

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

April 18, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 22-7005

RUSSELL GARVIS GRIFFITH, JR.,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 6:21-CR-00014-RAW-1)

Candace Caruthers, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Lisa C. Williams, Special Assistant United States Attorney (Christopher J. Wilson, United States Attorney, with her on the briefs), Office of the United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before **HARTZ**, **BALDOCK**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

Expert witnesses generally aren't allowed to testify about a criminal defendant's credibility. *See United States v. Hill*, 749 F.3d 1251, 1257–63

(10th Cir. 2014). Two expert witnesses allegedly violated this prohibition by testifying about the credibility of Mr. Russell Griffith, and the jury later found him guilty of sexually abusing his stepdaughter. The issue here involves the impact of that opinion testimony on the jury's finding of guilt.

We assess the likely impact based on the parties' theories and the trial evidence. Here both sides focused mainly on the credibility of the stepdaughter rather than Mr. Griffith himself. The focus on the stepdaughter's credibility softened whatever impact would otherwise have existed from the expert testimony on Mr. Griffith's credibility. The resulting impact was not enough to substantially affect the jury's finding of guilt.

I. Mr. Griffith allegedly abuses Amanda for roughly thirteen years.

Mr. Griffith lived with his wife (Chastity Griffith) and her daughter (Amanda) for almost eighteen years. For roughly thirteen of these years, Mr. Griffith allegedly abused Amanda, groping, penetrating, and ultimately impregnating her.

Mr. Griffith admitted that he'd had sex with Amanda and fathered her child. But Mr. Griffith denied having sex with Amanda until she was over 18. The government disagreed and charged Mr. Griffith with aggravated

sexual abuse of a minor under 12, sexual abuse of a minor under 16, and sexual abuse of an adult by a non-fatal threat.¹

The prosecution relied mainly on Amanda's account of an ongoing pattern of sexual abuse. But the prosecution also presented statements that Mr. Griffith had made to two law-enforcement officers: Sergeant Brandon Harris and Special Agent Jarrod Girod. In these statements, Mr. Griffith denied at least some of the allegations. After playing videotapes of these denials, the prosecution asked Sergeant Harris and Special Agent Girod to describe Mr. Griffith's demeanor or assess what he had said. Sergeant Harris testified that he hadn't believed Mr. Griffith, and Special Agent Girod testified that he had reached the "right place" after Mr. Griffith began changing his story.

Mr. Griffith presented a defense based primarily on Amanda's dishonesty, arguing that she had frequently manipulated others by making false allegations of sexual abuse.

Mr. Griffith was convicted on all charges.

II. Mr. Griffith has not shown an effect on a substantial right.

Mr. Griffith acknowledges that he didn't object to the opinion testimony by Sergeant Harris and Special Agent Girod. Because Mr. Griffith didn't object, he must satisfy the plain-error standard. *United*

¹ The federal district court had jurisdiction because the crimes allegedly occurred in Indian County. *See* R. vol. 1, at 167.

States v. Rosales-Miranda, 755 F.3d 1253, 1257 (10th Cir. 2014). Under this standard, Mr. Griffith must show that

- the district court committed an error,
- the error is clear or obvious under current law,
- the error affected a substantial right, and
- the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Id. at 1258.

We can assume for the sake of argument that Mr. Griffith has satisfied the first, second, and fourth requirements by showing an obvious error that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. With that assumption, we must determine whether Mr. Griffith has shown an effect on a substantial right.

The required showing involves “a reasonable probability that but for the error claimed, the result of the proceeding would have been different.” *United States v. Trujillo-Terrazas*, 405 F.3d 814, 818 (10th Cir. 2005) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 75 (2004)) (cleaned up). To predict the probability of a different outcome, we can consider

- the strength of the parties’ respective cases,
- whether the improper evidence affected the parties’ theory of the case,

- the extent that the parties emphasized the improper opinion testimony, and
 - whether the jurors had their own opportunity to assess the defendant's credibility.
- A. Mr. Griffith has not shown how the expert opinion on his honesty affected Amanda's credibility.**

At trial, both parties focused mainly on Amanda's credibility because she and Mr. Griffith had been the only eyewitnesses. Mr. Griffith didn't testify, but Amanda did. So both parties focused largely on Amanda's credibility.

The prosecution argued that Amanda's account was credible and corroborated by other individuals. In response, Mr. Griffith challenged Amanda's account by questioning her past allegations of abuse.

Though Mr. Griffith vigorously challenged Amanda's credibility, he didn't testify. Still, the prosecution presented three snippets of Mr. Griffith's prior statements to the police.

The first snippet involved Detective Kelly Hamm's questioning of Mr. Griffith in 2011. In this interview, Mr. Griffith denied Amanda's allegations of abuse and noted that she had previously made false allegations to avoid getting into trouble.

The second snippet came from Sergeant Harris, who questioned Mr. Griffith in 2019. The prosecution played part of a videotape containing this

questioning² and then asked Sergeant Harris to describe Mr. Griffith's demeanor. Sergeant Harris responded:

To me it seemed dishonest. In my experience he took too long to—it felt like to be [sic] it was completely fabricated because he, first of all, deflected and didn't answer the question I asked and then went off on this long tangent about having to build up why she asked him to have sex with her. I just did not believe a word he said.

R. vol. 2, at 302.

The third snippet came from Special Agent Girod, who gave a similar account of an interview that he had conducted in 2020. In this interview, Mr. Griffith denied being spotted in a compromising position with Amanda. After noting this denial, Special Agent Girod provided his own assessment: “[Mr. Griffith's] reaction to my confrontation about that incident was not consistent with his other reactions. I felt like I kind of struck a nerve with him and that I was getting – that I was at the right place.” *Id.* at 320.

Mr. Griffith's arguments did not focus on his denials to the police. He instead challenged Amanda's credibility, accusing her of making false

² The record on appeal doesn't contain the videotape, and the transcript says only that part of the videotape was played. So we have no way of knowing the content of the videotape. But Mr. Griffith doesn't base his appeal on the contents of the interviews themselves. To the contrary, he relies on what the officers said in open court. Because the officers' statements in court are reflected in the transcript, we have what we need for meaningful review.

sexual allegations in the past in order to manipulate adults. For this challenge, Mr. Griffith pointed to prior allegations that Amanda had made against himself, Amanda's grandfather (Raymond Mullins), and her father (Kenneth White). *Id.* at 114, 116, 396–97, 401–03.

Amanda's first allegation came when Amanda was 4 years old. At the time, Amanda's grandparents (Raymond and Phyllis Mullins) had custody over Amanda; and her mother (Chastity Griffith) was trying to wrest control from them. The mother told state officials that Amanda had accused her grandfather of tickling her "down there." *Id.* at 337. At trial Amanda denied that she had accused her grandfather, blaming her mother for concocting the accusation in order to get custody.

The second allegation came when Amanda was about 13 years old. She accused Mr. Griffith of sexual abuse, but later said that the abuser had actually been her father. At trial, Amanda explained that Mr. Griffith had convinced her to blame her father for the sexual abuse.

When Amanda was about 15 years old, she again accused Mr. Griffith of sexual abuse. Mr. Griffith downplayed this accusation, stating that Amanda had fabricated this accusation to avoid trouble for skipping school. Amanda ultimately recanted.

The parties disagree over the impact of these prior accusations. For the allegation when Amanda was 4 years old, she testified that she didn't remember making the accusation and attributed it to her mother. For the

allegation when Amanda was about 13, she insisted that Mr. Griffith had sexually abused her and had manipulated her into pinning the blame on her father. (Mr. Griffith didn't counter this evidence with any contrary testimony.) For the allegation when Amanda was about 15, she testified that she had told the truth about Mr. Griffith's abuse and recanted only because he had told her that family members would otherwise be taken away.

Sergeant Harris and Special Agent Girod had testified about Mr. Griffith's credibility, not Amanda's. The focus on Mr. Griffith's credibility—rather than Amanda's—substantially reduces the likelihood of prejudice.

B. The parties did not emphasize the officers' improper opinion testimony.

We consider not only the impact on the parties' theories but also the use of the disputed opinion testimony in closing argument. For example, when the prosecution uses closing argument to emphasize the disputed evidence, that emphasis could suggest an impact on the outcome. *See United States v. Hill*, 749 F.3d 1250, 1265–66 (10th Cir. 2014) (concluding that improper opinion testimony about the defendant's credibility had affected the defendant's substantial rights in part because the prosecution emphasized the testimony during closing argument). In contrast, if the parties do not mention the improper evidence in closing argument, the

evidence is less likely to affect the outcome. *See United States v. McHorse*, 179 F.3d 889, 902–03 (10th Cir. 1999) (stating that the evidence was more likely to be harmless because the prosecution hadn't referred to the evidence during closing argument).

That's the case here, for the prosecution's closing arguments contained no mention of the opinion testimony about Mr. Griffith's credibility. The prosecution's relative silence on the disputed opinion testimony substantially reduces the likelihood of prejudice. *See United States v. Rodriguez-Flores*, 907 F.3d 1309, 1323 (10th Cir. 2018) (concluding that opinion testimony on the defendant's credibility hadn't affected a substantial right in part because the prosecution's closing argument contained no mention of the disputed opinion on credibility).

C. The jury could independently assess the demeanor and inconsistencies underlying the opinion testimony.

In opining on credibility, Sergeant Harris and Special Agent Girod relied on Mr. Griffith's actions and statements that the jurors could see for themselves.

For example, the prosecution asked Sergeant Harris to describe Mr. Griffith's demeanor based on a videotaped interview that had been played for the jury. In responding, Sergeant Harris based his assessment of dishonesty on Mr. Griffith's attributes that the jury had just seen:

- deflecting and going on long tangents rather than answering the question,

- avoiding discussion of his sexual encounters with Amanda, and
- trying to blame others.

Similarly, Special Agent Girod relied on inconsistencies in Mr. Griffith's statements, which the jury could evaluate for itself. By the time that Special Agent Girod testified, the jury had already seen

Mr. Griffith say that

- he had used erectile dysfunction medication because the sex with Amanda had been planned,
- they had engaged in sex only once, and
- he had to awaken Amanda to have sex with her.

The jury then had a chance to see Mr. Griffith tell Special Agent Girod that

- Mr. Griffith had engaged in sex with Amanda twice, not once,
- he hadn't needed erectile dysfunction medication, and
- Amanda had already been awake when he came to her house.

Even without the officers' ultimate opinions on credibility, the jury could evaluate Mr. Griffith's

- demeanor at the videotaped interrogations and
- inconsistencies between what he had told Sergeant Harris and Special Agent Girod.

See United States v. Downen, 496 F.2d 314, 319 (10th Cir. 1974)

(demeanor); *United States v. Rodriguez-Flores*, 907 F.3d 1309, 1322 (10th

Cir. 2018) (internal contradictions). So even if we assume that the jurors had been improperly exposed to opinion testimony about Mr. Griffith's credibility, the jurors could see the demeanor and hear the inconsistencies. *See Rodriguez-Flores*, 907 F.3d at 1323 (concluding that improper opinion testimony on the defendant's credibility hadn't affected a substantial right in part because the jury had been "highly likely to draw [the same] inference" without the improper opinion testimony); *see also United States v. New*, 491 F.3d 369, 378 (8th Cir. 2007) (stating that the prosecution's improper questioning of a police officer about the defendant's credibility while testifying wasn't prejudicial in part because the jury could see the testimony for itself). The jurors thus would have seen the same signs of unreliability that had influenced the officers. Because those signs would be present with or without the officers' testimony, the likelihood of prejudice is substantially reduced.

* * *

These three factors, in combination, make it highly unlikely that the officers' opinion testimony influenced the jury.

D. *United States v. Hill* is distinguishable.

In our view, Mr. Griffith failed to show a reasonable probability of a different result without the disputed opinion testimony. Mr. Griffith focused mainly on Amanda's credibility, not his own. Because Mr. Griffith didn't testify, the jury had little information about his version of events.

And when he talked to the police, he contradicted himself. With or without expert testimony, the jury could consider those contradictions to discount Mr. Griffith's credibility. And the prosecution never referred to the disputed opinion testimony in closing arguments. So the officers' disputed opinion testimony didn't appear to influence the outcome.

Mr. Griffith disagrees, relying mainly on *United States v. Hill*, where we held that expert testimony on the defendant's credibility had affected his substantial rights. 749 F.3d 1250, 1263–66 (10th Cir. 2014). There, however, the parties' theories and trial evidence had emphasized the opinion testimony on the defendant's credibility.

In *Hill*, three brothers were alone in a house. Two of the men had been seen robbing a bank. *Id.* at 1252. The question was whether the third brother (the defendant) was one of the robbers. A law-enforcement officer improperly opined at trial that the defendant had been dishonest when answering questions. *Id.* at 1257. The prosecution focused in closing argument on the opinion testimony, and we concluded that the improper opinion testimony had affected the defendant's substantial rights. *Id.* at 1265–66. But we categorized *Hill* as the "rare exception rather than the rule." *Id.* at 1267.

More commonly, defendants fail to demonstrate the probability of a different outcome without the improper opinion testimony. In *United States v. Beierle*, for example, we concluded that the defendant had failed to show

an effect on a substantial right. 810 F.3d 1193, 1200 (10th Cir. 2016). In drawing this conclusion, we noted that the defendant had relied on *Hill*. *Id.* at 1201. We rejected this reliance in part because

- the government’s case in *Beierle* had been corroborated by other evidence,
- the defendant’s theory had conflicted with the evidence, and
- the improper opinion testimony had been fleeting.

Id. at 1200–01.

Our case more closely resembles *Beierle* than *Hill*. For example, our case differs with *Hill* as to

- the extent of corroborative evidence,
- the impact on the defendant’s trial theory,
- the prosecution’s use of the disputed opinion testimony in closing argument, and
- the jury instructions on use of expert testimony.

Here the government had corroborative evidence that had been lacking in *Hill*. There three brothers had been found in a house along with stolen merchandise. 749 F.3d at 1264. We observed that we would probably have reached a different result if the defendant had been alone in the house with the stolen merchandise. *Id.* But his two brothers were in the house, too, and they may have committed the robbery without the defendant’s involvement. *Id.*

In contrast, Mr. Griffith had to confront five forms of corroboration as to Amanda's account. First, Amanda's cousin had seen

- Amanda sleeping in Mr. Griffith's bed,
- Amanda suddenly rising from the couch after sitting on top of Mr. Griffith's lap, and
- Mr. Griffith entering a bathroom and looking at Amanda while she was naked.

Second, an adult relative had seen Mr. Griffith reach around Amanda and touch her breasts through her shirt. Third, Amanda had contemporaneously told her friends about the abuse. Fourth, Mr. Griffith admitted that he had impregnated Amanda when she was 22. Fifth, when Amanda was roughly 15 years old, she told a nurse about Mr. Griffith's acts of molestation. The prosecution thus had corroboration that had been missing in *Hill*. The presence of this corroborating evidence undercuts the impact of the officers' opinion testimony on credibility.

In *Hill*, we also relied on the close connection between the opinion testimony on the defendant's credibility and his theory at trial. There the defendant insisted that when he went to see his brothers, he was just in the wrong place at the wrong time. *Id.* at 1265. We concluded that the opinion testimony on the defendant's credibility had torpedoed his trial theory. *Id.*

Here, though, the officers' opinion testimony bore only indirectly on Mr. Griffith's main theory. His main theory challenged Amanda's credibility based on her willingness to make false sexual allegations to

skirt discipline, and Sergeant Harris and Special Agent Girod said nothing about Amanda's credibility. By addressing only Mr. Griffith's credibility, the two officers said little that would have affected the defense's primary focus.

In *Hill*, the prosecution also stressed the improper opinion testimony in closing argument. *Id.* at 1265–66. Here, though, the prosecution's closing argument contained no mention of the disputed opinion testimony. The prosecution instead referred to testimony by Sergeant Harris and Special Agent Girod about Mr. Griffith's demeanor and inconsistent statements, but asked the jury to rely on its own common sense in evaluating credibility. Because the prosecution did not emphasize the improper testimony, it more closely resembles the "single, unelaborated sentence" in *Beierle* than the "extensive analysis presented in *Hill*." *United States v. Beierle*, 810 F.3d 1193, 1201 (10th Cir. 2016).

The jury instructions here also differed from those in *Hill*. There the jury instructions referred to the law-enforcement officer's ability to present an expert opinion on credibility based on the officer's knowledge, skill, experience, training, or education. *Id.* at 1266. Here, the court gave a general instruction on the ability of expert witnesses to testify about specialized matters. But the jury instruction didn't refer to the officers' areas of expertise. To the contrary, the court instructed the jury to treat the

law-enforcement officers' testimony in "the same way as that of any other witness." R. vol. 2, at 379.

Given these differences, we conclude that *Hill* sheds little insight on the impact of the disputed opinion testimony about Mr. Griffith's credibility. His circumstances more closely resemble those in *Beierle*, where we found only minor impact from the improper testimony on the defendant's credibility.

III. The district court didn't err in allowing the introduction of a nurse's testimony about what Amanda had said.

Mr. Griffith also argues that the district court should not have let Ms. Williamson, a certified Sexual Assault Nurse Examiner, testify about what Amanda had said during her medical examination. These statements identified Mr. Griffith as the perpetrator of a sexual assault. The district court allowed Ms. Williamson to testify about this statement of Amanda's, relying on Federal Rule of Evidence 803(4). This rule creates a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment." *United States v. Joe*, 8 F.3d 1488, 1493 (10th Cir. 1993) (quoting Fed. R. Evid. 803(4) (modification in original)).

Mr. Griffith argues that identification of the perpetrator wouldn't trigger Rule 803(4) because Amanda hadn't intended the statement to aid in her treatment. But a panel held in *United States v. Edward J.* that a victim's statements to a medical provider, identifying an abuser, would

trigger the hearsay exception in Rule 803(4). 224 F.3d 1216, 1219–20 (10th Cir. 2000).

One panel can't overrule another panel's precedential opinion, *id.* at 1220, and Mr. Griffith admits that Ms. Williamson's testimony was admissible under a precedential opinion. So we must uphold the ruling allowing the introduction of Ms. Williamson's testimony.

IV. Conclusion

Mr. Griffith has not shown that the officers' opinion testimony had an effect on a substantial right, and Amanda's out-of-court statement to Ms. Williamson was admissible under our precedent. So we affirm the convictions.