IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-292

Filed: 4 December 2018

Guilford County, Nos. 15 CRS 79657-61; 79672-76

STATE OF NORTH CAROLINA

v.

ALLEN JAMISON

Appeal by defendant from judgments entered 13 July 2017 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather H. Freeman, for the State.

Mark Montgomery for defendant-appellant.

ZACHARY, Judge.

Allen Jamison ("Defendant") appeals from his convictions of three counts of first-degree sex offense with a child, five counts of indecent liberties with a child, and five counts of felony child abuse by a sexual act. Defendant argues on appeal that the trial court committed plain error by allowing an expert witness to vouch for the credibility of the victim. While it was error for the trial court to admit this testimony

in the absence of a timely objection, it does not rise to the level of plain error to award a new trial.

Factual and Procedural Background

Tyra Curry and her five-year-old daughter, Liza,[1] moved to New Jersey from Ohio to live with Defendant. Eventually Liza, her mother, and Defendant moved to Greensboro, where Liza's grandfather lived. Defendant and Liza's mother married. Defendant began sexually abusing Liza at night while Liza's mother was at work. The first incident occurred in Greensboro, when Defendant called for Liza to come into his bedroom. Liza testified that

> he told me to get on my knees, close my eyes and open my mouth. So I did. And he put his private part in my mouth. And I tried to pull away, but then he took his hands to the back of my head and started pulling. And so then I started choking.

Defendant "ended up peeing" in Liza's mouth, and Defendant told her to "spit it out." Defendant told Liza not to tell or she would get a "butt whooping," which Defendant had done before with a belt. Liza obeyed and did not tell her mother what happened because she "did not want to get a whooping."

A second incident occurred when Defendant called Liza into the guest bedroom and told her to take off her pants and underwear and get onto the bed. Liza testified that Defendant "took his private part out and tried to put it in my bottom, in my

[1] A pseudonym is used to protect the identity of the minor.

vagina, but he couldn't, so he put some vaseline and he had got it in my bottom, but he could not get in my vagina. And then he had made me suck [the vaseline] off." Eventually Liza saw "pee" come out of Defendant's "private part." When asked how many times Defendant put his private part in her mouth, Liza replied, "A lot." Liza testified that Defendant was able to get his penis all the way into her bottom four or five times.

Another incident occurred in the kitchen when Liza was seven years old and Liza's mother had gone to the store. Liza was playing a video game when Defendant called Liza into the kitchen. Defendant put his penis into Liza's mouth while Defendant stood near a window overlooking the driveway so he could see when Liza's mother returned. Liza again said that she did not tell anyone because she feared "a whooping" and did not want Defendant to hurt her.

When Liza was eight years old, she told her mother of the abuse she was experiencing. According to Liza, Liza's mother was mad, turned red, and told Liza that she would talk with Defendant. Defendant asked Liza why she told and instructed her never to speak to him again. The next day, Liza's mother asked Liza to describe Defendant's penis. Liza described an uncircumcised penis, after which Liza's mother said, "okay, and just walked away." Nevertheless, Defendant continued to live with and abuse Liza. Liza testified that she did not tell her teachers about the

abuse because she "thought that if [her] mom didn't do anything, . . . why would they."

When Liza was nine years old, Cherish Witcher, Liza's godmother, moved from Ohio to North Carolina to care for Liza while Liza's mother went to Texas for work. Liza had recently begun having accidents and defecating on herself. Initially, Cherish agreed with Tyra that Liza was "being lazy and not going to the bathroom[,]" but after one incident, Cherish asked Liza "what's going on." Liza began crying. Cherish asked Liza if anyone was touching her and Liza replied that Defendant was touching her. Liza then recounted Defendant's actions in detail, including Defendant putting his penis in her mouth and his numerous attempts to thrust his penis into her vaginal and anal areas. Cherish contacted Liza's mother and told her what Liza had revealed. Liza's mother admitted knowledge of the abuse, and Cherish informed her that she planned to file a police report. Cherish contacted Liza's grandfather, Tyrone McCain, who was a Greensboro Police Officer.

After a police investigation, the Guilford County Grand Jury indicted Defendant on 26 October 2015 for five counts of first-degree sex offense with a child, five counts of indecent liberties with a child, and five counts of felony child abuse by a sexual act. Defendant's case came on for trial at the 26 June 2017 criminal session of Guilford County Superior Court, the Honorable David L. Hall presiding. On 30 June 2017, a jury found Defendant guilty of three counts of first-degree sex offense

with a child, five counts of indecent liberties with a child, and five counts of felony child abuse by sexual act. Defendant gave oral notice of appeal in open court.

Discussion

I. Impermissible Credibility Testimony

Defendant argues on appeal that the trial court committed plain error in allowing an expert witness to vouch for Liza's credibility. Upon review, we conclude that the challenged testimony was inadmissible, but that the admission of the testimony could not have had a probable impact on the jury's verdicts sufficient to warrant reversal of Defendant's convictions.

Defendant did not object to the testimony at issue; therefore, we review the admission of the testimony for plain error. *See* N.C.R. App. P. 10(a)(4) (providing that certain unpreserved errors in criminal proceedings may nevertheless be made the subject of an appeal if contended to be plain error). To establish 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotations, and brackets omitted). "The plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *Id.*

Our statutes provide that a witness may qualify as an expert and testify to the witness's opinion as an expert in limited circumstances:

> (a) If 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, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017). Such testimony is admissible because the witness, due to his or her expertise, "is in a better position to have an opinion on the subject than is the trier of fact." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011). "[O]ur 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. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89, *disc. rev. denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Therefore, "[a]n expert witness may not attest to the victim's credibility, as he or she is in no better position than the jury to assess credibility." *In re T.R.B.*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 (2003),

appeal dismissed and disc. rev. improvidently allowed, 358 N.C. 370, 595 S.E.2d 146 (2004).

In *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam), our Supreme Court distinguished between an expert witness's opinion that sexual abuse has occurred where there is no physical evidence of abuse, and expert testimony that the child has exhibited characteristics consistent with the profiles of children who have been sexually abused:

> In 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. 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.

Id. at 266-67, 559 S.E.2d at 789 (citations and emphasis omitted).

The question of whether particular testimony amounted to improper vouching for a witness must be decided on a fact-specific basis. *State v. Chandler*, 364 N.C. 313, 318-19, 697 S.E.2d 327, 331 (2010) ("Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry. Different fact patterns may yield different results. . . . Before expert testimony may be admitted, an adequate foundation must be laid." (citations omitted)). Our appellate courts have had ample opportunity to analyze expert opinion in child abuse cases for potential

impermissible vouching. *See, e.g.*, *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 565 (2012) (holding that the trial court committed plain error by admitting a pediatrician's opinion that the victim was among 70 to 75 percent of "children who had been sexually abused but showed no physical symptoms of such abuse"); *State v. Martinez*, 212 N.C. App. 661, 665, 711 S.E.2d 787, 789-90 (2011) (concluding that the defendant was prejudiced by a social worker's testimony "that DSS 'substantiated' the [sexual abuse] claim after conducting an investigation" because "the State's case rested solely on [the victim]'s testimony and additional corroborative testimony"), *disc. rev. denied*, 365 N.C. 359, 719 S.E.2d 23 (2011); *State v. Horton*, 200 N.C. App. 74, 78, 682 S.E.2d 754, 757 (2009) (holding that a counselor provided "an impermissible opinion regarding the victim's credibility" by testifying that "when children provide those types of specific details it enhances their credibility"); *State v. Ewell*, 168 N.C. App. 98, 105-06, 606 S.E.2d 914, 919-20 (2005) ("In the absence of any physical evidence, the admission of Dr. Previll's opinion testimony that 'it was probable that [T.G.] was a victim of sexual abuse' was error. The improperly admitted opinion by a medical expert on T.G.'s credibility prejudiced defendant in the eyes of the jury." (alteration in original) (citations omitted)), *disc. rev. denied*, 359 N.C. 412, 612 S.E.2d 326 (2005); *State v. Bush*, 164 N.C. App. 254, 257, 595 S.E.2d 715, 717 (2004) (holding that the trial court's admission of "highly prejudicial and otherwise inadmissible testimony" by a pediatric gynecologist that she had made a "definite"

diagnosis of sexual abuse "rose to the level of plain error"); *State v. Grover*, 142 N.C. App. 411, 414-16, 543 S.E.2d 179, 181-83 (concluding that a social worker's testimony that she "confirmed that [the victim] is a sexually abused child" was inadmissible, where her conclusion was solely based upon the minor-victim's disclosures), *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001).

Defendant challenges the statements of Brenna Fairley, a child forensic interview specialist with the Greensboro Children's Advocacy Center, who testified as an expert in forensic interviewing and child disclosures. Fairley explained that when she conducts a forensic interview with a child, she assesses for "any kind of barriers there might be for their disclosure." Liza provided Fairley with "five separate episodic detailed events of times that she had been inappropriately touched." At one point during Fairley's testimony, the prosecutor repeatedly used the word "disclose" in her questions. When asked, "Did [Liza] disclose another incident to you?", Fairley responded by parroting the prosecutor's wording, answering that Liza "disclosed an incident." Later, Fairley described "barriers to disclosure" as "things that are [going to] influence the child's ability and the extent to which they're able to disclose their experiences." Fairley noted several barriers in Liza's case, including "her emotional closeness to the defendant," the fact "that she had been threatened not to disclose" which "was very impactful for her in her interview and in

other disclosures," and "a lack of support from her mother." Fairley then posited that those barriers affected Liza's disclosures:

> [I]t's rather impressive that she disclosed in spite of those barriers. And also, you know, when we talk about disclosure of child abuse, it's really—it's a process and it's not a singular event.
>
> And so when children disclose, they may give a little bit at a time and then more and more. I would say that the impact of her barriers was that there could have been more experiences that she still had not felt safe to tell at the time of her forensic interview.

When asked whether she thought Liza had been coached for the interview, Fairley responded:

> [Fairely:] While she was very nervous in her interview, she was also very forthcoming with information. She provided information that, had she been coached to make those statements, she wouldn't have been able to make those statements.
>
> [The State:] Like what statements are you referring to?
>
> [Fairley:] The way that she articulated some of her experiences were just very age appropriate. She also was able to provide really specific details about different instances that just—she wouldn't have been able to do if she hadn't lived those experiences herself.

Fairley's expert testimony regarding the victim's credibility is similar to that held inadmissible in *State v. Frady*, 228 N.C. App. 682, 747 S.E.2d 164 (2013). In *Frady*, a medical doctor testified that a six-year-old's disclosure was "consistent with sexual abuse." *Id.* at 684, 747 S.E.2d at 166. The doctor stated that her opinion was

based on "[t]he consistency of [the child's] statements over time, the fact that she could give sensory details of the event . . . and her knowledge of the sexual act that is beyond her developmental level." *Id.* (original alterations omitted). The *Frady* Court noted that the doctor never examined or interviewed the victim, but rather based her conclusions on a review of the forensic interview and case file. *Id.* at 686, 747 S.E.2d at 167. On those facts, this Court held that "[w]hile Dr. Brown did not diagnose Debbie as having been sexually abused, she essentially expressed her opinion that Debbie is credible. We see no appreciable difference between this statement and a statement that Debbie is believable." *Id.* at 685-86, 747 S.E.2d at 167.

Fairley's expert testimony is similarly inadmissible. First, we note the frequent use of the terms "disclosure" and "disclose." A disclosure is "[t]he act or process of making known something that was previously unknown; a revelation of facts[.]" *Disclosure*, *Black's Law Dictionary* (9th ed. 2009). The use of this word suggests that there was something factual to divulge, and is itself a comment on the declarant's credibility and the consequent reliability of what is being revealed. Fairley's repeated use of this term lent credibility to Liza's testimony. Next, Fairley's comment that it was "rather impressive that she disclosed in spite of those barriers" gives the impression that Liza's revelations in the forensic interview are more believable because she overcame barriers to her disclosure. Finally, Fairley testified that Liza was "very forthcoming with information," her responses were "age

appropriate," and she provided "really specific details" about the alleged abuse. These statements are similar to those held inadmissible in *Frady* as improper opinion regarding the victim's credibility, specifically "the fact that she could give sensory details, and because her knowledge of the sexual act was beyond her developmental level." *Frady*, 228 N.C. App. at 686, 747 S.E.2d at 167. These statements enhanced Liza's credibility and did not provide any information that the jurors could not determine for themselves based on their own observations. The challenged testimony was not admissible as an expert opinion, and it was therefore error for the trial court to admit Fairley's testimony.

Nonetheless, while the admission of Fairley's testimony was error, Defendant failed to object and failed to show any prejudice in that the admission of this testimony did not have a probable impact on Defendant's convictions. In *State v. Sprouse*, 217 N.C. App. 230, 719 S.E.2d 234 (2011), *disc. rev. denied*, 365 N.C. 552, 722 S.E.2d 787 (2012), this Court held that the testimony of an employee of the Department of Social Services that there had been a substantiation of sex abuse of the victim by the defendant was impermissible opinion vouching for the credibility of the victim. *Id.* at 242, 719 S.E.2d at 243. However, we concluded that the error did not rise to plain error because there was "more evidence of guilt against the defendant than simply the testimony of the child victim and the corroborating witnesses." *Id.*

Here, there was substantial other evidence that Defendant had sexually abused Liza. First, in her testimony, Liza described numerous instances of sexual abuse perpetrated by Defendant. The jury was also able to hear the recorded interviews Liza gave during the investigation. Because the jurors were able to listen to Liza, hear her responses to questions, and judge her demeanor, they would have been able to make their own assessments of Liza's credibility notwithstanding the impermissible opinion vouching from Fairley. Moreover, the State demonstrated that Defendant never denied the abuse during the police investigation. The jury viewed a video recording of the police interview of Defendant. When asked whether Liza fabricated the allegations against him, Defendant responded, "No. For me to sit here and blame [Liza] just making it up, I can't do that. I'm not gonna sit here and lie on [Liza]." The officer then asked Defendant, "[S]o is she making it up or not?", and Defendant responded, "I don't know." Later in the interview, Defendant told the officer that he "should believe any kid that makes these allegations, and that [Liza]—that it could be that [Liza] was just crying out for help."

Accordingly, we conclude that the trial court did not commit plain error by admitting the challenged opinion testimony from Fairley because the admission of the opinion evidence did not have a probable impact on the jury's determination of Defendant's guilt. *See Lawrence,* 365 N.C at 518, 723 S.E.2d at 334.

II. Ineffective Assistance of Counsel

Defendant argues in the alternative that he "has been denied his state and federal constitutional rights to the effective assistance of counsel." In that we hold that the trial court did not commit plain error below, we do not address this issue. Defendant is free to assert this claim in a motion for appropriate relief before the trial court. *See State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

Conclusion

For the reasons stated above, we hold that the trial court erred in admitting the expert opinion testimony of Brenna Fairley vouching for the credibility of the child victim; however, the erroneous admission of that testimony did not rise to the level of plain error in that it did not have a probable effect on the jury's determination of Defendant's guilt.

NO PLAIN ERROR.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).