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NO. COA14-672
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Franklin County
No. 05-CrS-51895

NATHAN RANDALL PETTIGREW

Appeal by defendant from judgments entered 18 December 2013 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Russell J. Hollers III for Defendant.

ERVIN, Judge.

Defendant Nathan Randall Pettigrew appeals from judgments entered based upon his convictions for statutory rape and taking indecent liberties with a child. On appeal, Defendant contends that the trial court committed plain error by allowing the admission of expert testimony that the alleged victim had been sexually assaulted. After careful consideration of Defendant's challenge to the trial court's judgments in light of the record

and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On 1 July 2005, D.B.[1] was a 15-year-old high school girl who attended Wake Forest-Rolesville High School. On that date, Darla was visiting two of her cousins, Angelica Wilson and Alisha Wilson, at her uncle's house in Bunn. After her uncle's wife pulled a gun on her uncle, Darla left the house with Angelica and her boyfriend, Frankie Batchelor, and went to Mr. Batchelor's apartment in Youngsville at some point between 9:00 p.m. and 11:00 p.m.

Upon arriving at the apartment complex, Angelica called Defendant, who lived upstairs, to come and talk with Darla, Angelica, and Mr. Batchelor. Prior to the date in question, Darla had never met Defendant. At some point, Angelica and Mr. Batchelor entered Mr. Batchelor's apartment, leaving Darla alone with Defendant, who asked Darla if she wanted to go upstairs to his apartment.

After entering the apartment, Darla and Defendant sat in the living room and talked. During their conversation, someone

[1]D.B. will be referred to throughout the remainder of this opinion as Darla, a pseudonym used for ease of reading and to protect the individual's privacy.

knocked on the apartment door. At that point, Defendant told Darla that the visitor might be his girlfriend, Peggy Woodlief, and told Darla to wait in his bedroom.

A minute or so later, Defendant joined Darla, who was seated on his mattress in the bedroom, and started kissing her. Although Darla pleaded with Defendant to stop, Defendant forced his hands down the front of her pants before entering the closet to retrieve a condom. Upon returning to the location at which Darla was situated, he pushed her legs up to her chest and vaginally penetrated her. After about thirty seconds to two minutes had elapsed, Defendant rose, went into the bathroom, and flushed the condom down the toilet. Once Defendant's assault had ended, Darla left Defendant's apartment and went to Mr. Batchelor's apartment, where she remained for the rest of the night.

On the following morning, Darla and Angelica returned to the residence of Angelica's parents in Bunn. After their arrival, Darla told Angelica's mother and Alisha everything that had happened during the preceding evening. Approximately two hours later, Darla's parents arrived and took her to the Youngsville Police Department, where Darla gave a statement describing the events of the preceding evening to investigating officers.

After their departure from the Youngsville Police Department, Darla and her parents went to Maria Parham Hospital in Henderson, where Darla was examined by Theresia Blackwell, a sexual assault nurse examiner. Ms. Blackwell took a detailed statement from Darla about the events that occurred on the preceding evening and performed a physical examination, which did not disclose any indication of any signs of trauma in or around Darla's vaginal area, the presence of semen or other bodily fluids, or any other physical evidence that a sexual assault had occurred.

B. Procedural History

On 5 July 2005, a warrant for arrest was issued charging Defendant with statutory rape of a person who was 13, 14, or 15 years old and taking indecent liberties with a child. On 29 November 2005, the Franklin County grand jury returned a bill of indictment charging Defendant with statutory rape of a person who was 13, 14, or 15 years old and taking indecent liberties with a child. The charges against Defendant came on for trial before the trial court and a jury at the 16 December 2013 criminal session of the Franklin County Superior Court. On 18 December 2013, the jury returned verdicts convicting Defendant of statutory rape of a person who was 13, 14, or 15 years old and taking indecent liberties with a child. At the conclusion

of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 288 to 355 months imprisonment based upon his conviction for statutory rape of a person who was 13, 14, or 15 years old and to a concurrent term of 19 to 23 months based upon his conviction for indecent liberties with a child. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

In his sole challenge to the trial court's judgments, Defendant contends that the trial court committed plain error by allowing the admission of testimony to the effect that Darla was the victim of a sexual assault. More specifically, Defendant contends that the trial court erroneously allowed Ms. Blackwell to provide an expert opinion that Darla had been the victim of a sexual assault despite the absence of any physical evidence tending to show that a sexual assault had, in fact, occurred. Defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

A. Relevant Facts

As we have already noted, the State presented the testimony of Ms. Blackwell, who discussed the interview with and examination of Darla that she conducted on the day following the

alleged sexual assault, at trial. During the course of her testimony, Ms. Blackwell testified that:

> [Prosecutor]: Describe [Darla's] demeanor throughout this.
>
> [Ms. Blackwell]: She was very cooperative and she was – I said she was tearful but you could see that she was scared. She was – when we have victims of sexual assault it's – you have – they have to understand and we have to understand that it's – that the test and the process that we have to go through is sort of – it is almost like repeating the incident again. And to explain that to her and to her to understand that and she – her – she just wanted to get it over. She knew, after I explained it, she wanted to get it over with and during the process it was like – it was tightening or you could sense this feel [sic] [or] I just – tightening or just nervousness or just shakiness. But she was very cooperative during that. And you didn't have to say, okay, in calming her down. She cooperated during the whole exam.
>
> [Prosecutor]: Is that common behavior to sexual assault victims?
>
> [Ms. Blackwell]: Yes, sir, yes, sir.

Defendant did not lodge an objection to any portion of the testimony that Ms. Blackwell delivered during this colloquy with the prosecutor in the court below.

B. Standard of Review

According to well-established North Carolina law, the admission of evidence without objection during the course of a criminal trial is reviewed on appeal for plain error. *State v.*

Locklear, 172 N.C. App. 249, 259, 616 S.E.2d 334, 341 (2005). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citation omitted). We will now review Defendant's challenge to the trial court's judgments utilizing the applicable standard of review.

C. Admissibility of Ms. Blackwell's Testimony

1. Relevant Legal Principles

As we have already noted, Defendant contends that the trial court committed plain error by allowing Ms. Blackwell to give an expert opinion that Darla had been the victim of a sexual assault. N.C. Gen. Stat. § 8C-1, Rule 702(a) of the North Carolina Rules of Evidence provides that, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." "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. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). Where "experts [find] no clinical evidence that would support a diagnosis of sexual abuse, their opinions that sexual abuse had occurred merely attest[] to the truthfulness of the child witness" and are inadmissible. *State v. Grover*, 142 N.C. App. 411, 413, 543 S.E.2d 179, 181 (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997)), *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (citing *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992)).

2. Ms. Blackwell's Status as Expert

In its brief, the State asserts that any opinions that Ms. Blackwell expressed should be viewed as having been provided by a lay witness rather than an expert. In support of this contention, the State points out that Ms. Blackwell was never formally tendered as, or found to be, an expert. However, we do

not believe that the absence of a formal determination concerning the extent to which Ms. Blackwell should be allowed to testify as an expert is controlling in this instance. As the Supreme Court and this Court have clearly held, in the event that the nature of the witness' job and the experience that the witness possesses make the witness better qualified than the jury to form an opinion concerning the characteristics of abused children or any other subject, "the finding that the witness is an expert is implicit in the trial court's ruling admitting the opinion testimony." *State v. Aguallo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988); *see State v. King*, __ N.C. App. __, __, 760 S.E.2d 377, 379-80 (2014) (finding that the trial court implicitly treated the witness as an expert given the witness' education and experience concerning child abuse-related issues).

The undisputed record evidence establishes that Ms. Blackwell, who was a registered nurse, worked as a sexual assault nurse examiner at Maria Parham Hospital. In view "of the nature of [her] job and the experience which [s]he had had, [s]he was better qualified than the jury to form an opinion on this matter," *State v. Phifer*, 290 N.C. 203, 213, 225 S.E.2d 786, 793 (1976), *cert. denied*, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977), making Ms. Blackwell's status as an expert in "the evaluation [of] sexual abuse [] implicit in the trial

court's admission of her testimony regarding common behaviors in [individuals] who have suffered from sexual abuse." *King*, __ N.C. App. at __, 760 S.E.2d at 380. Thus, any opinions that Ms. Blackwell delivered during the course of her testimony were expert, rather than lay, in nature.

3. Admissibility of Ms. Blackwell's Opinion

As Defendant contends and as Ms. Blackwell effectively acknowledged during her testimony, the record contains "no clinical evidence that would support a diagnosis of sexual abuse." *Grover*, 142 N.C. App. at 413, 543 S.E.2d at 181. In light of that fact, any testimony that Ms. Blackwell might have given to the effect that Darla had been sexually assaulted would have been inadmissible. We do not believe, however, that the challenged portion of Ms. Blackwell's testimony violated the evidentiary principle upon which Defendant relies.

A close reading of the relevant portion of Ms. Blackwell's testimony indicates that, rather than making an assertion that Darla had been the victim of a sexual assault, Ms. Blackwell's testimony consisted of a description of the characteristics of sexually abused children and a discussion of the extent, if any, to which Darla's conduct was consistent with the manner in which sexually abused children typically acted. In response to a request that she describe Darla's demeanor, Ms. Blackwell

testified, in essence, that Darla was both scared and cooperative; that the process of performing a sexual assault examination is "almost like repeating the incident"; that Ms. Blackwell had to explain the nature of the process to Darla, who just wanted to get "it over with"; and that, while she could "sense this feel" or "tightening or just nervousness or just shakiness" in Darla, Ms. Blackwell did not have to calm Darla down. After giving this description of Darla's demeanor, Ms. Blackwell responded in the affirmative when the prosecutor asked, "[i]s that common behavior to sexual assault victims?" As a result, the challenged portion of Ms. Blackwell's testimony consisted of a description of Darla's demeanor during the examination as cooperative leavened with a degree of nervousness and inquietude.

In the course of answering the prosecutor's question concerning Darla's demeanor, Ms. Blackwell did state that Darla "was – when we have victims of sexual assault it's – you have – they have to understand and we have to understand" that "the test and the process that we have to go through is sort of – it is almost like repeating the incident again." Although this portion of Ms. Blackwell's testimony does contain a reference to the attitudes of victims of sexual assault toward the examination process, we believe, when read in context, that this

very brief statement is, at most, one component of the explanation that Ms. Blackwell gave for Darla's nervousness rather than an assertion that Darla had been the victim of a sexual assault. In view of the fact that Ms. Blackwell, who served as the sexual assault nurse examiner at the hospital at which she worked, was clearly competent to describe the manner in which the victims of sexual assault typically respond to the examination process and the fact that this information would tend to explain the reason for Darla's nervousness during that process, the statement in question, "if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim." *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987). As a result, we do not believe that Ms. Blackwell's brief reference to the manner in which victims of sexual assault typically react to the examination process constituted an impermissible expression of opinion concerning Darla's credibility.

4. Plain Error Analysis

In addition, we are unable to conclude that the admission of any inadmissible testimony that Ms. Blackwell may have given in the course of discussing Darla's demeanor during the examination process constituted plain error. In support of his

request for a contrary determination, Defendant places principal reliance on our decision in *State v. Ryan*, __ N.C. App. __, __, 734 S.E.2d 598, 606 (2012), *disc. review denied*, 366 N.C. 433, 736 S.E.2d 189 (2013), in which we stated that:

> 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, even on plain error review, since the expert's opinion on the victim's credibility likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge.

Although the record does not, as we have already noted, contain any physical evidence tending to indicate that a sexual assault had occurred, the evidence of Defendant's guilt was overwhelming. In addition to Darla's testimony to the effect that Defendant had had vaginal intercourse with her, Ms. Woodlief testified that, after knocking on Defendant's door on the night of the assault, she peered through a crack in the window blinds and saw Darla lying on her back on a blow-up mattress in the living room wearing only a T-shirt and socks. Similarly, Angelica Wilson testified that Darla was in Defendant's apartment during the time when the assault allegedly occurred. Darla's father testified that, when he called Defendant and told him that Darla was only 15, Defendant replied

that "he did not mean for this to happen like it did." Officer Ron Atkins of the Youngsville Police Department testified that Defendant actively evaded arrest until he was taken into custody in Mississippi on unrelated charges in 2011. Defendant did not present any evidence tending to cast doubt on the credibility of Darla's description of his conduct. Thus, even if the jury had been precluded from hearing Ms. Blackwell's passing reference to the effect of the examination process on the victims of sexual assault, we cannot say that the outcome at Defendant's trial would probably have been different. As a result, for all of these reasons, Defendant is not entitled to relief from the trial court's judgments on the basis of the admission of the challenged portion of Ms. Blackwell's testimony.

III. Conclusion

Thus, for the reasons set forth above, we hold that Defendant is not entitled to relief from the trial court's judgments on the basis of the argument that he has advanced before this Court. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).