NO. COA10-488

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Brunswick County
Nos. 07 CRS 55339
07 CRS 55353

BRIAN KEITH PERRY

Appeal by Defendant from judgments entered 1 June 2009 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 26 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard and Certified Legal Intern Jennifer Lewis, for the State.

Haral E. Carlin for Defendant.

STEPHENS, Judge.

Facts

On 5 November 2007, Defendant Brian Keith Perry was indicted for statutory rape of a person thirteen years of age, indecent liberties with a minor, and possession of a firearm by a felon. Defendant was tried by a jury at the 8 December 2008 Criminal Session of the Brunswick County Superior Court, the Honorable Gary L. Locklear presiding.[1]

[1]Judge Locklear presided over Defendant's trial, which concluded 11 December 2008. However, Defendant was not sentenced until June 2009, and Judge Lewis, rather than Judge Locklear,

The evidence presented at trial tended to show the following: On the evening of 18 August 2007, C.W.,[2] the victim in this case, spent the night with her friend at the home of her friend's father, the Defendant in this case. After going to the grocery store and movie rental store, C.W., her friend, and Defendant went to Defendant's home to watch rented movies. After C.W.'s friend fell asleep while the three were watching movies in the living room, Defendant carried his daughter to the bedroom and then returned to the living room. While Defendant and C.W. were alone in the living room, Defendant put on a pornographic film. C.W. testified that she took off some of her clothing and that Defendant took several pictures of C.W. with his mobile phone. Defendant then came over to the couch on which C.W. was sitting and penetrated C.W.'s vagina with his penis. C.W. testified that Defendant did not ejaculate inside her, but that he went to another room in the house and ejaculated into a paper towel. At the time of this incident, C.W. was thirteen years old and Defendant was thirty-nine years old.

C.W. slept at Defendant's house that night, and then slept over at another friend's house the following night. Within forty-eight hours of the incident, C.W. informed her parents of what happened. C.W.'s parents took C.W. to the hospital and contacted law enforcement. C.W. underwent a physical examination that revealed no physical symptoms of sexual abuse; C.W. was also examined by mental health professionals.

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presided over the sentencing proceedings.

[2]C.W. is a pseudonym.

C.W. and her parents were interviewed by law enforcement officers and, at the request of an officer, C.W. recorded a telephone call to Defendant, in which C.W. informed Defendant that she thought she might be pregnant. Defendant responded that "[i]t didn't go that far."

Following the presentation of evidence, the jury returned verdicts of guilty on the charges of statutory rape, indecent liberties with a child, and possession of a firearm by a felon. Defendant was sentenced to consecutive sentences of 384 to 470 months for statutory rape, 25 to 30 months for indecent liberties with a minor, and 20 to 24 months for possession of a firearm by a felon. Defendant appeals.

Discussion

Initially, we note that Defendant cites and argues four assignments of error in his brief on appeal. However, the record on appeal contains only three assignments of error. Because our review is "confined to a consideration of those assignments of error set out in the record on appeal[,]"[3] Defendant's missing fourth assignment of error, which, according to Defendant's brief, alleges improper credibility testimony by witness Nicole Croteau-

[3]Although our Rules of Appellate Procedure have been amended so that a party is no longer required to set out assignments of error in the record on appeal, *see* N.C. R. App. P. 10 (2010), the amended Rules did not become effective until 1 October 2009. Because Defendant's notice of appeal was filed in June 2009, the pre-amendment Rules, including the Rule 10 requirements with respect to assignments of error, apply, and are mandatory, in this case.

Johnson ("Croteau-Johnson"), is not properly before this Court. N.C. R. App. P. 10(a) (2009).[4]

As for his first assignment of error, Defendant argues that the trial court erred by allowing Croteau-Johnson to testify as an expert witness "when Johnson did not possess the requisite qualifications to testify as an expert witness in the field of child abuse and trauma." Although Defendant presents various arguments as to why portions of Croteau-Johnson's testimony should have been ruled inadmissible, because Defendant failed to assign error to any portion of the testimony, these arguments are not properly before this Court. *See Knox v. Univ. Health Sys. of E. Carolina, Inc.*, 187 N.C. App. 279, 285, 652 S.E.2d 722, 725-26 (2007) (declining to address the merits of appellant's argument where the argument seeks to support an assignment of error that does not make a similar contention); *see also Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (holding that the "scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a

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[4]Further, as either the sole or an alternative legal basis for his three assignments of error, Defendant asserts violations of his state and federal constitutional rights. Because Defendant fails to argue these constitutional issues in his brief, we hold that the constitutional aspects of Defendant's assignments of error have been abandoned. *See* N.C. R. App. P. 28(a); *see also State v. Angel*, 330 N.C. 85, 91-92, 408 S.E.2d 724, 729 (1991) (holding that defendant abandoned his constitutional claim where defendant assigned as error introduction of evidence "in violation of both the Rules of Evidence and his state and federal constitutional rights to confront witnesses[,]" but only argued violation of the Rules of Evidence in his brief).

proper assignment of error, the matter is not properly considered by the appellate court"). The only aspect of Croteau-Johnson's testimony to which Defendant assigned error, and thus which is properly before this Court, is whether Croteau-Johnson was qualified under Rule of Evidence 702(a) to testify as an expert witness in the field of child abuse and trauma.[5]

"Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987). A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it. *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989). Under North Carolina Rule of Evidence 702, "a witness may be qualified as an expert if the trial court finds that through 'knowledge, skill, experience, training, or education' the witness has acquired such skill that he or she is better qualified than the jury to form an

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[5]We note that Defendant neither took exception to the trial court's acceptance of Croteau-Johnson as an expert following *voir dire*, nor objected to the State's tender of Croteau-Johnson as an expert in front of the jury. As appropriately conceded by Defendant, because Defendant failed to timely object, our review of this issue is limited to plain error. *See* N.C. R. App. 10(c)(4). Although the qualifications of an expert are reviewed by this Court for abuse of discretion, *see* discussion *infra*, and our appellate courts "[have] not applied the plain error rule to issues which fall within the realm of the trial court's discretion," *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001), we address Defendant's argument in the interest of ensuring Defendant was given a fair trial, free of error.

opinion on the particular subject." *Goodwin*, 320 N.C. at 150-51, 357 S.E.2d at 641 (quoting N.C. Gen. Stat. § 8C-1, Rule 702).

During *voir dire*, Croteau-Johnson testified that she had a masters degree in clinical psychology and seven years of experience as a licensed psychological associate. Croteau-Johnson also testified that she received specialty training at an internship focused on child abuse and juvenile sex offenders with a history of sexual abuse. Further, Croteau-Johnson testified to the jury that her current practice, which carried a caseload at the time of trial of around one hundred children, focused on child abuse and trauma, with roughly half of that practice dedicated to providing therapy for victims of sexual abuse. Given her education and experience, Croteau-Johnson was well qualified to testify as an expert in the field of child abuse and trauma. Accordingly, the trial court's decision to allow Croteau-Johnson to testify was not prejudicial error, and certainly not plain error. Defendant's first assignment of error is overruled.

In his second assignment of error, Defendant contends that the trial court erred by allowing Elizabeth Deaton ("Nurse Deaton"), a pediatric nurse practitioner tendered as an expert in child abuse and sexual assault, to give "improper expert testimony on [C.W.'s] credibility by stating 'sexual abuse cannot be ruled out' after testifying she found no indication of sexual abuse in her physical exam[.]" Because Defendant failed to object to this portion of Nurse Deaton's testimony at trial as required by N.C. R. App. P.

10(b)(1), our review of this argument is limited to plain error. N.C. R. App. P. 10(c)(4).

In his brief, Defendant cites several cases for the proposition that in a sexual offense prosecution involving a child victim, the trial court should not admit expert testimony that sexual abuse has occurred in the absence of physical evidence of such abuse because the testimony serves as an impermissible opinion regarding the victim's credibility. *See State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002); *State v. Horton*, __ N.C. App. __, 682 S.E.2d 754 (2009); *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004); *State v. Dixon*, 150 N.C. App. 46, 563 S.E.2d 594, *cert. granted*, 355 N.C. 752, 565 S.E.2d 185, *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002). In each case cited by Defendant, the testimony held to be inadmissible included a statement by the expert that abuse had, or probably had, occurred. *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (holding inadmissible testimony "that the victim was 'sexually assaulted and [that there was] also maltreatment, emotionally, physically, and sexually'"); *Horton*, __ N.C. App. at __, 682 S.E.2d at 758 (holding that statement that the child had "more likely than not been sexually abused" exceeds the scope of permissible expert opinion testimony); *Couser*, 163 N.C. App. at 729-730, 594 S.E.2d at 422-23 (holding that the trial court erred by admitting testimony of an expert's diagnosis and opinion that "the victim was probably sexually abused"); *Dixon*, 150 N.C. App. at 51-54, 563 S.E.2d at 598-99 (holding that permitting expert

to state his opinion that victim had been sexually abused was error).

Defendant argues that Nurse Deaton's testimony that "sexual abuse cannot be ruled out" is "consistent" with the testimony held to be inadmissible in those cases cited *supra* such that the admission of this evidence was plain error. We disagree.

Initially we note that Nurse Deaton's statement that "sexual abuse cannot be ruled out" serves only as an assertion that sexual abuse was possible, and does not amount to an assertion that sexual abuse did, or probably did, occur. Further, our Courts have held that although expert testimony is not admissible to establish the credibility of the victim as a witness, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith. *Stancil*, 355 N.C. at 267-67, 559 S.E.2d at 789.

In this case, Nurse Deaton's statement that "while sexual abuse cannot be ruled out, there is no indication from today's evaluation that abuse occurred" was preceded by her testimony that "[e]ven though we know abuse has occurred, 90 percent of children, and in my experience in the children I've examined, probably less than 10, 15 percent actually have physical findings that confirm abuse." According to this testimony, the profile of a sexually abused child does not necessarily include a finding of confirmatory physical evidence. Therefore, Nurse Deaton's statement that "sexual abuse cannot be ruled out" amounted to a statement of the

consistency between the profile of a sexually abused child and the lack of physical evidence found in her examination of C.W. As this statement by Nurse Deaton was not an impermissible statement by an expert witness as to the credibility of C.W., but rather was a permissible statement as to Nurse Deaton's findings as compared to the profile of a sexually abused child, *see Stancil*, 355 N.C. at 267, 559 S.E.2d at 789, we conclude that the trial court did not err in admitting this statement by Nurse Deaton. Defendant's second assignment of error is overruled.

In his third and final assignment of error, Defendant argues that the trial court erred by allowing Corporal Laurie Smith ("Corporal Smith") of the Brunswick County sheriff's office to testify "to the credibility of [C.W.'s] testimony[.]"

After testifying about her conversations with C.W. and about her investigation of Defendant's case, Corporal Smith testified as follows:

> Q. Corporal Smith, have you had an opportunity on different occasions to speak with [C.W.] since you originally took out these charges?
> A. I have spoke [sic] with her, probably maybe one occasion, until this trial.
> Q. Okay. And you also heard her testimony during this trial today?
> A. That's correct.
> Q. And is any of the information that you have obtained while speaking with her or while listening to her testimony significant in any way from what she told you originally four days after this happened?
> A. No, it is not.

In *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986), our Supreme Court considered a nearly identical examination and

concluded that the "opinion and inferences of the witness as to whether the statements of the victim had been at all times consistent" were inadmissible. *Id.* at 467, 349 S.E.2d at 572-73. The following is an excerpt of testimony held inadmissible in *Ramey*:

> Question: A number of times, you have had a number of occasions to speak to [the victim] other than that first time?
> Answer: I have talked with [the victim] on two occasions.
> Question: Has he ever told you anything inconsistent with what he told you that first time?
> Answer: No, sir.

Id.

Following our Supreme Court's reasoning in *Ramey*, we must conclude that admission of Corporal Smith's testimony on the consistency of C.W.'s statements describing the incident was error because such "[i]nconsistencies in a witness's testimony or pretrial statements are for the jury to determine as fact finders." *Id.* However, because Defendant failed to object to Corporal Smith's testimony, before we may grant Defendant relief from judgment, we must determine whether the error was plain error. *See* N.C. R. App. P. 10(c)(4).

"'The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (quoting *United States v.*

McCaskill, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (internal bracket, ellipsis, emphasis, and quotation marks omitted). "To show plain error, defendant must convince [the] Court not only that there was error, but that absent the error, the jury probably would have reached a different result[.]" *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, __ U.S. __, 175 L. Ed. 2d 362 (2009) (internal quotation marks omitted).

Upon review of the entire record in this case, we cannot conclude that, had the objectionable testimony by Corporal Smith not been admitted, the jury probably would have reached a different result. Corporal Smith's testimony consisted almost entirely of an explanation of her investigation and a reiteration of the statements made by C.W. to Corporal Smith. The reiteration of these statements was properly admitted to corroborate C.W.'s testimony, *State v. Ferebee*, 128 N.C. App. 710, 715, 499 S.E.2d 459, 462 (1998) (stating that "[e]vidence of prior consistent statements is admissible for the limited purpose of affirming a witness's credibility"), and it was nearly identical to C.W.'s description of the incident and of the statements she testified that she made to Corporal Smith. Because the jury was presented with C.W.'s testimony and her prior statements consistent with that testimony, it is reasonable to conclude that, absent Corporal Smith's statement on their consistency, the jury would have come to the same conclusion that C.W.'s testimony and her prior statements were consistent. Therefore, we conclude that Defendant has not

satisfied his burden of showing that Corporal Smith's comment prejudiced the jury and caused it to reach a different verdict. *See Ramey*, 318 N.C. at 468, 349 S.E.2d at 573 (finding no plain error where a witness commented on the consistency of the victim's prior statement because "[t]he jury had the victim's prior statements before it" and could compare it with the victim's testimony). Defendant's third assignment of error is overruled.

Based on the foregoing, we conclude that Defendant received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).