NO. COA02-155

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v. Graham County
No. 00 CRS 55-57

BOBBY JACK CLEVELAND

Appeal by defendant from judgment entered 5 June 2001 by Judge J. Gentry Caudill in Graham County Superior Court. Heard in the Court of Appeals 17 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.*

*Miles & Montgomery, by Mark Montgomery, for defendant-appellant.*

CAMPBELL, Judge.

On 24 January 2000, defendant was indicted on three counts of first degree sexual offense. The cases were tried jointly at the 29 May 2001 Criminal Session of Graham County Superior Court, Judge J. Gentry Caudill ("Judge Caudill") presiding. On 4 June 2001, the jury returned verdicts of guilty on all counts. Judge Caudill found that the mitigating factors outweighed the aggravating factors, and sentenced defendant to consecutive sentences of 259 to 320 months for each charge.

The charges were based on three separate incidents, in February, March and September or October of 1998. The evidence

tended to show that J.H. was born 27 March 1987, and defendant, J.H.'s stepfather, met J.H. when he was approximately six years old. Shortly thereafter, J.H. reported to his mother that defendant "would suck on me," but his mother did not believe him, and told him "that it never happened." When he was seven or eight years old, J.H. told a school counselor, but then said he lied "because mama had told us that if we didn't [lie] we would be removed from her." During this time J.H. and his sister, who was twelve or thirteen years old, had sexual intercourse. A videotape of this encounter was secretly made through a camera hidden in a smoke detector.

In 1997, J.H. was sent to live with his biological father and stepmother in North Carolina. J.H. was on numerous medications, but with structure and discipline was taken off the medications and his stepmother explained, "he really done good after we got him off the medication."

During 1998, defendant and J.H.'s mother began to come to North Carolina to visit him. J.H. testified that, on 14 February 1998, he was at the motel with defendant, and while his mother went out to get some things, "I was laying there and [defendant] told me to roll over. I rolled over and he pulled my underwear down and he pulled his underwear down and put Vaseline on his penis and he pushed it in my rear. . . .It hurt." J.H. further testified that this was not the first time defendant had done this to him. The next incident occurred in March 1998 when defendant and J.H.'s mother visited for J.H.'s birthday. In the motel "that night

[defendant] sucked on me and he put his penis in my rear end." J.H. testified that he didn't say anything because "[defendant] had always threatened me if I told that he would show the videotapes." The last incident was "toward the end of September, the beginning of October . . . [defendant] had told me to roll over while [my mother] was gone and he put his penis in my hind end [but a phone call interrupted him, and then later] he pulled my underwear down and he started sucking on me."

Following these visits, J.H.'s stepmother explained, "[he] would be doing real well and then after the visits he would be so mean, I mean, even by that next day. He would be just plum out of control." She explained that J.H. "did everything that he could try to do to tear up stuff . . . At night he couldn't sleep. He would swear up and down, and you could hear him in there screaming and I'd go to him and he'd be saying he'd seen something, he'd have dreams, he would be kicking the wall down."

After the final episode in September-October 1998, J.H. refused to speak to his mother on the phone, telling his stepmother that his mother had to choose between himself and defendant. J.H. then told his stepmother about the abuse. J.H.'s stepmother contacted social services. Clinical social worker, Barbara Dubrowski ("Dubrowski") testified, as did Drs. Donald Carringer ("Dr. Carringer") and Cynthia Brown ("Dr. Brown").

Defendant testified and denied the allegations. He presented several witnesses who testified as to his good character.

Defendant asserts the trial court erred in admitting the testimony of three expert witnesses. Defendant also assigns plain error to the jury instructions.

I. Testimony of Abuse

"[A] witness qualified as an expert by knowledge, skill, experience, training or education, may testify . . . in the form of an opinion" regarding a "scientific, technical or other [issue requiring] specialized knowledge" to "assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001). Moreover, "[t]estimony in the form of an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704 (2001).

An expert in diagnosing child sexual abuse may testify as to "the symptoms and characteristics of sexually abused children" and "the symptoms exhibited by the victim were consistent with" sexual abuse. *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366 (1987). Such 'consistent with' testimony is "vastly different from an expert stating on examination that the victim is 'believable' or 'is not lying'" because such testimony does not implicate the accused as the perpetrator of the crime. *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988). The symptoms and characteristics of child sexual abuse may be physical, as they were in *Aguallo*, or psychological, as they were in *Kennedy*.

Defendant asserts the trial court erred in permitting Dr. Carringer to testify "that J.H. had been sexually abused." The transcript reveals the following testimony, on direct examination:

> Q: . . . do you have an opinion as to whether or not the things you saw on Josh were *consistent with* a child who had been sexually abused?
> A: I did.
> Q: What was your opinion about that?
> A: I thought that was a definite possibility.

On re-direct the following testimony was given:

> Q: . . . [Defense counsel] asked you on that same page [as you wrote your conclusions] to conclude to a degree of medical certainty about the sexual abuse. Did you do that?
> A: Yes, I did.
> Q: What was your certainty?
> A: I said probably.
> Q: How does that fit in with what you normally find and do in cases like this?
> A: Obviously, there's an opportunity for me to say definite, and I only do that when I see conclusive physical evidence. That in my mind means that's it.

As held by the Court in *Kennedy* and *Augallo,* 'consistent with' questioning is proper. Though Dr. Carringer did not respond to the question using the 'consistent with' language, defendant did not object to the answer. Nor did defendant object to Dr. Carringer's testimony he thought it was "probable" J.H. had been sexually abused.

Without an objection, defendant's appeal is limited to plain error review. N.C. R. App. P. 10(c)(4) (2001). Plain error is error "'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Parker*, 350 N.C.

411, 427, 516 S.E.2d 106, 118 (1999) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied,* 485 U.S. 1036, 99 L.Ed.2d 912 (1988)), *cert. denied*, 528 U.S. 1084, 145 L.Ed.2d 681 (2000). Dr. Carringer's responses are similar to testimony in *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997), where a doctor testified that, in her expert opinion, "it was very likely that [the victim] had been sexually mistreated." In *Dick*, the Court concluded that such testimony was not error since "[the doctor's] medical findings were not conclusive of abuse." *Id.*, 126 N.C. App. at 316, 485 S.E.2d at 90. In the case at bar, we note that the witness similarly made it clear he would not say that the victim *was* abused, only that it was a "definite possibility" and that the victim probably was abused, but that he could not say "definitely." Here, we do not find a reasonable probability the jury would have reached a different decision without Dr. Carringer's testimony, therefore, we hold there was no plain error.

Defendant also asserts the trial court erred by permitting Dr. Brown to testify that J.H. was a victim of sexual abuse. The testimony was as follows:

> Q: . . . did you form an opinion as to whether or not [J.H.]'s history, the exam and all your knowledge indicate what you had seen were *consistent with* a child who had been sexually abused?
>
> MR. HENSLEY: Objection.
>
> THE COURT: Overruled.
>
> A: Yes, I did.
>
> Q: Can you tell those folks your opinion about [J.H.]?
>
> A: The results of my evaluation based on my history, interview with [J.H.], physical findings,

> his behavior are that he was a victim of child sexual abuse.
> Q: All the findings and things you saw were *consistent with* that?
> A: Yes.

Here, although defendant objected to the question, the "consistent with" question was proper. Defendant failed to object to the testimony, and therefore appellate review is limited to plain error. Here, the prosecutor corrected for the jury that Dr. Brown found J.H.'s evaluation to be "consistent with" a victim of sexual abuse. Under plain error review, we do not find it probable that without this testimony the jury would have reached a different verdict.

Defendant asserts the trial court erred in permitting Dubrowski, a clinical social worker, to testify that J.H.'s behavior and characteristics are consistent with a child who has been sexually abused without first establishing a proper foundation. Defendant did not object, and thus review is limited to plain error review.

Prior to the testimony Dubrowski explained symptoms of acting out in sexually abused children. Dubrowski then testified that she found J.H.'s symptoms to be consistent with those of sexually abused children. We find the testimony was supported by a proper foundation. Moreover, we do not find a reasonable jury would have reached a different verdict without this testimony, and therefore we find no plain error.

## II. Veracity Testimony

Defendant asserts the trial court erred by permitting Dr. Carringer to testify to J.H.'s veracity. The testimony occurred as follows:

> RECROSS BY DEFENDANT:
> Q: It's also well documented cases of children that had lied during exams and doctors have come in and said things and then it turned out not to be true, isn't that right?
> A: I'm aware of recantations later, yes.
>
> REDIRECT BY THE STATE:
> Q: You were just asked about the fact that some children come in and lie and the impact of that to the jury. Do you have an opinion about the child's truthfulness?
> MR. HENSLEY: Objection, Your Honor.
> THE COURT: Overruled.
> A: I found this child to be truthful in what he had to say to me.
>
> RECROSS BY DEFENDANT:
> Q: You have no way of knowing, though, do you?
> A: I cannot definitely say, that's correct.

"While it is true that in North Carolina expert testimony on the credibility of a witness is inadmissible the defendant must show prejudicial error." *State v. Davis*, 106 N.C. App. 596, 602, 418 S.E.2d 263, 267 (1992) (citations omitted). Though the Court often finds prejudicial error where the case hinges on the credibility of the victim and the expert testified he believed the victim's testimony, the test for prejudicial error is whether or not there is a "'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.'" *State v. Hall*, 98 N.C. App. 1, 11, 390 S.E.2d 169, 175 (1990) (quoting N.C. Gen. Stat. 15A-1443 (a) (2001)), *rev'd on other grounds*, 330 N.C. 808, 412 S.E.2d 883 (1992). As the Court in *Hall* explained, "the jury had already

heard lengthy testimony from the victim and testimony from two other witnesses to whom the victim had spoken about the alleged [offense]. The jury, therefore, could make their own assessment of the victim's credibility apart from [the expert]'s testimony on that subject." *Id.* In this case, J.H. had testified and his testimony was corroborated by his stepmother, his father, his stepbrother's wife, his cousin, and Dr. Brown before Dr. Carringer testified. As in *Hall*, here, the victim's testimony had already been corroborated by numerous witnesses. Therefore, despite J.H.'s credibility being at issue, we find the jury could make their own assessment of credibility apart from Dr. Carringer's belief J.H. had told him the truth. We do not find that without this testimony there is a reasonable possibility a different verdict would have been reached, therefore, we find no prejudicial error.

III. Jury Instructions

Defendant asserts the trial court erred in failing to require the jury to agree as to whether the conviction for each charge of first degree sexual offense was supported by oral or anal intercourse. The Court determined the "charge was not error, because the single wrong of engaging in a sexual act with a minor may be established by a finding of various alternatives." *State v. Petty*, 132 N.C. App. 453, 463, 512 S.E.2d 428, 434 (1999). Oral sex and anal penetration "are not disparate crimes, but are merely alternative ways of showing the commission of a sexual act." *Id.* Therefore, "'[e]ven if we assume that some jurors found that [oral sex] occurred and others found that [anal penetration] transpired,

the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct' constituting the single crime of engaging in a sexual act with a child." *Id.*, 132 N.C. App. at 463, 512 S.E.2d at 435 (quoting *State v. Hartness*, 326 N.C. 561, 565, 391 S.E.2d 177, 179 (1990)).

Defendant asserts the United States Supreme Court held in *Richardson v. United States*, 526 U.S. 813, 143 L.Ed.2d 985 (1999) that the jury must agree on the precise acts the defendant committed. In *Richardson*, the Court interpreted federal statute 21 U.S.C.S. § 848, which prohibits a person from engaging in a "continuing criminal enterprise." The Court addressed state statutes regarding sexual offenses in attempting to interpret the language of the federal law. In that discussion, the Court specifically noted that in the state cases, in part due to the special subject matter, "this Court has not held that the Constitution imposes a jury-unanimity requirement." *Richardson*, 526 U.S. at 821, 143 L.Ed.2d at 995 (citation omitted). Moreover, in *Richardson*, the Court did not impose a jury unanimity requirement for state statutes regarding sexual offenses. Therefore, we hold the trial court did not err.

We note that even when considering the errors cumulatively, we do not find prejudicial error. Considering all the evidence before the jury, including the victim's testimony, and corroborating testimony from numerous witnesses, and the expert testimony, we do not find it reasonable to conclude that without the testimony

objected to on appeal the jury would have reached a different verdict. The decision of the trial court is affirmed.

Affirmed.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).