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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1261

Filed: 1 December 2015

Wake County, No. 11 CRS 218067

STATE OF NORTH CAROLINA

v.

MARLON E. MENDOZA-MEJIA, Defendant.

Appeal by defendant from judgments entered 27 February 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Appellate Defender Staples S. Hughes and Assistant Appellate Defender Andrew DeSimone, for defendant.

DIETZ, Judge.

A jury found Defendant Marlon E. Mendoza-Mejia guilty of raping and sexually assaulting his five-year-old stepdaughter, Amy¹. The State did not present any physical evidence; its case turned almost entirely on the credibility of Amy's testimony.

¹ We use a pseudonym to protect the juvenile's identity.

STATE V. MENDOZA-MEJIA

Opinion of the Court

At trial, Amy's mother testified that, when Amy told her about the alleged sexual abuse, "she was shaking, so I knew she wasn't making anything up" Defendant objected to this testimony on the ground that Amy's mother impermissibly vouched for her daughter's credibility, but the trial court overruled the objection.

The State also called Lauren Rockwell, a psychologist specializing in child sexual abuse. During her testimony, Ms. Rockwell stated that, after interviewing Amy, she placed Amy in a therapy program for children who had been sexually abused. Defendant also objected to this testimony as impermissible vouching and the trial court again overruled the objection.

On appeal, Defendant argues that the trial court erred in admitting these two witnesses' testimony. We agree. Under well-settled precedent from this Court and the North Carolina Supreme Court, in juvenile sexual abuse cases where the State relies on the victim's testimony without any physical evidence, witnesses are not permitted to testify that they believe the victim's testimony or otherwise suggest that the victim is telling the truth. This Court has held that this type of vouching testimony is prejudicial and therefore reversible error. Accordingly, for the reasons discussed below, we are constrained to vacate the judgments and remand this case for a new trial.

Facts and Procedural History

Defendant Marlon E. Mendoza-Mejia married Ms. Maria Mendoza, who had a daughter, Amy, by a prior relationship. In 2010, when Amy was five, she, Defendant, and Ms. Mendoza moved into a family member's house in North Carolina, where they shared the same bed for a number of months. Ms. Mendoza testified that she and Defendant only had sex after Amy was asleep, but conceded that Amy could have seen them having sex. Ms. Mendoza denied engaging in anal intercourse, fellatio, or cunnilingus when Amy was in the room.

On 4 August 2011, Amy told Ms. Mendoza about "bad stuff" that Defendant had been doing to her. According to child protective service employees, Amy told Ms. Mendoza that Defendant "had put his weenie in her private part front and back, and also in her mouth." Ms. Mendoza contacted the Raleigh Police Department after Amy told her this. Amy told the responding officer that Defendant put his fingers, tongue, and "weenie" into her vagina. After interviewing Amy, the responding officer arrested Defendant. Later that day, Amy told a detective with the special victims unit that Defendant put his "wiener" in her "front private" and "bottom," and that he also used his fingers and tongue on her "front private."

Amy was examined at Wake Med on 4 August 2011, and there were no abnormal physical findings. A later physical exam of Amy's genitals and anus on 17 August 2011 was "completely normal."

Opinion of the Court

On 17 August 2011, Lauren Rockwell, a psychologist specializing in child sex abuse, interviewed Amy. In this interview, Amy told Ms. Rockwell about the alleged sexual abuse by Defendant.

At trial, the State presented no physical evidence of sexual abuse. The State based its prosecution on Amy's credibility and her detailed knowledge of the alleged sexual acts. Specifically, it produced evidence of Amy's statements to Ms. Mendoza, the responding officer, the detective, and Ms. Rockwell in order to corroborate her account of sexual abuse.

When testifying about Amy's disclosure of the alleged sexual abuse, Ms. Mendoza stated, "she was shaking, so I knew she wasn't making anything up. . . ." The trial court overruled Defendant's objection to this testimony.

Also, after Ms. Rockwell was accepted as an expert in the evaluation of children for abuse and neglect, she testified that, after interviewing Amy, she wanted Amy placed in trauma focused cognitive behavioral therapy based on what Amy shared with her in the interview. Ms. Rockwell explained that this program was the gold standard treatment for sexually abused children. The trial court also overruled Defendant's objection to Ms. Rockwell's testimony about placing Amy in the therapy program based on what Amy told her. The jury convicted Defendant of one count of rape of a child and four counts of first-degree sexual offense with a child. Defendant timely appealed.

Analysis

Defendant argues that the trial court committed prejudicial error in admitting Ms. Rockwell's and Ms. Mendoza's statements because both statements impermissibly vouched for Amy's credibility. Defendant argues that, in juvenile sexual abuse cases that depend on the victim's testimony without corresponding physical evidence, well-settled precedent from this Court bars witnesses from testifying that they believe the victim. For the reasons discussed below, we agree.

This Court reviews a trial court's admission of testimony that allegedly vouches for a victim's credibility for abuse of discretion. *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991) (“[t]he determination of the admissibility of expert testimony is within the sound discretion of the trial judge.”); *see also State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000) (“whether a lay witness may testify as to an opinion is reviewed for abuse of discretion.”).

I. Ms. Mendoza's Testimony

Defendant argues that the trial court erred in admitting Ms. Mendoza's testimony that Amy “was shaking, so I knew she wasn't making anything up. . . .” Defendant contends that this testimony improperly vouched for Amy's credibility. As explained below, we are bound by indistinguishable precedent from this Court holding that the challenged testimony is inadmissible.

Opinion of the Court

A lay witness at trial is forbidden from vouching for the credibility of another witness: “[w]hen one witness vouches for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701.” *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007) (internal quotations omitted).

In *Gobal*, a police detective testified that he believed a witness because when he spoke “I don't think he was quite breathing as hard . . . I felt like he felt guilty about it and just wanted to get it out.” *Id.* at 318-19, 651 S.E.2d at 286. This Court held that the detective’s testimony was error as a matter of law because it impermissibly vouched for the witness’s credibility. The Court emphasized that “the jury was able to see for itself the manner and appearance of [the witness] when he testified, and determine for itself if it wanted to believe him.” *Id.* at 319, 651 S.E.2d at 286.

Here, Ms. Mendoza’s testimony that Amy “was shaking, so I knew she wasn’t making anything up” is indistinguishable from the vouching testimony in *Gobal*. As in *Gobal*, the witness here—Amy—was available and testified. Indeed, the State’s case turned entirely on Amy’s testimony because there was no physical evidence of a sexual assault. To be sure, Ms. Mendoza certainly could testify about Amy’s appearance and demeanor. *See id.* at 317, 651 S.E.2d at 285. And from that testimony, the jury might draw its own conclusions about Amy’s statements at the

time. But by stating that she *knew* Amy wasn't making it up, Ms. Mendoza unquestionably vouched for Amy's credibility. This is improper and, as this Court has held, it is particularly prejudicial in a juvenile sexual assault case where there is no physical evidence and only the juvenile's testimony supports the crime. *See State v. Dixon*, 150 N.C. App. 46, 53-54, 563 S.E.2d 594, 599 (2002). As explained below, we find this and another similar error in the case cumulatively amount to reversible error.

II. Ms. Rockwell's Testimony

Defendant next argues that the trial court abused its discretion in admitting Ms. Rockwell's testimony that she placed Amy in a therapy reserved for children who have been sexually abused. Defendant contends that this testimony did not serve any purpose except to impermissibly vouch for Amy's testimony that she was sexually abused. Again, we agree.

It is well-settled that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (emphasis in original). Importantly, an expert need not expressly state that she finds a juvenile credible in order to impermissibly vouch for the juvenile; rather we analyze whether

there is any “appreciable difference between [the challenged] statement and a statement that [the child] is believable.” *State v. Frady*, ___ N.C. App. ___, ___, 747 S.E.2d 164, 167 (2013).

Here, Ms. Rockwell’s testimony that, after speaking to Amy, she referred Amy to therapy for sexually abused children served no purpose to the State’s case except to imply that Ms. Rockwell believed Amy’s testimony. Because Ms. Rockwell explained that the program was for children who were sexually abused, her challenged testimony necessarily communicated her opinion that, based on her interview with Amy, Amy had been sexually abused. This is the only explanation for why she would place Amy in a program reserved for victims of sexual abuse. Simply put, the obvious effect of Ms. Rockwell’s challenged testimony was to convey to the jury that Ms. Rockwell *believed* Amy’s statements that she had been sexually abused. As noted above, there was no physical evidence in this case—the case turned entirely on the credibility of Amy’s testimony. Thus, the trial court abused its discretion in admitting this testimony.

III. Cumulative Prejudice

Defendant argues that, taken as a whole, the erroneous admission of Ms. Rockwell’s and Ms. Mendoza’s vouching testimony prejudiced him. We agree.

In order to show that he was prejudiced by the admission of Ms. Rockwell’s and Ms. Mendoza’s testimony, Defendant must prove “there is a reasonable possibility

STATE V. MENDOZA-MEJIA

Opinion of the Court

that, had the error in question not been committed, a different result would have been reached at the trial. . . .” N.C. Gen. Stat. § 15A-1443(a) (2013). A defendant meets this burden when a trial court admits impermissible testimony vouching for a prosecuting witness and the state’s case depends largely on the testimony of that witness. *Dixon*, 150 N.C. App. at 53, 563 S.E.2d at 599.

Here, Amy was the prosecuting witness and the State’s case turned on her credibility because there was no physical evidence of sexual abuse. Therefore, under *Dixon*, the admission of Ms. Rockwell’s vouching testimony prejudiced Defendant. Moreover, it is clear that the admission of Ms. Rockwell’s and Ms. Mendoza’s vouching testimony cumulatively prejudiced Defendant. *See State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992) (errors were sufficiently prejudicial when considered cumulatively).

The State responds that, assuming the admission of the testimony at issue was error, it was not prejudicial because the judge instructed the jury that what Amy told each witness was not substantive evidence, but only corroborative to the extent it did in fact corroborate Amy’s testimony at trial. But that did not cure the error. This testimony was impermissible vouching; it is not admissible either as substantive evidence or to corroborate Amy’s testimony. Thus, the trial court could have cured the error only by instructing the jury to disregard the vouching testimony. The court did not do so.

Opinion of the Court

In sum, we hold that the testimony impermissibly vouching for Amy's credibility prejudiced Defendant. We must therefore vacate the judgments and remand for a new trial. Because we grant a new trial on this ground, we need not reach Defendant's remaining arguments.

Conclusion

For the reasons discussed above, the trial court abused its discretion by admitting testimony from two witnesses who vouched for the credibility of a juvenile victim in a sexual assault case that turned entirely on the victim's testimony without any physical evidence. This testimony prejudiced the defendant and we therefore grant a new trial.

VACATED AND REMANDED FOR NEW TRIAL.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).