STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FABIAN CALDERON RUIZ,

Defendant-Appellant.

UNPUBLISHED
December 21, 2021

No. 352431
Kent Circuit Court
LC No. 19-002550-FC

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b) (sexual penetration of a person less than 13 years of age by a person 17 years of age or older), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b) (sexual contact of a person less than 13 years of age by a person 17 years of age or older). The trial court sentenced defendant to concurrent sentences of 25 to 55 years' imprisonment and 8 to 15 years' imprisonment, respectively. We affirm.

I. BACKGROUND

This case arises out of the discovery that defendant sexually assaulted the victim, his minor daughter, over the course of several years. On one occasion, defendant was sitting on a couch in their house with the victim on a night when the victim's mother was not home. The victim testified that defendant touched her vagina and butt over her clothes, and then he took off her pants and put his finger or penis inside of her vagina or rectum. The victim disclosed the sexual abuse to her aunt, who then told the victim's mother. The victim's mother made an appointment for the victim at a health clinic where she was examined by pediatrician Dr. Susan O'Rourke. Defendant also went to the appointment but was asked to stay in the waiting room.

Dr. O'Rourke was not explicitly qualified as an expert, but her credentials were unquestioned, and on appeal defendant apparently refers to her as one of "two experts" who testified in this matter. Dr. O'Rourke examined the victim and found no evidence of trauma. On cross-examination, defendant asked her about a report she made to the police, to which she responded that she "did call the police to the office because of the unusual situation that the alleged

perpetrator was in our office." Defendant immediately followed up by eliciting testimony that Dr. O'Rourke was a mandatory reporter who had been required by law to make that report, and in fact would have committed a crime by failing to do so. On redirect examination, the prosecutor reconfirmed that Dr. O'Rourke had been "required to call." The trial court asked Dr. O'Rourke several questions submitted by the jury, and the following exchange occurred:

> *The Court*: *Did you tell her mother first that you were going to call the police?* I think you mentioned CPS [child protective services]. *What was the mother's reaction? Did you tell her you were going to call some authority?*
>
> [*Dr. O'Rourke*]: So I told the mom I was concerned something had happened to her, that she had been abused. And that would require—
>
> *Mr. Greene* [defense counsel]: (Interposing) I'm going to object. May we approach?
>
> *The Court*: Sure.
>
> (Bench conference)
>
> *The Court*: All right. I'm going to re-ask the question. I apologize. Did you tell the mother first that you were going to call the police or/and authority? What was the mothers [sic] reaction? If you could limit your answer to just how the mother reacted. I mean, did you tell her; yes or no? Then tell me how the mother reacted.
>
> [*Dr. O'Rourke*]: So we told mom that we needed to get other people involved, that CPS would need to be involved because of the nature of the allegations and that I would expect that she would also need to have --
>
> *The Court*: (Interposing) How is the mother reacting? That's all I want to know. Did you tell her you were going to report to the authorities, and how did she react?
>
> [*Dr. O'Rourke*]: She was agreeable to having other people involved to investigating [sic] further.
>
> *The Court*: Very good. Thank you.

After Dr. O'Rourke had finished testifying, and outside of the presence of the jury, defendant moved for a mistrial and argued that Dr. O'Rourke's testimony, that she was concerned that the victim had been abused, was improper vouching. The trial court denied defendant's request for a mistrial, but it agreed to give a curative instruction to the jury.

The prosecution also called Thomas Cottrell as an expert witness. Cottrell was qualified, without objection, as an expert in child sexual abuse dynamics and offender dynamics. Cottrell explained that he knew nothing about any of the details of this particular case beyond the victim's age and gender. Among other matters, he explained that a child victim would regard it as "a very,

very powerful motivator" to keep abuse a secret if told that disclosure would upset the victim's mother. Cottrell also explained that it was not uncommon for a child victim to disclose different details to different individuals, and that in fact it would be "a red flag" for such a victim "to say the exact same thing every time a different person asks her different questions about what happened to her." On cross-examination, he clarified that "if it were word-for-word identical," he would "be concerned about coaching." Defense counsel specifically asked Cottrell if he was "basically talking about statistics here," to which Cottrell responded that he hoped he had not offered any statistics and emphasized that he was primarily sharing generalities. Despite vigorous cross-examination regarding statistics, Cottrell maintained that he was not trying to persuade the jury to apply any statistics. Cottrell emphasized that in fact not everything he said would likely be relevant. During defense counsel's re-cross examination, following redirect examination largely concerning Cottrell's credentials, the following exchange occurred:

> *Q*. First of all, the forensic exam is designed to do just that, give them an environment where they can disclose?
>
> *A*. The best we can, yes.
>
> *Q*. We're talking about disclosure. Have you ever dealt with any false disclosures?
>
> *A*. Yes.
>
> *Q*. So it happens?
>
> *A*. It happens rarely, but it does happen.
>
> *Q*. It does happen?
>
> *A*. Yes.

After Cottrell finished testifying, defendant moved for a mistrial on the ground that Cottrell had vouched for the credibility of the victim during re-cross examination. The trial court denied the motion.

During closing argument, the prosecutor reminded the jury about Cottrell's belief that it "would be a red flag" if the victim had provided identical statements to every person and that a child victim might hold back from disclosure as a consequence of being yelled at. The prosecutor briefly referenced the fact that the victim told Dr. O'Rourke "what her dad did." Defense counsel's closing argument emphasized that numerous items of testimony did not make sense, and defendant urged the jury to conclude that the victim had been manipulated by other family members into lying. Defendant pointed out that Dr. O'Rourke had "examined [the victim] head to foot" and found no injuries or other evidence of abuse. Defendant emphasized that Cottrell had conceded that children do make false reports. Defendant further argued that the "red flag" of which Cottrell had warned was present here, because the victim "repeats herself continually." On rebuttal, the prosecutor largely disputed defendant's claim that Cottrell's "red flag" was present. At no point was any reference made to whether children "rarely" lie.

The trial court instructed the jury, in relevant part, as follows:

> You have heard testimony from an expert witness, Thomas Cottrell, who give [sic] you his opinions as an expert in the field of child sexual abuse dynamics and offender dynamics. Experts are allowed to give an opinion in court about matters they are experts on. However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is.
>
> When you decide whether you believe an expert's opinion, think carefully about the reasons and facts they gave for the opinion and whether those facts are true. You should also think about the expert's qualifications and whether the opinion makes sense when you think about the other evidence in the case.
>
> The witness, Susan O'Rourke, testified, among other things, that she was concerned that [the victim] had been abused. She called Child Protective Services. Susan O'Rourke, by Michigan law, is a mandatory reporter. You may accept this portion of her testimony only for the limited purpose that she was informed of a situation for which she was required to report. You may not consider her testimony as vouching for the credibility of [the victim].

The jury found defendant guilty as described earlier, and this appeal followed. Defendant argues that portions of the testimony from Dr. O'Rourke and Cottrell constituted impermissible vouching for the victim's credibility, contrary to *People v Thorpe*, 504 Mich 230; 934 NW2d 693 (2019), and *People v Del Cid (On Remand)*, 331 Mich App 532; 953 NW2d 440 (2020).

II. STANDARD OF REVIEW

"We review preserved claims of evidentiary error for an abuse of discretion." *People v Bergman*, 312 Mich App 471, 482; 879 NW2d 278 (2015). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Alleged evidentiary error must be considered "in the context of the untainted evidence," and "a preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotation marks and citation omitted).

III. PRINCIPLES OF LAW

An expert witness[1] may provide opinion testimony encompassing the ultimate issue in a case. *Thorpe*, 504 Mich at 255. In sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537

[1] As noted, Cottrell was qualified as an expert without objection, and defendant on appeal apparently regards Dr. O'Rourke as an "expert," presumably as a pediatrician.

NW2d 857 (1995). Nevertheless, "[a]n expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." *Id*. at 373 (emphasis omitted). Furthermore, a treating physician may give opinions based on physical findings and a victim's self-reported history in combination, but not based on the victim's statements alone. *Thorpe*, 504 Mich at 255. A statistical assessment to the effect that children almost never lie about abuse is tantamount to impermissibly vouching for the victim. *Id*. at 259-260. A treating physician drawing a conclusion that a child victim had even possibly been sexually abused, when based solely on statements from the victim, likewise constitutes impermissible vouching. *Del Cid*, 331 Mich App at 542-543, 547-548.

IV. ALLEGED VOUCHING BY COTTRELL

Defendant argues that Cottrell's testimony is similar to the testimony that was ruled impermissible in *Thorpe*; in that case, Cottrell, who was also the expert witness in *Thorpe*, testified that "only 2% to 4% of children lie about sexual abuse." *Thorpe*, 504 Mich at 259. Our Supreme Court reasoned that Cottrell's testimony in *Thorpe* was impermissible because, "although he did not actually say it, one might reasonably conclude on the basis of Cottrell's testimony that there was a 0% chance [the child] had lied about sexual abuse," and it was "for all intents and purposes vouch[ing] for [the child]'s credibility." *Id*.

If any error occurred in this matter, it was at least partially invited by defendant bringing up the matter of false disclosures on cross examination. See *People v McPherson*, 263 Mich App 124, 138-139; 687 NW2d 370 (2004). Our Supreme Court has held that a defendant cannot be entirely faulted for "opening the door" where a witness's answer is unpredictable and totally unresponsive to the question. *Thorpe*, 504 Mich at 253-254. Nevertheless, during his cross examination of Cottrell, defendant was seemingly aware of *Thorpe*, given defendant's repeated interrogation about statistics. It is difficult not to draw the conclusion that defendant was specifically trying to bait Cottrell into providing the kind of statistical statement condemned by our Supreme Court in *Thorpe*. Appropriately, Cottrell did not take that bait.

In *Thorpe*, Cottrell testified that children lie about sexual abuse only 2% to 4% of the time, and he identified only two scenarios under which such lies might occur, neither of which was relevant to the case at hand. *Thorpe*, 504 Mich at 259. Our Supreme Court held that the clear import of Cottrell's testimony was that there was "a 0% chance" that the victim in that case had lied. *Id*. In this matter, however, Cottrell initially stated unequivocally that he had actually dealt with false disclosures, qualified that they occurred "rarely," and then reaffirmed that false disclosures do occur. Importantly, Cottrell also provided an example of a "red flag" that could signify a false disclosure, and defendant directly applied that "red flag" to the evidence introduced in this matter. The differences between Cottrell's statements in *Thorpe* and in this case are significant and should not be overlooked. In *Thorpe*, Cottrell provided a specific and exceedingly low percentage, along with two inapplicable examples that implicitly reduced that percentage to zero. In contrast, the word "rarely" is far less precise, and it was provided along with express affirmations that children do indeed lie. Furthermore, in stark contrast to *Thorpe*, Cottrell provided a concrete indicator of false disclosure that *was* relevant to this case, despite the fact that the jury clearly did not ultimately agree. Thus, even beyond Cottrell's repeated explanations that he knew

none of the details about this case, Cottrell's testimony did not carry any particular connotation that the victim in this matter must not have lied.

Even more importantly, the prosecutor in *Thorpe* relied heavily on Cottrell's statistical assessment during closing argument, which played a large part in our Supreme Court finding both error and prejudice. *Id*. at 259-260. Here, neither side commented on the rarity (or not) of false disclosures, but rather properly concentrated on whether the actual evidence showed this specific victim to have lied or told the truth. Indeed, defendant relied heavily on Cottrell's admission that false disclosures do occur and description of a "red flag" tending to indicate that a false disclosure had occurred.

We conclude that if any error occurred, which we do not find, then defendant partially brought it up on himself, seemingly pursuant to an intentional plan to cause an error. Although an interesting trial strategy to be sure, "in general, an appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence." *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003). Furthermore, Cottrell's remark was vague, isolated, and never mentioned again. Defendant instead made competent use of Cottrell's admission that children do lie. Additionally, there is no indication that it is more probable than not that this alleged error was outcome-determinative, because the trial court provided a curative instruction. See *Lukity*, 460 Mich at 495-496. The trial court explicitly instructed the jury that it did not have to believe Cottrell's opinion. The issues as presented to the jury clearly and starkly showed that the question was whether the victim actually had lied, not whether it was likely or unlikely that she had lied. Cottrell did not impermissibly vouch for the victim's credibility.

V. ALLEGED VOUCHING BY DR. O'ROURKE

The allegedly-improper testimony from Dr. O'Rourke presents a slightly closer question. Dr. O'Rourke stated that she found no physical evidence of any abuse, although she also pointed out that she would not have expected any such findings. She explained that she called the police "because of the unusual situation that the alleged perpetrator was in our office" and that she had told the victim's mother she "was concerned something had happened to [the victim], that she had been abused." Defendant contends that her testimony constituted improper vouching. We disagree.

Dr. O'Rourke was permitted to testify, pursuant to MRE 803(4) (statements made for purposes of medical treatment), about what the victim said during the examination, including the victim's statement that defendant had touched her inappropriately. Dr. O'Rourke also testified that the victim's mother and defendant had both come to the examination. Defendant has not appealed those portions of Dr. O'Rourke's testimony. As a consequence, the jury was aware that the victim had alleged defendant to have committed sexual assault and that defendant was physically in the office. Dr. O'Rourke's testimony "that the alleged perpetrator was in our office" was therefore simply a fact already known to the jury, not any kind of medical diagnosis. Both attorneys vigorously established that Dr. O'Rourke was a mandatory reporter who had been required to contact the police under the circumstances, and Dr. O'Rourke had no physical evidence that any sexual assault had occurred. Defendant further elicited testimony from Dr. O'Rourke that defendant had waited patiently for the police and did not appear to display any concern about the police talking to him. In context, it would have been clear to the jury that Dr. O'Rourke was

merely fulfilling a legal obligation to pass information on to the police, with no particular endorsement as to the truth of that information.

The slightly closer question arises from Dr. O'Rourke's unresponsive answer to the jury's questions regarding what Dr. O'Rourke told the victim's mother about making the call to the police. The questions generally asked *whether* Dr. O'Rourke told the mother about calling the police and how the mother reacted. Dr. O'Rourke initially responded that she "told the mom I was concerned something had happened to [the victim], that she had been abused." This was not directly responsive to the question. Defendant objected while Dr. O'Rourke was apparently attempting to explain that she was therefore required to make the call; however, defendant did not ask to strike Dr. O'Rourke's statement. After the trial court clarified the question, Dr. O'Rourke gave another unresponsive answer that, in part, "CPS would need to be involved because of the nature of the allegations." Defendant did not object at that time, but rather moved for a mistrial after the conclusion of Dr. O'Rourke's testimony.

Even when considered alone outside of its context, Dr. O'Rourke's testimony that she "told the mom I was concerned something had happened to [the victim], that she had been abused" does not appear to rise to the level of a proper diagnosis. Nevertheless, defendant contends that it could still potentially be construed as an opinion that the victim had been sexually assaulted based only on the victim's statements. *Thorpe*, 504 Mich at 262; *Del Cid*, 331 Mich App at 542-543, 547-548. When considering Dr. O'Rourke's statement in context, however, we disagree. Her statement is much harder to construe as an assessment that the victim *had* been sexually abused. We are unwilling to speculate that the significance of Dr. O'Rourke being a mandatory reporter was lost on the jury. We note, as well, that defendant could have moved to strike Dr. O'Rourke's unresponsive answers or for a contemporaneous curative instruction. If improper testimony is given, but immediately stricken, it is generally presumed that any prejudice is cured. See *People v Mitchell*, 298 Mich 172, 181-182; 298 NW 495 (1941). Defendant's decision to gamble on moving for a mistrial instead of seeking to strike Dr. O'Rourke's unresponsive statement might preclude appellate relief. See *People v Buckey*, 424 Mich 1, 18; 378 NW2d 432 (1985); *People v Abdalla*, 70 Mich App 697, 701; 247 NW2d 332 (1976).

In any event, the trial court explicitly and properly instructed the jury that Dr. O'Rourke's testimony "that she was concerned that [the victim] had been abused" could only be considered "for the limited purpose that she was informed of a situation for which she was required to report" and not "as vouching for the credibility of [the victim]." Juries are presumed to follow their instructions, and proper instructions are presumed to cure any prejudice. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). Even if we were to accept defendant's contention that Dr. O'Rourke's testimony was potentially prejudicial, which we do not, its context rendered any such impropriety too mild for us to find "an 'overwhelming probability' that the jury will be unable to follow the court's instructions." *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001) (quotation omitted).

Finally, at oral argument, defendant argued that in *People v Uribe*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 159194), our Supreme Court held that a curative instruction is necessarily inadequate. We disagree. In *Uribe*, the complainant's examining physician repeatedly and affirmatively stated that he had definitively diagnosed the complainant as having been sexually abused on the basis of only the complainant's statements. *Id*. at ___ (slip op at pp 2-3). The trial

court instructed the jury that it was not to consider the doctor's opinion whether the complainant had been sexually assaulted and not to consider the doctor's statements regarding his report. *People v Uribe*, unpublished per curiam opinion of the Court of Appeals, issued January 3, 2019 (Docket No. 338586), unpub op at p 3. We do not read *Uribe* as crafting a bright-line rule mandating an immediate and unconsidered mistrial any time a child complainant's examining doctor utters anything that could even potentially be construed as an opinion whether the complainant was sexually abused. Rather, we think it significant that in *Thorpe*, our Supreme Court expressly reaffirmed that these kinds of errors must be individually reviewed for harmlessness. *Thorpe*, 504 Mich at 252-253, 259-266. If our Supreme Court in *Uribe* intended to overturn that portion of *Thorpe*, we trust our Supreme Court would have said so in unambiguous terms. Instead, our Supreme Court held that the curative instruction was insufficient under the circumstances of that case. Importantly, the circumstances in *Uribe* differ significantly from the circumstances here. Dr. O'Rourke's statement was much more isolated and, in context, was clearly an expression of concern about a possibility, not a diagnosis. Furthermore, the trial court gave the jury clear guidance about *how* to consider Dr. O'Rourke's statement, rather than telling the jury to achieve the more difficult task of trying to put the statement out of mind entirely. We do not find that *Uribe* dictates reversal under the circumstances of this case.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick