

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

JONATHAN SMITH,

Appellant,

v.

Case No. 5D18-2444

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed March 6, 2020

Appeal from the Circuit Court for
Seminole County,
Melanie Chase, Judge.

William R. Ponall, of Ponall Law,
Maitland, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Carmen F. Corrente,
Assistant Attorney General, Daytona
Beach, for Appellee.

SASSO, J.

Jonathan Smith appeals his judgment and sentence after a jury found him guilty of one count of capital sexual battery.¹ He raises several issues on appeal, one of which

¹ Smith was charged with two counts of capital sexual battery through penis to mouth penetration or union during two separate time periods (Counts One and Two), and one count of lewd or lascivious molestation by forcing or enticing the alleged victim to touch his penis (Count Three). The victim identified in the amended information was six

has merit. Smith argues the trial court erred in denying his requests to redact certain portions of the recording from a police interview at his home. We agree that the probative value of the evidence was outweighed by unfair prejudice because the recording contained improper comments on the credibility of the victim and invaded the province of the jury. Because we cannot say the error was harmless beyond a reasonable doubt, we reverse. In light of our decision, we decline to address the remainder of Smith's arguments.

FACTS

The State alleged Smith committed capital sexual battery through penis to mouth penetration or union. During trial, the State sought to introduce the audio recording of Smith's interview with the police. Smith objected, arguing the recording included inadmissible comments made by the investigating officers bolstering the victim's credibility. In support, Smith filed a detailed motion outlining the specific objectionable statements and corresponding legal basis for the objections. Although the trial court sustained a few of Smith's objections, the recording as submitted to the jury contained several statements by the investigating officers commenting on the truthfulness of the child victim, including, but not limited to, the following remarks:

- "I can tell you once again from experience it's in her brain because it happened."
- "But I'm going to tell you right now, I believe that your [] licked someone's pee-pee. I wholeheartedly believe that . . ."
- "It's not within the realm of what a [] year old would come up with."
- "And I can tell you she's not lying. She's not lying about this. She did not make this story up."
- "Once again, a [] doesn't make this stuff up."
- "Very descriptive. Very detailed, not something that comes out of a [] year-old's mouth."

years old. The jury found him guilty on Count One but not guilty on Counts Two and Three. Smith was sentenced to life in prison.

In addition to the recording of Smith's interview, the State also presented testimony of the victim, the victim's mother, a family nurse practitioner, and a senior crime laboratory analyst. The witnesses confirmed that the victim reported the incident to her mother, but there was no physical evidence corroborating the victim's report. In the State's closing argument, it emphasized certain portions of the recording, noting, for example, that the detective said, "there are things that []-year-olds just don't say."

STANDARD OF REVIEW

The trial court's ruling on admissibility of evidence is reviewed for an abuse of discretion. However, that discretion is limited by the rules of evidence. *Hudson v. State*, 992 So. 2d 96, 109 (Fla. 2008).

ANALYSIS

We begin our analysis by observing a basic principle: it is error to permit a witness to comment on the credibility of another witness because the jury alone determines the credibility of witnesses. *Calloway v. State*, 210 So. 3d 1160, 1189 (Fla. 2017). This principle applies equally in cases where the testimony offered directly comments on the truthfulness of a minor victim. See *Tingle v. State*, 536 So. 2d 202 (Fla. 1988) (holding that it was error to allow counselor and social worker to testify that they believed alleged child victim was telling truth); *Fuller v. State*, 540 So. 2d 182 (Fla. 5th DCA 1989) (holding that it was error to allow member of child protection team to testify that he believed alleged child victim was telling truth); *Davis v. State*, 527 So. 2d 962 (Fla. 5th DCA 1988) (holding that it was error to allow psychologist to testify that alleged child victim was telling truth). And, "[i]t is especially harmful for a police witness to give his opinion of a witness[s] credibility because of the great weight afforded an officer's testimony." *Seibert v. State*,

923 So. 2d 460, 472 (Fla. 2006) (quoting *Page v. State*, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999)).

Applying these principles to the instant case, the error in admitting the objected-to comments becomes readily apparent. The detectives' comments during their interview of Smith went far beyond simply positing how a child could know about the sexual conduct alleged and instead constituted unequivocal statements supporting the victim's veracity. The trial court recognized this by sustaining Smith's objection to a few of the detective's similar comments. Even so, other prejudicial comments were admitted. In this respect, the trial court abused its discretion.

The State, however, argues the statements were properly admitted. The State observes that the detectives were simply engaging in an appropriate investigative technique, and with this observation we agree. However, we disagree that it necessarily follows that the jury was therefore permitted to hear the detectives' statements in order to provide context to Smith's statements. Rather, even in this setting, the trial court's gatekeeping role pursuant to section 90.403, Florida Statutes, is critical. *Accord McLean v. State*, 934 So. 2d 1248 (Fla. 2006).

Our conclusion finds support in *Jackson v. State*, 107 So. 3d 328 (Fla. 2012). In *Jackson*, the defendant filed a motion to exclude a videotaped interrogation on several grounds, including that the tape contained numerous statements of the detective's belief in the defendant's guilt. 107 So. 3d at 331. In determining the trial court erred in admitting the interview, the Florida Supreme Court noted that the detectives made repeated expressions of their personal opinions and proclamations of knowledge that the defendant committed the murder as well as statements praising the victim and eliciting sympathy for

the victim. *Id.* at 341. The *Jackson* court held that admission of the videotape was harmful error that was more prejudicial than probative, and that the great majority of the detectives' statements did not provoke relevant responses from the defendant and did not set forth circumstances in which he admitted any culpability or involvement. *Id.* at 341-42.

Here, as in *Jackson*, the objectionable statements permitted the State to improperly elicit police opinion testimony and invade the province of the jury because a central issue in the case was whether the victim fabricated or distorted a memory. And here, as in *Jackson*, the detectives' statements did not provoke relevant responses from Smith. Indeed, several of the improper comments did not provoke relevant responses at all.² Also aligning this case with the circumstances in *Jackson*, the detectives here never secured a confession from Smith.

The similarities between this case and *Jackson* also distinguish this case from *King v. State*, 260 So. 3d 985 (Fla. 2018). In *King*, the Florida Supreme Court held that a defendant failed to show the prejudice necessary for entitlement to postconviction relief resulting from the admission of a detective's statements during an interrogation and

² This exchange is emblematic of the interrogation:

Investigator One: And it's not within the realm of what a []-year-old would come up with.

Investigator Two: Okay. And you know, I'm waiting for you to kind of open up because I feel like you're on that fence, you're teetering.

Smith: I'm just . . . so in shock.

reaffirmed that “when placed in their proper context, an interrogating detective’s statements to a suspect could be understood by a rational jury to be techniques used by law enforcement officers to secure confessions.” 260 So. 3d at 996 (quoting *McMillian v. State*, 214 So. 3d 1274, 1286 (Fla. 2017)) (internal quotation marks omitted). In contrast from the interview here, the detective’s comments in *King* gave proper context to the entirety of the interrogation, which elicited several incriminating and inconsistent statements from the defendant.

Because we conclude the trial court abused its discretion in admitting portions of the recorded interview, we next consider whether the error was harmless. *Jackson*, 107 So. 3d at 342. Application of the harmless error test requires an examination of the entire record by the appellate court “including a close examination of the permissible evidence on which the jury could have legitimately relied” *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)).

In evaluating whether the error here was harmless, we first note the child victim’s credibility was the central and determinative issue in this case. There was no physical evidence corroborating the child’s statements, and the child’s report of the incident served as the foundation for each of the other witnesses’ testimony. Second, this is not a case presenting an isolated, prejudicial comment. Instead, the frequency of the prejudicial statements here compounded the error. Third, the error was further compounded when the State emphasized the recorded statement in closing. And finally, during deliberations, the jury requested and was permitted to hear the first fifteen minutes and the last fifteen minutes of Smith’s interview again. Thus, based on the specific facts and circumstances of this case, we cannot say beyond a reasonable doubt that the error was harmless.

CONCLUSION

For the reasons expressed above, we determine the trial court abused its discretion in admitting portions of the recorded interview at trial. Because the probative value of the statements at issue was substantially outweighed by the danger of unfair prejudice, and the error in admitting the statements was not harmless, we reverse Smith's convictions and remand for a new trial.

REVERSED and REMANDED.

COHEN and WALLIS, JJ., concur.