IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1028

Filed: 19 July 2016

Forsyth County, No. 14 CRS 51869

STATE OF NORTH CAROLINA

v.

JOHN FREDE SABBAGHRABAIOTTI

Appeal by defendant from judgments entered 14 January 2015 by Judge Edwin G. Wilson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 24 February 2016.

Roy Cooper, Attorney General, by Sherri Horner Lawrence, Assistant Attorney General, for the State.

Mark Montgomery for defendant-appellant.

DAVIS, Judge.

John Frede Sabbaghrabaiotti ("Defendant") appeals from his convictions for two counts of first-degree sex offense with a child and one count of taking indecent liberties with a child. On appeal, he contends that the trial court erred by (1) allowing the admission of expert witness opinion testimony as to whether the victim was sexually abused; (2) admitting testimony referencing the fact that he was subject to satellite-based monitoring; and (3) improperly vouching for the victim's credibility. After careful review, we vacate Defendant's convictions and remand for a new trial.

Factual Background

The State presented evidence at trial tending to establish the following facts: In 2013, S.S.[1] and her seven year old son Kody lived at the home of D.H. S.S.'s boyfriend D.W. also resided at D.H.'s residence. Defendant, a friend of D.H.'s, became acquainted with S.S. while visiting with D.H. and would often spend time playing with Kody in Kody's room.

Between 4:00 p.m. and 5:00 p.m. on 31 December 2013, Defendant picked up Kody from D.W.'s mother's residence to take him bowling and out to eat. S.S. instructed Defendant to bring Kody back to her mother's house by 9:00 p.m., and Defendant assured her that he would do so.

On the way to the bowling alley, Defendant drove Kody to his house, took him inside, and brought him into Defendant's bedroom. Defendant proceeded to perform fellatio on Kody and also penetrated Kody's anus with his finger. Afterwards, Defendant took Kody bowling. He then took Kody to his maternal grandmother's house around 9:30 p.m.

Approximately two weeks later, on 11 January 2014, while Kody was staying with his paternal grandmother, he asked his younger cousin to "put her mouth on his penis." Kody's cousin told Kody's grandmother about his request and she, in turn,

[1] Initials and pseudonyms are used throughout this opinion to protect the identity of the minor child.

asked Kody to explain why he would ask his cousin to do that. Kody responded by recounting the incident at Defendant's home to her.

Kody's grandmother called Kody's father and then 911 to report what Kody had told her. Deputy Brad Emilson with the Forsyth County Sheriff's Office responded to the call. He spoke with Kody who related Defendant's actions at the home on 31 December 2013. Defendant was subsequently arrested.

On 21 April 2014, Defendant was indicted on charges of taking indecent liberties with a child and two counts of first-degree sex offense with a child. On 18 August 2014, a superseding indictment was filed as to these charges.

Prior to trial, Defendant requested a list of the State's expert witnesses along with their curricula vitae, their opinions, and the underlying bases for those opinions. The State responded by providing notice that Fulton McSwain ("McSwain") would provide testimony as an expert witness in the field of "forensic interviewing of children." The State also provided Defendant with two reports on Kody that McSwain had produced after interviewing Kody at the Vantage Pointe Child Advocacy Center. The State's notice stated that the reports "detail[ ] his expert opinion concerning the child, as well as the underlying basis for that opinion."

Beginning on 12 January 2015, a jury trial was held before the Honorable Edwin G. Wilson, Jr. in Forsyth County Superior Court. At trial, McSwain provided testimony — discussed in more detail below — on a number of issues related to his

interviews with Kody. The State also introduced the testimony of Defendant's parole officer, Christopher Alves, who testified as to Defendant's whereabouts on 31 December 2013 based upon a review of satellite based monitoring data.

The jury found Defendant guilty of all charges. The trial court sentenced Defendant to consecutive sentences of 483-592 months imprisonment for the first first-degree sex offense with a child conviction, 483-592 months imprisonment for the second first-degree sex offense with a child conviction, and 33-49 months imprisonment for the taking indecent liberties with a child conviction. Defendant was additionally ordered to enroll in satellite-based monitoring for the remainder of his natural life. Defendant gave timely notice of appeal.

Analysis

Defendant argues on appeal that the trial court plainly erred in allowing McSwain to state his opinion during cross-examination that Kody had, in fact, been sexually abused. We agree.

Because Defendant did not object to this portion of McSwain's testimony at trial, we review Defendant's argument on this issue only for plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

It is well settled that

> in a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. Moreover, even when physical evidence of abuse existed and was the basis of an expert's opinion, where the expert added that she would have determined a child to be sexually abused on the basis of the child's story alone even had there been no physical evidence, we found this additional testimony inadmissible. However, if a proper foundation has been laid, an expert may testify about the characteristics of sexually abused children and whether an alleged victim exhibits such characteristics.

State v. Towe, 366 N.C. 56, 61-62, 732 S.E.2d 564, 567-68 (2012) (internal citations, quotation marks, and brackets omitted).

During McSwain's direct examination, he testified, among other things, that based on his interviews with Kody he believed Kody matched the profile of sexually abused children generally. On cross-examination, the following exchange occurred:

> Q. Now, in that report -- in fact, those two reports, is there anywhere in there that you list these characteristic profiles?
>
> A. As far as I --
>
> Q. The profile of -- the sexually abused child profile that you just referred to.
>
> A. No, sir, I didn't specifically make a report addressing all the characteristics of sexually abused children.
>
> Q. Well, isn't it true, as a matter of fact, that in this report, you didn't actually make a statement that he, [Kody], was a -- matched the child abuse profile?
>
> A. I made note that he was consistent with the information he provided.
>
> Q. Nothing about a child profile. Right?
>
> A. I didn't -- no, sir, I didn't do it.
>
> Q. Nothing about any characteristics matching any profile?
>
> A. No, sir.
>
> Q. You just noted your observations?
>
> A. I noted my observations of what the child said, yes.
>
> Q. And it was only until Ms. Glanton decided to ask you about child sexual profiles that you offered that opinion?

> A. I don't think that's accurate, no, sir.
>
> Q. You offered it before she asked that?
>
> A. I had -- yes, sir. I had my opinion on whether or not he was exposed to sexual abuse.
>
> Q. You didn't render it anywhere in writing. Correct?
>
> A. I think by noting he was consistent with the information, *I was suggesting that I believe that he had been exposed to sexual abuse*.

(Emphasis added).

Defendant asserts that the above-quoted testimony rises to the level of plain error because McSwain's statement that "I was suggesting that I believe that [Kody] had been exposed to sexual abuse" impermissibly vouched for Kody's credibility as to Kody's allegation that Defendant had, in fact, sexually abused him. The State contends that the challenged testimony falls within the category of invited error. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd per curiam,* 362 N.C. 342, 661 S.E.2d 732 (2008).

In response to the State's argument, Defendant asserts that the invited error doctrine is inapplicable to the challenged statement by McSwain because his answer was nonresponsive to the question asked. "A witness' testimony is nonresponsive if it exceeds the scope of the question or fails to answer the question." *State v.*

Wilkerson, 363 N.C. 382, 412, 683 S.E.2d 174, 192 (2009), *cert. denied*, 559 U.S. 1074, 176 L.E.2d 734 (2010). Invited error cannot occur where a witness's testimony is nonresponsive to the question asked of him by a defendant's trial counsel. *State v. Hardy*, __ N.C. App. __, __, 774 S.E.2d 410, 414 (2015).

The key portion of the exchange between McSwain and Defendant's trial counsel was the following:

> Q. You didn't render it anywhere in writing. Correct?
>
> A. I think by noting he was consistent with the information, *I was suggesting that I believe that he had been exposed to sexual abuse*.

(Emphasis added).

A careful contextual reading of the cross-examination of McSwain reveals that defense counsel was attempting to establish that nowhere in McSwain's reports of his interviews with Kody had McSwain offered a written opinion regarding the characteristics of sexually abused children generally or whether Kody matched this profile. It is likewise apparent that the above-quoted question was asked in an attempt to discredit McSwain's statement during direct examination that in his opinion Kody exhibited these same characteristics. It was in response to this line of inquiry that McSwain testified "I had my opinion on whether or not [Kody] was exposed to sexual abuse."

Without asking McSwain what this opinion was, Defendant's trial counsel instead proceeded to ask McSwain the following question: "You didn't render it anywhere in writing. Correct?" This question was straightforward and simply called for an answer of "yes" or "no." Instead, McSwain proceeded to volunteer the fact that "I think by noting he was consistent with the information, I was suggesting that I believe that he had been exposed to sexual abuse."

This answer was nonresponsive to the question asked by Defendant's trial counsel. At no point did Defendant's trial counsel ask McSwain to state his opinion of whether Kody had actually been abused. Nor did he ask a question that could reasonably have led McSwain to provide such an answer. Thus, the invited error doctrine does not apply.

As noted above, when an expert witness gives an opinion that a child has, in fact, been sexually abused in a case where no physical evidence of sexual abuse has been admitted into evidence, "such testimony is an impermissible opinion regarding the victim's credibility." *Towe*, 366 N.C. at 61, 732 S.E.2d at 567 (citation and quotation marks omitted).

> Notably, a review of relevant case law reveals that where the evidence is fairly evenly divided, or where the evidence consists largely of the child victim's testimony and testimony by corroborating witnesses with minimal physical evidence, especially where the defendant has put on rebuttal evidence, the error is generally found to be prejudicial, even on plain error review, since the expert's opinion on the victim's credibility likely swayed the jury's

> decision in favor of finding the defendant guilty of a sexual assault charge.

State v. Ryan, 223 N.C. App. 325, 337, 734 S.E.2d 598, 606 (2012), *disc. review denied*, 366 N.C. 433, 736 S.E.2d 189 (2013); *see also State v. Delsanto*, 172 N.C. App. 42, 48, 615 S.E.2d 870, 874 (2005) ("A trial court commits plain error when it admits expert testimony on a victim's credibility because it prejudices the defendant in the eyes of the jury. . . . Had the jury not heard [the doctor's] inadmissible expert opinion [that the victim had been sexually abused], there is a reasonable possibility that the jury would have reached a different result. In accordance with this Court's previous decisions on this issue, we find plain error."); *State v. Bush*, 164 N.C. App. 254, 260, 595 S.E.2d 715, 719 (2004) ("In the case at bar, any and all corroborating evidence is rooted solely in [the victim's] telling of what happened, and that her story remained consistent. . . . Therefore, the conclusive nature of [the doctor's] testimony as to the sexual abuse and that defendant was the perpetrator was highly prejudicial. This constituted plain error.").

Here, no physical evidence was presented tending to show that Kody had been sexually abused. The State's case was predicated entirely on Kody's own testimony and the testimony of corroborating witnesses — none of whom had first-hand knowledge of whether the sexual abuse had occurred. Therefore, in accordance with our prior caselaw on this issue, we conclude that McSwain's opinion testimony that Kody actually had been sexually abused constituted prejudicial error rising to the

level of plain error. *See Ryan*, 223 N.C. App. at 341, 734 S.E.2d at 608 ("Given that [the doctor's] testimony was central to the State's case, and in light of the minimal physical evidence and other conflicting testimony presented at trial, we hold [the doctor's] improper opinion testimony vouching for the credibility of the child had a probable impact on the jury's finding defendant guilty, and therefore, the admission of such testimony constituted plain error, necessitating a new trial for defendant."); *Delsanto*, 172 N.C. App. at 49, 615 S.E.2d at 875 ("[I]t was improper for [the doctor] to testify that she diagnosed [the victim] as having been sexually abused. Finding plain error, we grant defendant a new trial."); *Bush*, 164 N.C. App. at 260, 595 S.E.2d at 719 ("[T]he conclusive nature of [the doctor's] testimony as to the sexual abuse and that defendant was the perpetrator was highly prejudicial. This constituted plain error. Defendant is entitled to a new trial."). Consequently, we vacate Defendant's convictions and remand for a new trial.[2]

Conclusion

For the reasons stated above, we vacate Defendant's convictions and remand for a new trial.

NEW TRIAL.

Judges ELMORE and HUNTER, JR. concur.

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[2] Based on our holding, we need not address the additional arguments contained in Defendant's brief. *See State v. Ipock*, 129 N.C. App. 530, 534, 500 S.E.2d 449, 451 (1998) ("In light of our disposition of this case, we need not reach defendant's remaining assignments of error.").

Report per Rule 30(e).