishing. Brown testified that A.T. and her brother went fishing with them and spent a night. Brown recalled a few weeks later A.T. came over to play with his daughter and spent the night in the girl’s room. He stated A.T. acted normal and did not appear uncomfortable around him. Brown denied any sexual contact with A.T.

In closing arguments, the prosecutor noted that the case “comes down to” whether the jury believed A.T. “So why should you believe the victim”? The prosecutor argued the child had no incentive to lie and that her testimony was “verified” by the interview with Mattox. He then stated,

Her testimony is reinforced by the reports from Dr. Harre. Dr. Harre testified this morning. She is a board-certified physician

in pediatrics. She specializes in child abuse sex cases and her testimony was that [A.T.] told her that Matt touched her in a way that she didn't like, that Matt touched her with his hand, that it was under her clothes. She said the same thing to Michele Mattox, she said under her clothes. She was wearing underpants at the time that it happened at the defendant's house, it happened in the living room, it happened on the floor, it happened when all the kids were on the floor [with] Matt. And then she told her mom she wanted it to stop and she was glad she told her mom and she really did like Matt. She just didn't like Matt when he was doing this.

Now, there is an assessment that's been introduced into evidence—you will have a copy to look at back in the jury room—but the doctor wrote a full assessment here and I want to just read one part of that assessment. You can read the whole assessment. Dr. Harre, a board-certified physician in child sex abuse wrote in her assessment, “[A.T.’s] history is detailed and clear. She has been consistent in what she has reported to her mother and to this examiner, Dr. Harre. She was clear about where the touching occurred and she confidently demonstrated this. This examiner, Dr. Harre, agrees that the disclosure is significant and that an investigation is clearly warranted.”

Subsequently, defense counsel objected (“Golden Rule”) to this portion of the prosecutor’s rebuttal argument:

I am going to ask you for one minute and ask you to look at the case through a 7-year old child If you can't look at it through the eyes of [A.T.], I would ask that you look at it through the eyes of when you were 7. Go back to when you were 7-years-old and something like this happened to you and then—

The court stated, “Counsel, it is a Golden Rule issue. Rephrase.” The prosecutor continued without further motion by defense counsel.

Brown was convicted of second-degree sexual abuse. He made a motion for new trial, contending, in part, the court erred in admitting the paragraph in Dr. Harre’s report that impliedly vouched for A.T.’s credibility, which Dr. Harre read to the jury, and the prosecutor re-read during closing argument. The court denied the motion for new trial, stating “the Court does not believe that the paragraph of

Dr. Harre's report was in any way a violation of *State v. Myers* . . . in terms of any prohibition on an expert testifying to the truthfulness or credibility of any individuals, specifically the victim in this case."

Brown now appeals, contending the trial court improperly allowed expert testimony expressing an opinion on the credibility of a witness, the verdict was against the weight of the evidence, and the prosecutor's "golden rule" argument constituted prosecutorial misconduct, for which defense counsel was ineffective in not moving for a mistrial. We address only the first issue, finding it dispositive.

II. Scope and Standard of Review.

We review evidentiary rulings for an abuse of discretion. See *State v. Richards*, 809 N.W.2d 80, 89 (Iowa 2012). "When a trial court has exercised its discretion to admit expert testimony, we will reverse only if we find an abuse of that discretion and prejudice." *State v. Myers*, 382 N.W.2d 91, 93 (Iowa 1986). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Richards*, 809 N.W.2d at 89 (citation omitted).

III. Discussion.

Iowa Rule of Evidence 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

We take a liberal approach to the admissibility of expert testimony, giving considerable deference to the trial court's

exercise of its discretion. *Mensink v. Am. Grain*, 564 N.W.2d 376, 380 (Iowa 1997). Expert testimony directly expressing an opinion on the credibility of a witness is not admissible. *State v. Pansegrau*, 524 N.W.2d 207, 210 (Iowa Ct. App. 1994). However, expert witnesses may express opinions on matters explaining the pertinent mental and physical symptoms of the victims of abuse. *Id.* “There is a fine but essential line between testimony that is helpful to the jury and an opinion that merely conveys a conclusion concerning the defendant’s guilt.” *Id.* at 210–11.

State v. Allen, 565 N.W.2d 333, 338 (Iowa 1997).

We conclude the “fine line” was crossed here. In *Myers*, 382 N.W.2d at 97, the court observed “it seems experts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children,” but such experts will not be allowed to opine on matters “that either directly or indirectly renders an opinion on the credibility or truthfulness of a witness.” *Cf. State v. Chancy*, 391 N.W.2d 231, 234 (Iowa 1986) (explaining that *Myers* “involved a direct comment by an expert on the credibility of a witness, a matter generally reserved for the trier of fact”); see also *State v. Barrett*, 445 N.W.2d 749, 752 (Iowa 1989) (also explaining “*Myers* involved expert opinion testimony on the credibility of a complaining witness who was a child and allegedly the victim of sexual abuse”).

All agree A.T.’s credibility was the central issue. The “assessment” in Dr. Harre’s report that A.T. has been “consistent,” “clear about where the touching occurred,” and “[t]his examiner agrees that the disclosure is significant and an investigation clearly warranted” was, in effect, an expert opining that A.T. was to be believed. The prosecutor emphasized that assessment in closing.

In *Myers*, the court held that expert opinions as to the truthfulness of a witness are not admissible under what has been renumbered as Iowa Rule of Evidence 5.702. 382 N.W.2d at 97. “These inadmissible opinions go a step beyond merely aiding the fact finder in understanding the evidence and actually invade the exclusive domain of the jury, that is, the determination of the guilt or innocence of the accused.” *Id.* at 95. Credibility is reserved for the trier of fact and we conclude the court erred in admitting Dr. Harre’s report, which invaded the province of the jury. *Cf. State v. Hulbert*, 481 N.W.2d 329, 332-33 (Iowa 1992) (upholding a trial court’s exclusion of “professional” character evidence that “comes cloaked with an aura of scientific reliability about the predisposition of certain individuals”).

We reverse and remand for a new trial.

REVERSED AND REMANDED.

Tabor, J. concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent. Dr. Harre was asked to do a medical assessment on the child, which she followed with a detailed eight-page report. Toward the end of the report, she wrote an “assessment” that summarized her findings. Dr. Harre found the child to be “consistent” in her reporting, which is an accurate reflection of what the child repeatedly revealed to her during the evaluation. I do not find the additional phrase “that an investigation is clearly warranted” to be equivalent to stating “the child is telling the truth,” or an implied opinion regarding A.T.’s credibility. Rather, it is a recommendation for a follow-up to what the doctor had observed in her evaluation. Dr. Harre also encouraged the mother and father to seek additional support and counseling as needed for themselves and for the child, which supports the conclusion this phrase is meant as a request for further action, rather than an opinion that either the abuse occurred or that A.T. was telling the truth. For the district court to deny striking the report and testimony of Dr. Harre as to these recommendations was not an abuse of discretion, nor did it cross the “fine line” of commenting on a witness’s credibility. See *Myers*, 382 N.W.2d at 97–98 (the expert’s *express opinion* the victim did not fantasize the rape was a comment on the witness’s credibility, and thus “crossed that fine but essential line between an opinion . . . and . . . a conclusion concerning defendant’s legal guilt.”) (internal citations omitted); see also *Chancy*, 391 N.W.2d at 234 (stating *Myers* “involved a direct comment by an expert on the credibility of a witness, a matter generally reserved for the trier of fact”). For this reason, I would affirm the defendant’s conviction.