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NO. COA13-294  
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v.

Onslow County  
Nos. 11 CRS 50379, 50381-83

EUGENE ELLIOT MCKENZIE,  
Defendant.

Appeal by defendant from judgments entered 19 September 2012 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 26 August 2013.

*Roy Cooper, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State.*

*Russell J. Hollers III, for defendant-appellant.*

MARTIN, Chief Judge.

Defendant Eugene Elliot McKenzie appeals from judgments entered upon jury verdicts finding him guilty of two counts of first-degree sexual offense, three counts of statutory sex offense, four counts of felonious child abuse by a sexual act, and six counts of taking indecent liberties with a child. As to each count, the victim was alleged to be defendant's daughter,

C.M. ("Caroline").<sup>1</sup> Judgments were entered upon the verdicts sentencing defendant to consecutive sentences totaling not less than 593 months and not more than 740 months of imprisonment.

At trial, the evidence tended to show that defendant is the biological father of the alleged victim, Caroline. Defendant was married to Caroline's mother Aimee, with whom he also had twin boys, who are younger than Caroline. At all times during the alleged abuse, defendant resided with Aimee, Caroline, and his two sons.

On 12 January 2011, Caroline disclosed allegations of sexual abuse by defendant to her neighbor Jason Moors. Prior to the disclosure, Caroline got into an argument with defendant who was outraged about Caroline's absence from the home and demanded that she give defendant her cell phone, stating, "if [I'm not] good enough to hang out with, then [I'm not] good enough to pay [Caroline's] phone bill." According to Caroline's mother, Aimee, Caroline responded, "[t]his is what happens whenever I tell you no, you punish me for everything," and then walked over to Jason Moors's house in tears.

Jason let Caroline into his home and questioned her about why she was upset, to which Caroline responded that defendant

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<sup>1</sup>Pseudonyms are used throughout to protect the identities of those who claimed that they were sexually abused by defendant.

had been touching her, engaging in oral sex with her, and forcing her to touch him.

Jason then summoned Aimee to his home and told her about Caroline's allegations. Aimee called Onslow County Sheriff's Deputy and family friend, Jon Thomas. Deputy Thomas came to Jason's house, took a statement from Caroline and advised her to stay with Jason. Aimee took Caroline to the sheriff's office the following day after school to be interviewed. Department of Social Services ("DSS") caseworker Sue Patterson and Onslow County Sheriff's Office Detective John Getty interviewed Aimee and made arrangements for Caroline to go to the Onslow County Children's Advocacy Center ("CAC") the next day.

Caroline testified at trial that defendant sexually abused her two to four times a week from age nine through age fourteen, recalling that defendant "would wait until [her] mother was gone or busy, and he'd find some way to occupy [her] brothers" before taking advantage of her. Caroline also stated that defendant took advantage of her by threatening to take away her phone and other privileges if she did not do what he asked. Additionally, the jury heard testimony from neighbor Jason Moors, Caroline's mother Aimee McKenzie, and Sheriff's Deputy Jon Thomas that tended to show consistency in Caroline's allegations.

On 14 January 2011, Aimee took Caroline to be interviewed and examined at CAC. Caroline was interviewed by child interview specialist Elizabeth Pogroszewski and examined by gynecologist Wesley Hambright, M.D. ("Dr. Hambright"). Dr. Hambright reviewed Caroline's history and assessment from the social worker and her family, and conducted a physical examination of her. Dr. Hambright described his qualifications to the court and was accepted as an expert in the field of general medicine, with a specialty in gynecology, and in the area of child sexual abuse. Dr. Hambright testified that he did not find any physical evidence of abuse upon examining Caroline, but that he was "[n]ot surprised in the least" about the lack of evidence of trauma.

Further evidence at trial tended to show that defendant sexually abused Caroline's friend Lucy, Caroline's aunt Mary, and Aimee's niece Cathy when they were about Caroline's age. Lucy, Mary, and Cathy further testified that they were scared to tell others about defendant's abuse because defendant stated that he would kill or hurt their loved ones if they did so.

Additionally, forensic scientist Jessica Posto testified that she found sperm on two pillowcases collected from Caroline's room. Thereafter, forensic scientist Elaine Staley

testified that the DNA taken from cuttings of one of the pillowcases matched defendant's DNA and that "[i]t is scientifically unreasonable to believe that the DNA profile obtained from the cutting from the [white] pillowcase could have originated from anyone other than Eugene McKenzie."

Defendant testified at trial that he wrote letters to Aimee while in jail, stating in part, "[Caroline] was the one that actually started with the questions about men and sex. . . . The only thing that ever happened was oral. No penetration at all. She had no problem with me doing her." He testified, however, that the statements in the letters were untrue and that he was trying to get Aimee to have Caroline treated by a therapist. He denied having abused Caroline.

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Defendant contends that the trial court erred in admitting expert testimony from Dr. Hambright that amounted to vouching for Caroline's credibility. More specifically, defendant argues that the trial court erred in allowing Dr. Hambright to diagnose Caroline as having been sexually abused by testifying as to his "impressions," "concerns," "worries," and by identifying defendant as perpetrator.

Defendant did not object to any of the alleged evidentiary errors at trial. "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C.R. App. P. 10(a)(4); *State v. Black*, 308 N.C. 736, 739-41, 303 S.E.2d 804, 805-07 (1983)). Thus, the standard of review for these unpreserved errors is plain error.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "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.'" *Id.* (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). A plain error "will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Furthermore, "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." *State v. Ryan*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 734 S.E.2d 598, 606 (2012), *disc. review dismissed as moot and supersedeas and disc. review denied*, \_\_\_ N.C. \_\_\_, 736 S.E.2d 188-89 (2013).

Defendant argues that the trial court erred by allowing expert witness Dr. Hambright to testify that Caroline's disclosures were "chilling" and that "the history is of great concern for long-standing sexual abuse. [Caroline] discloses sexual contact with her father against her wishes, both long-standing, since age five, to as recent as two weeks ago." Defendant further disputes Dr. Hambright's testimony that "[Caroline has] disclosed a significant long-term history of oral slash genital sexual abuse by her father. I have a high level of concern for her safety in the current setting with her father present."

"In sexual abuse cases involving child victims, an expert may not testify that sexual abuse has occurred without physical evidence supporting her opinion." *State v. Towe*, 210 N.C. App. 430, 435, 707 S.E.2d 770, 774 (2011) (citing *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (*per curiam*)), *aff'd as modified*, 366 N.C. 56, 732 S.E.2d 564 (2012). Furthermore, "[a]n expert may not testify that the child has

been 'sexually abused' if the testimony is based solely on the interview with the child-victim." *Id.* at 435, 707 S.E.2d at 774-75 (citing *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 183, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001)).

Dr. Hambright testified that he observed no physical evidence of sexual abuse on Caroline. However, the statements that he made at trial regarding his "concerns" indicate that he believes that Caroline was sexually abused. Our Supreme Court concluded in *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012), that evidence of a victim's history and account, "standing alone, is insufficient to support an expert opinion that a child was sexually abused." *Id.* Here, Dr. Hambright testified about his "concerns" and "diagnoses" in regards to Caroline based solely on history from the social worker and assertions by Caroline. Thus, because Dr. Hambright found no physical evidence of abuse, his statements constituted an inadmissible expression of opinion that Caroline had been sexually abused.

Defendant also contends that the trial court erred in allowing Dr. Hambright to identify defendant as the perpetrator of the sexual abuse of Caroline. Since Dr. Hambright's opinion



regarding defendant relied upon Caroline's credibility, it constitutes improper opinion testimony. *State v. Figured*, 116 N.C. App. 1, 9, 446 S.E.2d 838, 843 (1994) (holding that a doctor's "opinion that the children were sexually abused by defendant did not relate to a diagnosis derived from his expert examination of the prosecuting witnesses in the course of treatment" and "thus constituted improper opinion testimony"), *disc. review denied*, 339 N.C. 617, 454 S.E.2d 261 (1995). Therefore, since Dr. Hambright's opinion that Caroline was not safe around her father was not drawn from his expert examination of Caroline, but was based upon her statements to him, Dr. Hambright's testimony that she had been abused by defendant was erroneously admitted.

Finally, defendant argues that Dr. Hambright's diagnosis of sexual abuse and identification of defendant as the perpetrator was plain error, which had a probable impact on the jury's verdict, entitling him to a new trial.

In *Towe*, our Supreme Court found plain error to be prejudicial where a doctor who did not find physical evidence of abuse testified that "approximately 70 to 75 percent of the children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or

very non-specific findings, such as redness." 366 N.C. at 60, 732 S.E.2d at 566. Then, the State replied, "[a]nd that's the category that you would place [the victim] in; is that correct?" *Id.* The doctor answered, "[y]es, correct." *Id.* The State also presented testimony from the victim's mother and the mother's sister who described a similar sexual assault on her by defendant in order to show "that the defendant had a motive for the commission of the crime charged in this case." *Id.* at 63, 732 S.E.2d at 568. Despite this testimony, our Supreme Court stated that this case turned on the credibility of the victim, and thus, the testimony by expert doctor amounted to plain error. *Id.*

In the instant case, the State presented overwhelming evidence beyond Caroline's testimony to support the finding that defendant sexually abused Caroline. This case, unlike *Towe*, does not turn solely on Caroline's credibility. Although the State relied heavily upon the child victim's testimony, there was also testimony of corroborating witnesses as to their own personal accounts of sexual abuse by defendant in order to show defendant's intent, a pillow obtained from Caroline's room revealing defendant's semen, and letters defendant wrote to Aimee while in jail admitting sexual abuse of Caroline. Thus,

although we find error in the admission of Dr. Hambright's testimony, after our examination of the entire record we hold that defendant has not shown that the error had a probable impact on the jury's finding that he was guilty.

No prejudicial error.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).