

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-374

Filed: 5 November 2019

Durham County, Nos. 16 CRS 58002–03

STATE OF NORTH CAROLINA

v.

DARWIN JOSUE PERALTA

Appeal by defendant from judgments entered 4 October 2017 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

BRYANT, Judge.

Where an expert witness did not impermissibly vouch for the credibility of another witness, the trial court did not err in admitting the expert witness testimony. Where defendant sought to admit impermissible character evidence, the trial court did not err in denying the testimony. Where the admission of witness testimony was proper, the trial court did not err in its instructions to the jury regarding that witness testimony.

On 3 October 2016, a Durham County Grand Jury indicted defendant Darwin Josue Peralta on one count of statutory rape of a child by adult offender and three

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counts of statutory sexual offense of a child by adult offender. A second indictment was issued charging defendant with three counts of indecent liberties with a child. Defendant pled not guilty, and his case was tried before the Honorable Henry W. Hight, Jr., Judge presiding, on 26 September 2017. Defendant was found guilty by a jury on all seven counts.

In August 2016, while her mother, Nancy, was out of town, five-year-old Delia¹ stayed overnight at a babysitter's house where defendant resided. On the day before Nancy returned, Delia called Nancy and asked her to tell defendant not to "lock her up in the room anymore." Thereafter, Delia told Nancy that defendant had been "touching her in her privates[,] "put his private organ inside [of] her[,] and said, "give me your milk." Nancy took Delia to the emergency room at Duke Medical Center, and the staff referred them to the Duke Child Abuse and Neglect Medical Evaluation Clinic ("CANMEC").

During trial, the State proffered testimony from several witnesses including seven-year-old Delia, Delia's brother, Ryan², Scott Snider, and Dr. Beth Herold.

Delia testified before the jury on her birthday and had just turned seven years old that day. Delia described, in significant detail, the numerous acts of sexual abuse by defendant: that defendant touched her private area ("her pee-pee" and "her poo

¹ Pseudonyms were used to protect the identities of the juveniles and for ease of reading.

² See *supra* note 1.

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poo”) many times with his hands and his private part; that defendant “spit in his hand” and touched his private part; and that defendant touched her in all the rooms in the house. In particular, Delia described defendant bringing her to his bedroom, taking off her clothes along with his clothes, and touching her while they were both naked in bed. She stated this occurred sometimes while they were playing hide-n-seek with other children in the house. Delia further testified that she hid in the bathroom because defendant would touch her.

Ryan, Delia’s ten-year-old brother, testified at trial that Delia would sometimes ask him to stand at the door while she used the bathroom. He stated that one day while playing hide-n-seek, he saw defendant and Delia laying on the bed under the covers. Delia’s clothes were on the floor, and Delia was lying on her back while defendant was looking in her direction and touching her private part. Ryan testified to also observing the following behavior of defendant towards Delia: that defendant “told [Delia] to go with [him] and then he [would] give her candy;” that defendant kept candy in a blue bowl under his bed; and that defendant would only play with Delia in the room during hide-n-seek and “never went [to] find [the other children].” Ryan further testified that he asked Delia about lying down with defendant and that she told him defendant touched her private parts. Ryan urged her to tell their parents, but she was scared. Finally, she told them what defendant had been doing to her.

The State presented Snider and Dr. Herold to testify about Delia's medical evaluation. Defendant objected to their testimony—specifically to the use of Delia's out-of-court statements in regard to their respective evaluations. The trial court overruled defendant's objections and permitted Snider and Dr. Herold to testify.

Snider, a licensed clinical social worker at CANMEC, saw Delia on or about 8 September 2016 as a part of her evaluation to determine a medical diagnosis or treatment. Snider video recorded his diagnostic interview with Delia, gathered detailed statements from Delia describing the sexual contact with defendant, and prepared a report. At trial, Snider testified to his interview with Delia: "She described alleged sexual contact by a man named Darwin. She described that 'he [would] put his finger in my cosita,' which was based upon determinations of questioning her, was her genital area. And his finger [was] in her cosita, her back. And that he had droul [sic] on his part, and put his part in her mouth and in her cosita, and in her back. And her back, meaning her buttocks." Snider also testified that he asked Delia "where she would be when these things would happen. And she sa[id], 'in the room. In the bathroom. In the living room. His room.'" Specifically, Delia told him about "a particular isolated incident in the bedroom: When she came in and she says he put her on top of him in the bedroom, and he had no clothes on[.]" Snider's videotaped interview with Delia was played for the jury during his testimony.

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Dr. Herold, a nurse practitioner at CANMEC, testified about the physical examination she performed on Delia, which was based on Delia's statements provided by Snider, and the CANMEC team evaluation.

Although called as a witness for defendant, Detective Jesus Sandoval, who investigated the case, testified about his interview with Delia, in which she told him about the sexual acts performed by defendant: "She told me about the kids playing a game, and that [defendant] called her into [another] room. . . . She said, 'he was touching me.' And I said, 'How did he touch you?' And that is when she stated that he pulled her pants down and 'put his fingers in [her][.]' . . . And I said, 'Where did he put his fingers?' She said, 'Right here,' and she pointed down to her genitals. And she was on video, but she gestured down her genital area." Detective Sandoval further testified: "[B]asically she said that he carried her to the room. She said, 'No' so he picked her up and carried her there. . . . And I asked her, 'Did that happen a lot or just one time?' And she said, 'A lot of times.'"

After being found guilty on all counts, defendant was sentenced to 300 to 420 months for statutory rape of a child, 300 to 420 months for three counts of statutory sex offense with a child by an adult, and 16 to 29 months for three counts of indecent liberties with a child. All sentences were to run consecutive to each other. Defendant was ordered to register as a sex offender upon his release from prison and enroll in satellite-based monitoring for the remainder of his life. Defendant appeals.

On appeal, defendant argues the trial court erred by: I) allowing the State to introduce improper testimony from Dr. Herold, II) excluding statements from rebuttal witnesses to be used during his defense, and III) issuing instructions to the jury regarding certain testimony and evidence presented by the State.

I

Defendant first argues the trial court erroneously admitted opinion testimony. On this record, defendant does not directly challenge the testimony of the child victim, Delia, or Scott Snider. Instead, defendant argues that Dr. Herold's testimony was inadmissible because her expert opinion attested to the truthfulness of Delia's statements. Having not objected to the disputed testimony at trial, defendant now urges that Dr. Herold's statements detailing the process of diagnosing Delia constituted plain error. After careful consideration, we disagree.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4) (2019). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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.* (citation and quotation marks omitted).

Our courts have

set out the limits and restrictions on expert testimony in child sexual abuse cases. 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. [A]n 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. Wallace, 179 N.C. App. 710, 714, 635 S.E.2d 455, 459 (2006) (internal citations and quotation marks omitted).

In the instant case, defendant directs this Court’s attention to *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993), and *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000),³ in

³ In *State v. Trent*, our Supreme Court held that the expert gave a “limited basis” for his diagnosis—presumably relying *exclusively* on the child’s statements of sexual abuse—where he “repeatedly testified that his diagnosis was based upon the results of the pelvic exam, [which showed the child’s hymen was not intact], and the history given to him by the victim. He cited no other basis for his diagnosis.” 320 N.C. 610, 614, 359 S.E.2d 463, 465–66 (1987). The expert’s testimony was ruled to be inadmissible.

Similarly, in *State v. Parker*, this Court held the expert’s testimony to be inadmissible where he testified that the child “had been sexually abused over a long period of time” and his opinion was based “*only* on his interview with [the child] in which [the child] related a history of sexual abuse and the fact that [the child’s] hymenal ring was not intact.” 111 N.C. App. 359, 366, 432 S.E.2d 705, 709–10 (1993) (emphasis added).

challenging Dr. Herold's testimony as "she implied that Delia was sexually abused." Notwithstanding the notion that an inference was made by Dr. Herold, defendant conceded during oral argument before this Court that Dr. Herold did not explicitly testify to Delia's diagnosis or state that Delia was sexually abused. Nevertheless, we note that in the instant case, unlike the testimony from the experts in *Trent, Parker*, and *Bates*, Dr. Herold did not reveal a conclusive diagnosis that Delia was sexually abused.

On direct examination, Dr. Herold testified about the "comprehensive" procedures for conducting a medical evaluation on children to make a medical diagnosis:

[DR. HEROLD]: I work as a part of a team at [Duke's] CANMEC. We see children when we evaluate children. We see them -- typically one medical provider and one social worker will see the child. And then once a week we do what is called Peer-Review, and we case-review a hundred percent of our cases. And on that team there are two Board Certified Child Abuse Pediatricians, and two Social Workers, and one fellow, and we Peer-Review every case.

.....

[THE STATE]: And when [Delia] came to your clinic, what if any actions did you take?

In *State v. Bates*, the expert opined that the child was sexually abused after he completed the child's examination, which showed no physical evidence of abuse, and admitted that his diagnosis was "based *entirely* on statements made by the child[.]" 140 N.C. App. 743, 748, 538 S.E.2d 597, 601 (2000) (emphasis added). This Court ruled the testimony was inadmissible.

[DR. HEROLD]: We do complete medical evaluations. And that include[s] speaking to a caretaker, whoever brings the child; and we will speak to the caretaker and get a complete medical history. . . . And we also [complete] a social history, which [involves] speaking to the patient and finding out who lives in the home. We do -- I get an evaluation that include[s] risk factors, so I [can] do a full parent interview. . . .

[T]he social worker will then be getting a medical history from the child at the same time. And after . . . our social worker is done getting a medical history from the child, and I know how I need to treat the child, I will then do a medical exam on the child, and do any necessary labs or test, or anything that have been determined are necessary through the obtaining of medical history that the social worker will have done.

[THE STATE]: And did you do that in this case?

[DR. HERORD]: Yes, ma'am.

Dr. Herold detailed the examination process of a pre-pubescent child and her findings from Delia's examination—in which she revealed that Delia had a “normal genital exam”—and testified that the absence of physical evidence was not uncommon after 72 hours of initial contact for a majority of cases involving children who had been sexually abused.

On cross-examination, Dr. Herold was expressly asked by defense counsel the following questions:

[DEFENSE COUNSEL]: And now on September 8, 2016, [Delia] is in your clinic, correct?

[DR. HEROLD]: Yes.

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[DEFENSE COUNSEL]: And it is your understanding that she has been raped, correct?

[DR. HEROLD]: I have never -- I had never heard that word.

[DEFENSE COUNSEL]: It is your understanding that [Delia] who is not able to give consent has been penetrated, correct?

[DR. HEROLD]: It was my understanding that the child had been digitally penetrated and anally penetrated by an adult and we consider that sexual abuse.

.....

[DEFENSE COUNSEL]: On the 8th of September, 2016, you were not able to make any medical determination that [Delia] had been penetrated, were you?

[DR. HEROLD]: Yes, I was.

[DEFENSE COUNSEL]: And how were you able to make a medical determination of that?

[DR. HEROLD]: The medical evaluation, when we're evaluating child sexual abuse, 90 to 95 percent of children do not have medical findings. The medical diagnosis is based on the entire evaluation which consist[s] of statements that the child says, as well as history from the patient, as well as the medical exam itself.

[DEFENSE COUNSEL]: And notwithstanding what the child said, what the mother said, and in your capacity as a Nurse Practitioner, and during your medical examination, you were not able to make a determination based off of that alone that [Delia] was penetrated; were you?

[DR. HEROLD]: Based upon the medical exam alone [we] cannot make a diagnosis of penetration.

On redirect, Dr. Herold clarified that a conclusive finding for child sexual abuse can be medically diagnosed in four situations: the child is pregnant, the child has gonorrhea, the child has chlamydia, or the child has HIV. Dr. Herold further testified to the significant parts of Delia's team evaluation:

[DR. HEROLD]: The statements that [Delia] provided and she provided clear statement[s] describing sexual abuse. She described the alleged perpetrator putting saliva, or she called it droul [sic] on his hand. She described details of him placing his finger inside of her genital, in her anus, and in her vagina. She described clear statements of these events occurring.

At five years of age[,] this child was able to tell us what had happened, and give details that were details that were clear and concise details which led us to have the medical findings that we did.

Following redirect, defense counsel expressly asked if the team evaluation relied solely on Delia's statements, in which Dr. Herold testified as such:

[DEFENSE COUNSEL]: So what she said matters much more than any physical evidence that you did or did not find; correct?

[DR. HEROLD]: We did a medical exam well after three days from when this child last had alleged contact with the alleged perpetrator. Therefore, I would not expect to find any findings on her medical exam. The most important part of a child's evaluation, if it has been greater than 72 hours, is the statement that the child provides.

.....

[DEFENSE COUNSEL]: But you did find [that] sexual abuse happened, correct?

[DR. HEROLD]: We found that the child gave clear and concise statement[s] regarding child sexual abuse.

[DEFENSE COUNSEL]: So your testimony today is based [on] the statements that [Delia] made, correct?

[DR. HEROLD]: It is based off a complete medical evaluation, not only her statements.

Considering Dr. Herold's testimony in its entirety, and as admitted by defense counsel, Dr. Herold did not make a conclusive medical diagnosis. Although defendant raises the holdings in *Trent*, *Parker*, and *Bates*, where the admission of the expert's medical diagnosis, which rested exclusively on the victim's statements, was precluded in these cases, Dr. Herold's testimony was inapposite in the present case.

Dr. Herold carefully explained the results of Delia's examination, the statistics of sexually abused children with normal medical exams, and the collective process of the team evaluation—reviewing all the information that was obtained involving Delia. Her “testimony was relevant not only to help the jury understand the results of her examination, but also to demonstrate that a lack of physical evidence of sexual abuse does not preclude sexual abuse when there is a passing of time between the alleged incidents and the physical examination.” *State v. Chavez*, 241 N.C. App. 562, 569, 773 S.E.2d 108, 114 (2015).

Moreover, we reject defendant's contention that he was prejudiced by Dr. Herold's testimony that Delia gave “clear and concise” details about sexual abuse as the record reveals that, if there was any error, defendant invited the error.

Throughout Dr. Herold's direct testimony, she repeatedly stated that Delia's statements about sexual abuse were "allegations." However, on cross-examination, defendant deliberately elicited testimony from Dr. Herold regarding whether she had made a medical diagnosis that Delia had been sexually abused and what data she collected to connect defendant to the alleged penetration. Therefore, defendant is precluded from asserting prejudice from Dr. Herold's statements when he invited the error for which he now seeks relief from on appeal. *See* N.C. Gen. Stat. § 15A-1443(c) (2017) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.").

Notwithstanding defendant's invited error, defendant has not demonstrated that the jury would have reached a different result in light of all the other unchallenged evidence presented at trial. This includes strong testimony from Delia at trial and during videotaped interviews; from Ryan, who testified, *inter alia*, to seeing defendant and Delia in bed together; from Snider; and from Detective Sandoval. Thus, we conclude the trial court did not err by admitting Dr. Herold's testimony.

II

Defendant next argues the trial court erred by not allowing the testimony of two defense witnesses who allegedly asked Delia's mother to stop talking about sex in front of children. We disagree.

“The admissibility of evidence is governed by a threshold inquiry into its relevance.” *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000). “Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citing N.C.G.S. § 8C-1, Rule 401 ([2017])). “The trial court may exclude evidence that is irrelevant, non-probative, *speculative, not within a witness’ personal knowledge*, and calling for legal conclusions from a lay witness.” *State v. Pallas*, 144 N.C. App. 277, 283, 548 S.E.2d 773, 779 (2001) (emphasis added).

Although the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court’s ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn, 162 N.C. App. at 266, 591 S.E.2d at 17 (internal citations and quotation marks omitted). When it can be shown that a witness has personal knowledge of a witness’s character for truthfulness or untruthfulness, that opinion testimony can be admitted as evidence of credibility. *State v. Hernandez*, 184 N.C. App. 344, 349, 646 S.E.2d 579, 583 (2007).

In the instant case, defendant sought to introduce testimony of witnesses that he proffered as relevant to prove a “central part of his theory of defense [] that [Delia] heard these type[s] of statements and these type[s] of sexual statements from [her mother] when she was around her boyfriends or talking about her boyfriends[.]” However, it is clear that defendant’s attempt to introduce the testimony was premised on “undermining the truthfulness of [Delia’s] statements;” in other words, to “raise doubts about the origin of [Delia’s] ability to graphically describe certain sex acts.”

Although premised as an attempt to impeach the mother’s credibility, defendant’s proposed testimony was, in reality, an attempt to put forth impermissible character testimony as to Delia’s credibility. Neither witness could offer an opinion as to Delia’s credibility. All they could offer was speculation that comments made by Delia’s mother “might” serve as the basis of Delia’s explicit statements of sexual abuse, not whether Delia personally experienced the abuse. Defendant was unable to demonstrate that the proposed witnesses had sufficient personal knowledge to form an opinion about Delia’s credibility.

Thus, because the proffered testimony was too speculative and not within the witnesses’ personal knowledge, the trial court did not err in excluding the testimony.

III

Finally, defendant argues the trial court erred by failing to properly issue limiting instructions to the jury as to Dr. Herold’s testimony regarding the statistics

of sexually abused children with normal exams and Delia's out-of-court statements about sexual abuse that she made to Snider. We disagree.

Defendant did not request a limiting instruction as to Dr. Herold's testimony at trial but on appeal, requests that we review his argument for plain error, and we do so. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial."); *see also id.* ("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." (citation and quotation marks omitted)).

Here, as we have already considered defendant's arguments regarding Dr. Herold as a witness and found no error in allowing her testimony, we reject defendant's argument that trial court was "obligated to issue a limiting instruction informing jurors [that] they could only consider the 'profile' testimony for corroborative purposes[.]" Dr. Herold properly testified as to her findings from Delia's examination, her history of dealing with child sexual abuse cases, and the process to complete a medical evaluation—which included the statements provided by Delia. Further, the evidence—the explicit testimony by Delia of defendant's acts of sexual abuse, the testimony of her brother Ryan, Delia's consistent statements to Snider and Detective Sandoval, and the video of Delia's statements—when viewed collectively by

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the jury, was significant and sufficient evidence for the jury to find defendant guilty. Even assuming the trial court erred in not giving limiting instruction as to Dr. Herold's testimony, there is no probability that the jury would have reached a different result under the circumstances.

Accordingly, for the reasons stated herein, we hold defendant received a fair trial, free from any prejudicial error.

NO ERROR.

Judges DILLON and ARROWOOD concur.