IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-229

Filed: 19 September 2017

Mecklenburg County, Nos. 14 CRS 243974-77

STATE OF NORTH CAROLINA

v.

KEVIN CHRISTOPHER MCREED

Appeal by defendant from judgments entered 20 November 2015 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ann W. Matthews, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant.

ARROWOOD, Judge.

Kevin Christopher McReed ("defendant") appeals from judgments entered upon his convictions for second degree sexual offense, second degree kidnapping, and assault on a female. Defendant's sole issue on appeal is that the trial court erred by instructing the jury to treat a witness as an expert in forensic and emergency

medicine and by admitting testimony that improperly vouched for the credibility of the alleged victim. For the reasons stated herein, we find no error.

I. Background

On 1 December 2014, defendant was indicted on the following charges: second degree sexual offense in violation of N.C. Gen. Stat. § 14-27.5; first degree kidnapping in violation of N.C. Gen. Stat. § 14-39; common law robbery; and assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2). The four charges were joined for trial.

Defendant was tried at the 16 November 2015 criminal session of Mecklenburg County Superior Court, the Honorable Yvonne Mims Evans presiding.

The State's evidence tended to show that around 3:00 or 4:00 a.m. on 10 October 2014, E.R.[1] was drinking alcohol at a friend's residence located at the Shamrock Garden Apartments in Charlotte, North Carolina. The police had been called and so E.R. decided to go home. As she was walking home, defendant came out of a path that led to Shamrock Road and whistled at her. E.R. stopped to talk to him. E.R. testified that they negotiated sex for money. The two walked down Shamrock Road, crossed the street, and went into Methodist Park. Defendant tried to "lure" E.R. into a soccer field but E.R. was able to direct defendant towards a stairway that led into a recreation center.

[1] Initials have been used to protect the identity of the victim.

When E.R. and defendant reached the bottom of the stairway, E.R. took two cell phones out of her pocket and placed them on a ledge. E.R. asked defendant for the money and he "basically said he didn't have any money." E.R. then picked up her cell phones, placed them in her back pocket, and started walking back towards the street. When she reached the street, she heard defendant running towards her. E.R. turned around and defendant grabbed her. Defendant placed his hand over her mouth and dragged her back down the stairway. Defendant then threw her on the ground, pulled E.R.'s pants down, and began "hitting me and pounding me, hit me in the ribs and my face, everywhere. Then – then he raped me." E.R. testified that defendant's penis entered her anally. Defendant then took E.R.'s cell phones and left the scene. E.R. went home and used her friend's cell phone to call the police.

E.R. was taken to Presbyterian Hospital by ambulance. There, she was questioned by police, examined by a physician and then by a sexual assault nurse examiner ("SANE"). Gina Spath ("Spath"), accepted as an expert in emergency and forensic medicine, testified that she was the SANE that examined E.R. on 10 October 2014. Spath testified that she first obtained a statement from E.R. about the alleged sexual assault. Spath then took pictures of E.R.'s injuries. E.R. had bruises on the side of her neck, jaw, and ear and abrasions on her hip, lower back, and knees. Spath also performed a pelvic examination of E.R. and found no injuries to E.R.'s genitals or rectum.

Detective William Clark and Detective Michael Melendez, of the Charlotte-Mecklenburg Police Department, interviewed defendant on 11 November 2014. Defendant waived his *Miranda* rights. A DVD containing the video recorded interview was played for the jury. The jury was also given copies of a transcript of the interview. In the interview, defendant stated that after he asked E.R. "for some service[,]" the two went to a stairwell. E.R. informed defendant that sex would cost $20.00 and fellatio would cost $10.00. Defendant stated that he gave E.R. $15.00, all the money he had. Defendant recalled receiving fellatio from E.R. and then stated that he "stuck it in her butt for a little second[.]" Defendant stated that he got "a mess" on his penis and then "bailed." He admitted that the two "got into it" and that E.R. started swinging and threw a stick at him. Defendant conceded to grabbing, pushing, and punching E.R. a couple of times. He also stated that he "probably did drag her" across the stairs.

The defendant did not present any evidence.

On 20 November 2015, a jury found defendant guilty of second degree sexual offense, first degree kidnapping, and assault on a female. Defendant was found not guilty of common law robbery.

Judgment was arrested on the conviction for first degree kidnapping with a sentenced imposed for second degree kidnapping. Defendant's second degree sexual offense and second degree kidnapping convictions were consolidated for judgment and

defendant was sentenced to a term of 80 to 156 months imprisonment. On the conviction for assault on a female, defendant was sentenced to imprisonment for 75 days. Defendant filed timely notice of appeal on 24 November 2015.

II. Discussion

The sole issue on appeal is whether the trial court erred by instructing the jury to treat Nurse Spath as an expert in forensic and emergency medicine and by allowing her to testify that nothing in her examination of E.R. caused her to question E.R.'s account of the alleged sexual assault.

At the outset, we note defendant has failed to provide any argument or supporting authority for the first portion of his argument that the trial court erred by instructing the jury to treat Spath as an expert in forensic and emergency medicine. Accordingly, we consider this portion of defendant's argument on appeal as abandoned. *See* N.C. R. App. P. 28(b)(6) (2017) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

In regards to the second portion of defendant's issue on appeal, defendant argues that it was error to allow Spath to testify that she found nothing in her examination of E.R. that raised any questions about E.R.'s account of the alleged sexual assault. Defendant asserts that Spath's opinion was "nothing but an inadmissible expert opinion on E.R.'s credibility." We disagree.

"In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of discretion." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012).

"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). "In a prosecution for a sexual offense . . ., absent physical evidence of sexual abuse, expert opinion that sexual abuse has in fact occurred constitutes an impermissible opinion regarding the victim's credibility and is inadmissible." *State v. Pierce*, 238 N.C. App. 537, 542, 767 S.E.2d 860, 864 (2014).

In the present case, Spath testified that in her examination of E.R., she "look[ed] for and evaluat[ed] injury on the outside of her body head to toe, and then we would move on to doing the pelvic exam part of it to examine the genitalia." Spath testified that during the genital examination of E.R., she found no injury to E.R.'s genitals or rectum. Spath was asked by the State whether she had an opinion as to whether or not there should have been injuries, to which she replied, "We don't always find injury." Thereafter, Spath described other results of her examination of E.R. that included "battle signs" on her ears, multiple areas of bruising on E.R.'s body, and scratches. Then, the following challenged exchange occurred:

> [THE STATE:] In your examination of [E.R.], did anything in your physical examination of her cause you to question

the history or – the history being the statement that she provided to you?

[SPATH:] No.

[THE STATE:] And was her examination –

[DEFENSE COUNSEL:] I'm going to object to that opinion.

[THE STATE:] I'm sorry, I didn't hear.

[DEFENSE COUNSEL:] Objection.

THE COURT: What was the question?

[THE STATE:] Did anything in your examination cause you to question the history she provided?

[DEFENSE COUNSEL:] Objection.

THE COURT: Overruled.

[SPATH:] No.

[THE STATE:] Is her examination consistent – is her physical examination consistent with the history that she provided you?

[DEFENSE COUNSEL:] Objection.

THE COURT: Sustained.

[THE STATE:] Did anything cause you to question the history she provided?

[DEFENSE COUNSEL:] Objection.

THE COURT: Overruled.

[SPATH:] No.

In support of his argument that the trial court erred in admitting this testimony, defendant cites to *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001).

In *Grover*, our Court held that the trial court erred by admitting the testimonies of two expert witnesses. *Grover*, 142 N.C. App. at 418-19, 543 S.E.2d at 183. On *voir dire*, the first expert witness stated, "[t]he conclusion was that I *confirmed* that [S] is a sexually abused child." *Id*. at 414, 543 S.E.2d at 181. The trial court then allowed the first expert witness to testify, over the defendant's objection, that her conclusion was based upon "[S]'s description of a number of sexualized activities and acts . . . which also corroborated [S]'s statements and provided further validation." *Id.* The first witness admitted that she filed her report, in which she reached her conclusions, before S's physical examination results had even returned. *Id.* The second expert witness also testified that although she found no physical evidence of abuse, "[i]t was [her] conclusion that [M] was a sexually abused child." *Id.* Her conclusion was based solely on M's disclosures to her and on M's disclosures to an interviewer at a hospital. *Id*. at 416, 543 S.E.2d at 182. Our Court held that in the absence of physical evidence of sexual abuse, expert testimony that a child had in fact been sexually abused was inadmissible because it bolstered the veracity of the children's testimonies of sexual abuse. *Id.* at 418-20, 543 S.E.2d at 183-85.

Grover is distinguishable from the present case because Spath never testified that the sexual assault had *in fact* occurred, nor did Spath provide an opinion that E.R. was a victim of sexual assault. Spath's testimony that the results of her physical examination did not cause her to question E.R.'s account of the alleged sexual assault cannot be equated with a statement that E.R. had in fact been sexually assaulted. Therefore, defendant's argument that Spath's testimony amounted to an impermissible expert opinion on E.R.'s credibility fails.

Defendant also cites *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988), for the proposition that it is improper for an expert to give an opinion that "implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts[]" as this is a "comment on the truthfulness of the victim or the guilt or innocence of defendant." *Id.* at 822-23, 370 S.E.2d at 678. Although this contention is an accurate statement of the law, the expert testimony in the case *sub judice* did not implicate defendant as the perpetrator by affirming E.R.'s account.

In *Aguallo*, the expert witness, a pediatrician, testified that she performed a complete examination of the victim and found a "lacerational cut" in the hymen area of the child. *Id.* at 822, 370 S.E.2d at 678.

> When asked if the findings from the physical examination were consistent with what the child had told her, the doctor responded affirmatively. At a later time during direct examination, the prosecutor again asked the doctor if, in her opinion, the lacerations and adhesions she found were consistent with what the child had told her. Over objection

she responded, "I felt it was consistent with her history."

Id. The defendant argued that the pediatrician's testimony was a comment on the victim's truthfulness or the guilt or innocence of the defendant and the North Carolina Supreme Court disagreed. *Id*. It held that:

> Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is "believable" or "is not lying." The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred. The important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not.
>
> The statement of the doctor only revealed the consistency of her findings with the presence of vaginal trauma. This expert opinion did not comment on the truthfulness of the victim or the guilt or innocence of defendant.

Id. at 822-23, 370 S.E.2d at 678.

Similar to the pediatrician's testimony in *Aguallo*, Spath testified that the results of her physical examination did not cause her to question the history E.R. provided. Spath did not opine that E.R. was "believable" or "not lying." Essentially, Spath's testimony suggested that the results of E.R's physical examination did not contradict E.R's account. Her opinion did not comment on the truthfulness of E.R. or

on the guilt or innocence of defendant. Accordingly, we hold that defendant has failed to demonstrate that the trial court abused its discretion in admitting the testimony of Spath.

NO ERROR.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).