IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1385

Filed: 6 June 2017

Wake County, No. 13 CRS 2579

STATE OF NORTH CAROLINA

v.

ADRIAN WIGGINS, Defendant.

Appeal by Defendant from judgments entered 24 February 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 19 September 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jonathan H. Hunt and Assistant Appellate Defender Jillian C. Katz, for Defendant-Appellant.

INMAN, Judge.

Adrian Wiggins ("Defendant") appeals his convictions for committing a sex offense with a child by an adult, three counts of indecent liberties with a minor, and disseminating obscene material to a minor following a jury trial. Defendant contends the trial court erred by allowing the State's expert to vouch for the victim's credibility,

allowing the State's expert to testify that she diagnosed the victim with Post-Traumatic Stress Disorder ("PTSD"), and sentencing him to a term in prison not authorized by law. Defendant also contends that he was denied his right to effective assistance of counsel. After careful consideration, we conclude that Defendant has failed to demonstrate reversible error during his trial. However, we remand for resentencing to correct the trial court's miscalculation of Defendant's maximum sentence.

Factual and Procedural Background

The evidence at trial tended to show the following:

Daniel[1] was born on 3 July 2002. At the time of the trial, he was twelve years old. Daniel lived with his mother, stepfather, and siblings in Raleigh, North Carolina. Daniel knew Defendant because Defendant was a close friend of Daniel's grandmother. Daniel frequently visited his grandmother's house.

In March 2011, when Daniel was eight years old, Daniel's mother and stepfather went on a week-long trip to California. Daniel and his sister stayed with his grandmother while his parents were out of town. It was during this time period that Defendant sexually abused Daniel. The abuse, ranging from Defendant showing Daniel obscene material to anally penetrating Daniel, occurred over four separate incidents.

[1] We use this pseudonym to protect the identity of the juvenile and for ease of reading.

First, while Daniel's grandmother and his sister went to the grocery store, Daniel was left with Defendant at Daniel's parents' home. Daniel and Defendant were "play fighting" in the living room. When Daniel accidentally hit Defendant in Defendant's "private area," Defendant asked Daniel if he wanted to know where babies came from. When Daniel responded affirmatively, Defendant pulled down his pants and told Daniel to touch Defendant's penis. Defendant masturbated and ejaculated. Defendant told Daniel that if Daniel did not tell anyone that Defendant would give Daniel five dollars. Daniel did not tell his grandmother or sister when they returned from the grocery store.

Approximately two days after the first incident, Daniel and Defendant were in Daniel's bedroom at his grandmother's home. Daniel's grandmother and sister were not home. Defendant asked Daniel if Daniel wanted to play a game, and Daniel said, "yes." Defendant then pulled down his pants, masturbated, and asked Daniel to hold Defendant's ejaculate. Daniel obeyed, held out his hand, and Defendant ejaculated. Daniel did not tell his grandmother or sister about the incident because he was scared.

Another day, while Daniel's mother and stepfather were still in California, Daniel was with Defendant at Defendant's home. While others were in the basement, Defendant showed Daniel a video on a laptop. In the video, three naked men engaged in fellatio and anal sex.

The next day, Daniel and Defendant were alone in Daniel's room, at a time when Daniel's grandmother and sister were away from the home. Defendant pulled down his pants and Daniel's pants and underwear. Defendant instructed Daniel to lean against the bed. Daniel leaned against the bed, placing his face on the bed, with his legs and body off of the bed. Defendant masturbated and ejaculated. Then, Defendant "stuck his penis up [Daniel's] butt." The assault was painful to Daniel, and Daniel told Defendant that he needed to use the restroom. Defendant stopped, and Daniel went into the bathroom and cried. Daniel stayed in the bathroom until his grandmother and sister came home. Daniel did not tell his grandmother or sister because he was scared.

The next day, Defendant gave Daniel a Play Station One. Daniel considered telling people, but then had nightmares of Defendant killing his family. Daniel had that nightmare three times.

Two years later, when Daniel was 10, Daniel went to the bathroom and started bleeding. His grandmother asked if someone had touched him, and Daniel told her that Defendant had touched him. Daniel also told his sister. The next day, Daniel told his mother, and she drove him to the Raleigh Police Department.

Defendant was arrested on 22 May 2013. On 20 May 2013, Defendant was indicted for the following offenses: (1) two counts of sexual offense with a child by an

adult; (2) four counts of taking indecent liberties with a child; and (3) one count of disseminating obscene material to a minor.

The case came on for trial on 18 February 2015. In addition to Daniel's testimony, the State presented lay testimony from Daniel's grandmother, sister, mother, and Raleigh Police Department Detective Alex Doughty. The State also presented expert testimony from the following witnesses: Holly Warner, a nurse practitioner and an expert in the field of pediatrics and child maltreatment; Elizabeth Barnard, a clinical social worker and an expert in the field of treatment and diagnosis of abused children; Sara Kirk, a clinical social worker and child abuse evaluation specialist at Safe Child Advocacy Center and an expert in forensic interviewing and the field of child maltreatment; and Kimberly Dekan, a clinical social worker at Triangle Family Services and an expert in the field of child maltreatment and therapy. Defendant testified on his own behalf and denied the State's allegations. Defendant presented no other evidence.

On 24 February 2015, the jury found Defendant guilty of one count of sexual offense with a child, three counts of taking indecent liberties with a child, and one count of disseminating obscene material to a minor. Defendant stipulated to being a prior record level VI offender for sentencing purposes. The trial court sentenced Defendant to an active term of 450 to 552 months in prison, followed by two active terms of 30 to 36 months in prison, to run consecutively. The trial court also ordered

Defendant to enroll in satellite based monitoring for his natural life. Defendant gave oral notice of appeal in open court.

Analysis

I. Expert Witness Testimony About False Claims of Sexual Abuse

A. *Whether the Trial Court Committed Error*

Defendant contends the trial court erred by allowing an expert witness for the State to vouch for Daniel's credibility. We disagree.

Holly Warner, a nurse practitioner, was tendered as an expert witness in the fields of pediatrics and child maltreatment, without objection from Defendant. Warner examined Daniel at Safe Child Advocacy Center in Raleigh in 2013, shortly after he reported to his grandmother that Defendant had sexually abused him.

On direct examination, Warner described her findings in the medical examination of Daniel as "normal" with no evidence of physical trauma. The prosecutor asked Warner if it was "unusual" to find no evidence of trauma when examining a child who has reported being sexually abused. Warner testified that 96 percent of children evaluated for possible sexual abuse have "normal" exams. When asked specifically about the results for anal examination, Warner testified that 99 percent of male children reporting anal sexual abuse have normal examinations. Warner opined that her findings from the examination were consistent with Daniel's disclosure.

On cross-examination, Defendant's counsel elicited the following testimony:

> Q: Okay. Do you have – so 99 percent of these people have normal exams, do you have any percentage of what number [of] these were false claims?
>
> A: So false claims in child sexual abuse are very rare. There's a couple studies on that come to mind, one shows that about two, maybe one to two percent of children make a false allegation. Those children typically are very young preschoolers who were reportedly more likely to be coached or – can't think of the word. Coaching was the concern with that group of children studied.

Defense counsel did not ask the trial court to strike Warner's testimony at trial. Defendant argues that the admission of this statement was plain error because it impermissibly resolved the issue of Daniel's credibility, which is a question in the sole province of the jury. The State argues that Defendant waived his right to plain error review of this issue because Defendant elicited the remark from the expert on cross-examination, and, thus, invited the error, if error at all.

We hold Defendant invited this alleged error because he elicited the statements on cross-examination. "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,* 362 N.C. 342, 661 S.E.2d 732 (2008) (citations omitted). "[A] defendant who invites error has waived his right to all appellate review concerning the invited error, *including plain error review*." *State v. Dew*, 225 N.C. App. 750, 758,

738 S.E.2d 215, 221 (2013) (emphasis added) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)).

Indeed, the now complained-of statements were made in direct response to Defendant's counsel asking the witness to provide a percentage of false claims made by children with normal medical examinations who alleged they were sexually abused. As such, Defendant cannot now complain of the error and has waived his right to appellate review of the invited error, including plain error review. *Dew*, 225 N.C. App. at 758, 738 S.E.2d at 221 (citation omitted). Accordingly, we overrule this assignment of error.

B. *Ineffective Assistance of Counsel*

Defendant, in the alternative, argues that he was denied his constitutional right to effective assistance of counsel. Specifically, Defendant argues his counsel was ineffective "both for asking the expert questions giving rise to the damning, inadmissible testimony and for failing to object to the answers given by the expert."

Ineffective assistance of counsel claims are usually raised in post-conviction proceedings and not on direct appeal. See*, e.g.*, *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524–25 (2001). Such claims may be reviewed on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue. *Id.* at 166, 557 S.E.2d at 524-25 (citation omitted). Because the record here is

insufficient to address the ineffective assistance claim, we dismiss Defendant's claim without prejudice to Defendant's right to file a motion for appropriate relief.

II. Expert Witness Testimony About Daniel's PTSD Diagnosis

Defendant next argues that the trial court erred when it allowed Barnard, one of the State's expert witnesses, to testify that she diagnosed Daniel with PTSD without any limiting instruction. We disagree because Defendant failed to preserve this issue at trial and has failed to demonstrate plain error.

A. *Standard of Review*

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2016). "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (citation omitted).

"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." N.C. R.

App. P. 10(a)(4) (2016); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

Defendant argues that his trial counsel properly objected to Barnard's statement regarding the PTSD diagnosis, and, thus, he is entitled to prejudicial error review. Defendant also argues, in the alternative, that the trial court committed plain error in allowing the testimony and failing to provide the jury with a limiting instruction. The State argues that although Defendant objected after Barnard stated she "diagnosed [Daniel] with post[-]traumatic stress disorder[,]" Defendant waived his objection by subsequently allowing the witness to testify regarding Daniel's diagnosis of PTSD without objection.

Immediately after Barnard testified that she diagnosed Daniel with PTSD, Defendant objected, and the trial court overruled the objection. Later in her testimony, Barnard described her session with Daniel, including factors leading to her diagnosis of PTSD and the treatment she provided to Daniel to manage his PTSD. During this lengthy and detailed testimony, Defendant's trial counsel objected only twice more to Barnard's testimony: (1) when the State asked Barnard if Daniel's symptoms matched those of someone who experienced trauma; and (2) when Barnard read Daniel's narrative to the court.[2]

[2] Defendant also objected to certain exhibits being admitted, on relevancy and Rule 403 grounds.

We agree with the State that Defendant waived his objection to Barnard's testimony about the PTSD diagnosis. Although Defendant objected when Barnard testified that she diagnosed Daniel with PTSD, our review of the record reveals extensive prior and subsequent testimony about PTSD, free of objection from Defendant. For example, Barnard testified without objection about a PTSD index, which is a standardized measure for determining whether a patient's symptoms are consistent with PTSD, and that Daniel "did endorse a significant number of the symptoms that are listed for PTSD." Barnard also testified, without objection, that she designed a treatment plan for Daniel and set a goal "related to processing the effects of sexual abuse by improving coping skills, . . . expressing his thoughts and feelings about the trauma, [and] increasing the understanding of the effects of the trauma for the client and the family . . . . " This evidence is "of a similar character" of the testimony now complained of by Defendant. *Campbell*, 296 N.C. at 399, 250 S.E.2d at 231 (citations omitted). Accordingly, we hold Defendant waived his objection, and our review is limited to plain error.[3]

[3] The State argues the applicable standard of review for all of the challenged testimony is abuse of discretion. The general admissibility of this evidence is subject to plain error review if not preserved at trial and *de novo* review if the challenge is preserved. *See State v. Hall*, 330 N.C. 808, 823-24, 412 S.E.2d 883, 892 (1992); *State v. Lark*, 198 N.C. App. 82, 94, 678 S.E.2d 693,702 (2009) (applying plain error standard when the defendant alleged the trial court failed to properly give limiting instructions for testimony regarding PTSD); *State v. Brigman*, 178 N.C. App. 78, 92-93, 632 S.E.2d 498, 508 (2006) (applying the prejudicial error standard to testimony regarding a PTSD diagnosis). In *Hall*, our Supreme Court declared that "[t]he trial court should balance the probative value of evidence of post-traumatic stress, or rape trauma, syndrome against its prejudicial impact under Evidence Rule 403. It should also determine whether admission of this evidence would be

B. *Barnard's Testimony about Diagnosing Daniel with PTSD*

"[E]vidence that a prosecuting witness is suffering from [PTSD] should not be admitted for the substantive purpose of proving that a [sexual assault] has in fact occurred." *State v. Hall*, 330 N.C. 808, 821, 412, S.E.2d 883, 890 (1992). However, evidence of PTSD is allowed if admitted for purposes of corroboration. *Id.* at 822, 412 S.E.2d at 891. If the evidence is admitted for a proper purpose, the trial court "should take pains to explain to the jurors the limited uses for which the evidence is admitted." *Id.* at 822, 412 S.E.2d at 891. Here, the trial court failed to give the required limiting instruction.

"The rule, however, in this State has long been that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction." *State v. Quarg*, 334 N.C. 92, 101, 431 S.E.2d 1, 5 (1993) (citing *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985)). *See also Lark*, 198 N.C. App. at 94, 678 S.E.2d at 702 (holding the trial court did not commit plain

helpful to the trier of fact under Evidence Rule 702." 330 N.C. at 822, 412 S.E.2d at 891. Defendant, in passing, argues the trial court failed to comply with the analysis set forth in *Hall*. But in *Hall*, the Supreme Court did not issue a specific mandate that a trial court must set forth specific findings in the record or explicitly announce its rationale from the bench before admitting PTSD evidence. Notably, Defendant did not object to Barnard's testimony on Rule 403 or Rule 702 grounds. We conclude that, in this case, where Daniel's credibility and post-assault behavior were central issues, the challenged testimony was helpful to the jury and thus admissible pursuant to Rule 702 and that the probative value of the PTSD evidence was not substantially outweighed by the potential for unfair prejudice so that the trial court did not abuse its discretion in allowing the testimony even if Defendant had objected pursuant to Rules 702 and 403.

error by failing to give a limiting instruction when the defendant failed to request a limiting instruction).

Here, Barnard testified regarding her mental health assessment of Daniel and her diagnosis of PTSD. Barnard testified about Daniel's statements to her during the assessment. Defense counsel objected, and the trial court overruled the objection, explaining that the statements corroborated Daniel's earlier testimony "and also what she did as a result of those statements as far as her treatment or therapy, what effect it had on her, his statement." Barnard then testified at length about statements Daniel made to her describing Defendant pulling down Daniel's pants, touching Daniel, having Daniel touch him, and penetrating Daniel's anus. Defense counsel objected and requested a limiting instruction with respect only to Barnard's testimony about what Daniel's mother told her Daniel had said regarding the abuse:

> Q: And what did she tell you at that time?
>
> A: What she said was that in several weeks prior to the meeting with me, so I saw him on the 4th, I assumed this had been some time in March, that [Daniel] had been with his grandmother and had perhaps had some bleeding from his anus area, which he talked to the grandmother about, and that prompted her to ask him if anyone had touched him in that area. And he – he apparently said – endorsed that, yes, that that had happened, that it was [the Defendant] that had done that. So mom reported that this came to her via [Daniel] also telling her, perhaps the next day, I'm not sure when.
>
> [Defendant's Counsel]: Your Honor, we'd object and ask for limit[ing] instructions about those statements.

THE COURT: Overruled.

Defense counsel did not state the basis for his objection and request for a limiting instruction, but in the context of the transcript it appears the objection and request for a limiting instruction concerned the hearsay statements by Daniel's mother to Barnard, rather than Barnard's diagnosis. Defendant argues that even if his trial counsel failed to request a limiting instruction regarding the diagnosis, its omission was plain error because it is probable that Defendant would have been found not guilty without the evidence of the PTSD diagnosis being admitted. The State argues the failure to provide a limiting instruction did not amount to plain error.

Even if an instruction limiting the admissibility of testimony to corroborative or other purposes were required in the absence of a specific request by Defendant, the omission was not fundamental error in light of direct testimony by Daniel, his mother, his grandmother, his sister, Detective Doughty, and three other expert witnesses. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (defining plain error as "a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done") (internal quotation marks, citations, and alterations omitted). *See also Lark*, 198 N.C. App. at 94, 678 S.E.2d at 702 (holding that the trial court did not commit plain error by failing to give a limiting instruction regarding an expert's testimony about diagnosing the victim with PTSD). Accordingly, we overrule this assignment of error.

III. Whether the State's Expert Witnesses Improperly Vouched for Daniel's Credibility

Defendant next argues that the trial court erred by allowing two of the State's expert witnesses, Holly Warner and Sara Kirk, to vouch for Daniel's credibility.

The North Carolina Supreme Court has explicitly held that a witness is not permitted to vouch for the credibility of the alleged victim in a child sexual abuse case. *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988). Impermissible vouching includes expert witness testimony "that the victim was believable, had no record of lying, and had never been untruthful." *Id.* at 822, 370 S.E.2d at 678. *See also State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) ("Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence."); *State v. Kim*, 318 N.C. 614, 620-21, 350 S.E.2d 347, 351-52 (1986) (holding the trial court erred in allowing a doctor to testify that a victim had never been untruthful with her); *State v. Heath*, 316 N.C. 337, 340-42, 341 S.E.2d 565, 567-69 (1986) (holding the trial court erred by allowing expert testimony that the victim did not suffer from a mental condition that would cause her to lie about sexual assault); *State v. Hannon*, 118 N.C. App. 448, 449-51, 455 S.E.2d 494, 495-96 (1995) (holding that the trial court committed plain error by allowing an expert to testify that the prosecuting witness was truthful).

However, a medical expert may testify that a victim's physical injuries are consistent with the victim's account of an assault. *Aguallo*, 322 at 822, 370 S.E.2d at 678. Additionally, "the mere fact that an expert's testimony makes the testimony of another witness more believable, thus 'enhancing' their credibility, is not sufficient to warrant its exclusion." *State v. Oliver*, 85 N.C. App. 1, 10, 354 S.E.2d 527, 533 (1987).

A. *Warner's Testimony*

Warner, a nurse practitioner, testified about her findings from her examination of Daniel. Defendant's trial counsel made no objection to Warner's testimony regarding her findings or the basis for her findings.[4] As such, we review for plain error.

Defendant now complains of the following testimony:

> Q: So in your opinion, was your – were your findings consistent with [Daniel]'s disclosure?
>
> A: Yes.

[4] Defendant's counsel objected only once during Warner's testimony, regarding the location of the examination:

> Q: Okay. And when [Daniel] and his family got there, do you recall who was present?
> A: I'm not sure who went at the police department with him, I believe it was his parents.
> [Defendant's Counsel]: Objection.

Defendant argues Warner's testimony resulted in plain error because Warner vouched for Daniel's credibility. The State argues Warner's testimony was proper under *Aguallo* because the testimony did not vouch for Daniel's credibility, and merely declared Daniel's statements to be consistent with a physical exam.

A full review of *Aguallo* is helpful in our review of Warner's testimony. In *Aguallo*, our Supreme Court considered the contested evidence at issue in that case as follows:

> When asked if the findings from the physical examination were consistent with what the child had told [the doctor], the doctor responded affirmatively. At a later time during direct examination, the prosecutor again asked the doctor if, in her opinion, the lacerations and adhesions she found were consistent with what the child had told her. Over objection she responded, "I felt it was consistent with her history."
>
> . . .
>
> Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. [This evidence is] vastly different from an expert stating on examination that the victim is "believable" or "is not lying."
>
> . . .
>
> This expert opinion did not comment on the truthfulness of the victim or the guilt or innocence of defendant.

Aguallo, 322 N.C. at 822-23, 370 S.E.2d at 678.

Here, the testimony by Warner was permissible. As in *Aguallo*, the medical provider testified that her findings were consistent with what the victim told the medical provider. *Id.* at 822, 370 S.E.2d at 678. Warner did not testify about any forbidden topic, such as whether Daniel was believable, had a record of lying, or had ever been untruthful. *See id.* at 822, 370 S.E.2d at 678. *See also e.g. State v. Pierce*, 238 N.C. App. 537, 542-43, 767 S.E.2d 860, 864 (2014) (allowing testimony from a nurse in which the nurse confirmed her medical findings were consistent with the victim's disclosure in the interview with the nurse); *State v. Bullock*, 207 N.C. App. 749, 701 S.E.2d 403, No. COA10-320, 2010 WL 4290134, at *4 (2010) (unpublished) (allowing testimony from a doctor that the cause of injury was consistent with the history of sexual assault the victim provided); *State v. Mitchell*, 179 N.C. App. 656, 635 S.E.2d 73, No. COA05-1631, 2006 WL 2806872, at *2 (2006) (unpublished) (allowing testimony from a nurse regarding the consistency of her physical examination of the victim and the victim's account of the sexual assault). Accordingly, we hold that the trial court did not err in allowing Warner's challenged testimony.

B. *Kirk's Testimony*

On direct examination, Kirk, a clinical social worker and child abuse evaluation specialist, testified about her meetings with Daniel. Kirk also explained the RADAR protocol used by Safe Child Advocacy Center:

> It's developed by a professor, clinical psychologist at UNC Chapel Hill, it's based off of a national protocol that's through the NICHD protocol . . . It's for Center for National . . . it's child health and development. So it's a national protocol, most researched protocol is.
>
> . . .
>
> Radar stands for recognizing abuse disclosure and responding, so it's – the protocol follows that structure I just mentioned, but it's – it has certain sections so that engagement phase, the rapport building I mentioned, talking to a child generally and introducing myself, the orientation phase where you're doing the interview guidelines. We talk about barriers, so we talk to the child how they feel about talking with me. And you also teach a child to talk in narratives, so sharing an experience that usually is the morning, so that morning where they think about it, tell from beginning to end with details, so if they do make a disclosure, the[y're] prompted to talk with details. And then when it transitions to the topic of concern, that's where it follows more closely with that national protocol.

Kirk then answered questions on direct examination regarding her use of RADAR protocol with Daniel:

> Q. You talked about the RADAR protocol . . . . When you got to the portion after you did the initial section where you talked about scripted questions, did you have to use those in working with [Daniel] or how were you able to use the RADAR protocol at that point?
>
> A. Once he made that initial disclosure of the child abuse?
>
> Q. Yes.
>
> A. So once he made that disclosure that was prompted by one of the perhaps questions about what's the reason he

was here or the detective wanted him to come to the appointment. So once you have a disclosure, the way the protocol works is that you find out if the abuse, what the child disclosed occurs one time or more than one time because that – whether it's one time incident or multiple times, that changes the types of questions I ask.

So then you follow the protocol by having them – so [Daniel] says more than one time, he says four times. And so you try to isolate specific incidents where a child can think about one specific incident, think about it until beginning to end.

Then once you've tried that, tried to elicit a narrative account, then the questions are a little bit less scripted, but I'm trained on them through the different trainings of asking more open questions that have some focus, so the sensory questions, what did you see, where were you thinking, questions like that.

Q. And with respect to the sensory questions and sensory response, why are you trying to elicit those sorts of answers?

A. What we're trying to do in the child medical evaluation then the interview is find out from the child what has occurred to them, what's really happened, what they've experienced. So the details are crucial to understanding that. The details give context, show their perspective, so it helps you understand this is something they've experienced and are not just vague.

Q. What sort of details did [Daniel] give in your interview with him that gave that sort of context or sensory information?

A. He was able to give some details of context related to like time frames, locations, and the order of events. He also gave sensory details in the moments that he remembers about what he could see or couldn't see, was one example.

What he – what was said, what he heard. He also talked about his emotions, his thoughts. He provided additional context about where different people were when the abuse occurred. And then I can't remember your original question, sorry, but within that context he was able to tell detailed, eventually, sequentially, about what's occurred and with some internal consistencies.

Q. What do you mean by internal consistency?

A. So as he told about a specific event from – you know with details from, you know, what was occurring, kind of the summary, then walking through it with the details. He would in more than one way share the same details. An example would be saying I was crying, but also saying I was wiping my face about the same incident or saying that [his] pants were off and then later saying what he did next was put his pants back on. So that shows internal consistency.

Q. And what does that signify to you in your evaluation and examination of – or interview I guess, rather, of [Daniel]?

A. It signifies an increased likelihood that it's reliable –

[Defendant's Counsel]: Objection.

THE COURT: Sustained.

[STATE]:

Q. And when you – you mentioned about details and memory, I think you said something about what he was able to remember. [Daniel] was 10 years old at the time that you interviewed him.

A. Ten and a half, yeah.

Q. And he told you that these things happened when he

> was eight years old?
>
> A. Yes.
>
> Q. And there was a delay of approximately two years, how did that delay factor into your interview with [Daniel]?
>
> A. So with any memory, traumatic or not, over time you're likely to lose some details of what's occurred, though there are some indications traumatic memories that that will – you'll be able to recall better than unless, trying to think [of] a good word for it, meaningful, less unique memory. And kind of what's important in the interview protocol, why it differentiates between a one time incident and more than one time incident is because if something's happened multiple times, then you might form a script, is the term we use, related to memory, a script of what's occurred.
>
> So something happens similar, an event that happened more than one time, it's a similar event, then your memory is going to form on top of the prior memory. So this happens for trauma or non-traumatic events, like an analogy is that if you're someone if you go to the dentist every six months, that you're likely to be able to tell well about what happened usually at the dentist, but it's a little harder to talk about the specific timing to the dentist, because it happens in the same way. *So, but overall, the scripted memory can be pretty reliable.*
>
> *And so [Daniel] used a little bit of that*, he talked about there's some parts of the four different incidents that were similar. And so he didn't tell as much detail about those parts, but when something's unique, the worst last time, he was able to tell more detail about it and despite being two years later.

(Emphasis added.)

Defendant argues the trial court committed plain error by allowing Kirk to vouch for Daniel's credibility and to categorize Daniel's memories as internally-

consistent and reliable. The State argues Kirk's testimony was proper because it merely "informed the jury about the process of forming scripted memories to assist the jury in understanding how Daniel may have the capacity to recall more details about some of the events that he was disclosing than of others."

We hold that Kirk did not impermissibly vouch for Daniel's credibility. Kirk's testimony that "scripted memory *can* be pretty reliable" and that "Daniel used *a little bit* of that" was not tantamount to an opinion that the child was credible. *Cf. State v. Ryan*, 223 N.C. App. 325, 334, 734 S.E.2d 598, 604 (2012) (citing *State v. Heath*, 316 N.C. 337, 341-42, 341 S.E.2d 565, 568 (1986)) (testimony that "[t]here was nothing about the evaluation which led me to have . . . concerns" that the child was giving a fictitious story was tantamount to the expert witness giving her opinion that the child was not lying about the sexual abuse). We acknowledge that Kirk's testimony *could* give rise to an inference that because Daniel used scripted memory, his memory was reliable. However, Kirk's testimony did not impermissibly make that inference for the jury. Indeed, the province of the jury was left undisturbed. Accordingly, we hold the trial court did not commit error in allowing this testimony from Kirk.

Assuming *arguendo* that Kirk's testimony was impermissible vouching, the limited nature of her challenged testimony rendered its potential impact on the jury verdict *de minimis* and insufficient to demonstrate plain error.

IV. Defendant's Sentencing

Defendant argues, and the State concedes, that the trial court incorrectly sentenced him to a term not authorized by the statute applicable to his conviction for sex offense, because the offense was committed prior to the effective date of the amended sentencing statute. We agree.

An amended version of N.C. Gen. Stat. § 15A-1340.17(e1), which became effective 1 December 2011, provides:

> Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms of 340 Months or More. – Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is 340 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, *plus 12 additional months*.

N.C. Gen. Stat. § 15A-1340.17(e1) (2015) (emphasis added). The prior version of the statute calculated a maximum sentence by the same formula, except the final provision was "plus nine additional months." N.C. Gen. Stat. § 15A-1340.17(e1) (2009). The amendment added three months to any maximum sentence governed by the statute.[5]

"Trial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect *at the time of the offense*." *State v. Whitehead*, 365 N.C.

[5] Only Defendant's conviction for committing a sex offense with a child was within the scope of the statute. Defendant does not challenge, and we do not address, the sentences imposed for Defendant's other crimes.

444, 447, 722 S.E.2d 492, 495 (2012) (emphasis added) (citing *State v. Roberts*, 351 N.C. 325, 327, 523 S.E.2d 417, 418 (2000)). Defendant was convicted of committing a sex offense with Daniel in March of 2011. Accordingly, based on his minimum sentence of 450 months, Defendant should have been sentenced under the prior version of the statute to a maximum term of 549 months. But the trial court, apparently applying the amended version of the statute, sentenced Defendant to a maximum term of 552 months.

The State concedes this miscalculation, and we agree that the trial court erred. N.C. Gen. Stat. § 15A-1447(f) provides: "If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence." Because the trial court's error can be corrected by simple mathematical subtraction of three months from the maximum term, it is in the interest of judicial economy and not prejudicial to Defendant that we vacate the entry of judgment imposing the erroneous sentence and direct the trial court to enter judgment of conviction for sex offense with a child and impose a sentence of 450 to 549 months imprisonment.

Conclusion

We conclude that Defendant failed to demonstrate any reversible error. We also conclude that the trial court erred in sentencing Defendant and, therefore, vacate

the judgment of conviction for sex offense with a child and remand to the trial court for entry of judgment of conviction for that offense imposing a sentence of 450 to 549 months imprisonment. Defendant's sentencing on his other convictions will remain undisturbed.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).