IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-963

Filed: 3 September 2019

Forsyth County, No. 15 CRS 59032

STATE OF NORTH CAROLINA,

v.

ERVAN L. BETTS, Defendant-Appellant.

Appeal by defendant from judgment entered 23 March 2018 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 23 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Catherine F. Jordan, for the State.

Craig M. Cooley for defendant-appellant.

BERGER, Judge.

Ervan L. Betts ("Defendant") appeals from his convictions of three counts of indecent liberties with a child. Defendant argues the trial court plainly erred by (1) not issuing a limiting instruction regarding "profile" testimony; (2) allowing testimony and reports that amounted to improper vouching for the credibility of the victim; (3) incorrectly instructing the jury on the proper use of testimony related to the victim's PTSD; and (4) admitting evidence of prior incidents of domestic violence by Defendant. Defendant also argues that he did not receive a fair trial due to the cumulative effect of these purported errors. We disagree.

Factual and Procedural Background

In 2013, Charity Luck ("Luck") gave birth to a daughter, B.C., who had illegal drugs in her system at birth. The Forsyth County Department of Social Services ("DSS") began investigating Luck and her children. On October 25, 2013, social worker Melony Archie ("Archie") conducted an interview with M.C., Luck's seven year old daughter. M.C. informed Archie that Defendant had touched her inappropriately. When Archie asked M.C. additional questions, she denied being touched inappropriately by Defendant, but described incidents of domestic violence between Luck and Defendant.

On November 4, 2013, Archie conducted a follow-up interview with M.C. at her elementary school. During this interview, M.C. stated that Defendant "rubbed and poked" her vagina while she had taken a nap in a bedroom. When M.C. rolled over, Defendant left the bedroom to watch T.V. in the living room. Based upon M.C.'s comments, Archie referred M.C. to Vantage Pointe Child Advocacy Center for a forensic interview. Archie also contacted Sergeant Crystal Prichard with the Winston-Salem Police Department.

On November 26, 2013, Fulton McSwain ("McSwain"), conducted a forensic interview with M.C. McSwain videotaped the interview and wrote a report ("McSwain Report") summarizing the forensic interview. M.C. told McSwain about instances of domestic violence by Defendant and referenced two specific instances in which Defendant touched her inappropriately. M.C. told McSwain that in March

2013, Defendant had said, "[expletive deleted] you [expletive deleted]," and "slapped [her] on the leg really hard." M.C. also reported that Defendant had punched her mother on one occasion, and tried to break into their apartment while holding a gun on another.

M.C. also informed McSwain that one night when she had slept in the bed with Luck and Defendant, Defendant "pulled up her nightgown then went inside of her underwear and touched her vagina . . . . in a circular motion" when Luck had gone to the bathroom. M.C. rolled over, fell off the bed, and struck her head on a small refrigerator located next to the bed. When Luck returned from the bathroom, she picked M.C. up, and carried her to the living room. M.C. said Defendant approached her shortly thereafter and threatened to hurt her if she told anyone.

M.C. told McSwain that Defendant had touched her inappropriately on several occasions between January and March 2013, but Defendant had "never penetrated her vagina." M.C. was unable to state the exact number of times Defendant touched her inappropriately, but told McSwain that Defendant "kept on doing it over and over again." McSwain asked M.C. if Defendant had ever touched her on another part of her body. M.C. reported "one incident in which [Defendant] reached his hand inside of her shirt and rubbed her breasts" on the living room couch while Luck was outside smoking a cigarette.

In the conclusion of McSwain's report documenting his interview with M.C., McSwain wrote that M.C. had "disclosed that the alleged assailant, [Defendant], sexually abused her on multiple occasions" and M.C. "reported to being truthful and did not appear to display any overt signs of deception."

M.C. was also seen by Mary Katherine Masola ("Masola"), a licensed clinical social worker with DSS. Masola also assessed M.C. for neglect, sexual abuse, and violence, and determined that M.C. had post-traumatic stress disorder ("PTSD"). Masola encouraged M.C. to prepare a "trauma narrative" as part of her treatment. The trauma narrative consisted of chapters entitled: "Meet the Author!"; "What Erv Did to My Mom; "When Erv Touched Me"; "When Erv Pulled [out] a Gun and Tried to Break Into My House"; and "When I Told."

M.C. told Masola of three occasions which were depicted in the trauma narrative. The first occurred when M.C. was sleeping in the middle of the bed in-between Defendant and Luck. M.C. stated in the trauma narrative:

> I was in the middle, and [Defendant] rolled over to me and touched me in my private part with his hand. . . . [H]e put his hand in my pants. . . . He started moving his fingers around on top of my private parts. Then he took his hand out of my pants, and rolled over and went back to sleep. . . . [Luck] was facing the other way. . . . I went to the bathroom, but I didn't really go to the bathroom. I went back to the living room. The next morning, [Defendant] left and my mom asked me where I went. And I told her that I thought I went to the bathroom, but I went to the living room.

M.C. wrote about another occasion in the trauma narrative:

> About two weeks later, I was sitting [o]n the floor and [Defendant] was helping me with my homework at the coffee table, and he reached over and put his hand inside my shirt. . . . He pulled his hand out and I pretended I had to go to the bathroom and I went to the bathroom and I cried. . . . I came back out and I waited until [Defendant] was gone, and I told [Luck]. She said she was going to call Grandma Sue and talk to her about it, but we forgot about it again.

M.C. described the third occasion in the trauma narrative as follows:

> One day, I was taking a nap on the couch and [Luck] was in the bathroom. [Defendant] came over and put his hand in my pants and touched me. I felt worried. He didn't say anything. . . . My mom came out of the bathroom and [Defendant] rushed over to the recliner. I went back to sleep and when I woke up, [Defendant] was acting weird. He was talking fast and he was shaky and acting like he did something wrong. He left[.]

The trauma narrative also included incidents of domestic violence between Luck and Defendant. According to Masola, M.C. "reported several incidents of her mom. . . getting a black eye, having a bloody nose, [and] having to call the ambulance" on occasions when she had been hit by Defendant. M.C. also told Masola of a time when Defendant had broken into Luck's apartment with a firearm.

On April 25, 2016, the Forsyth County Grand Jury indicted Defendant on three counts of indecent liberties with a child occurring between January and March 2013. At trial, witnesses for the State included M.C., Archie, McSwain, and Masola. McSwain and Masola were qualified as expert witnesses. Defense counsel initially objected to introduction of the McSwain Report into evidence; however, Defendant

did not object to entry of a redacted version. The trauma narrative was also admitted into evidence without objection.

Defendant did not testify at trial, and the jury found Defendant guilty of all counts of taking indecent liberties with a child. For each count, the jury also found the presence of two aggravating factors which included the victim being very young, and Defendant taking advantage of a position of trust or confidence to commit the offenses. The trial court sentenced Defendant to an active sentence of three consecutive terms of 31 to 47 months imprisonment. Defendant appeals.

Standard of Review

> In criminal cases, an issue that was not preserved by objection noted at trial and which 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). 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, quotation marks, and brackets omitted).

"The plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *Id.* The Supreme Court of North Carolina applied plain error review to a trial court's failure to strike, on its own motion, improper testimony from an expert witness vouching for the credibility of an alleged sexually abused child. *State v. Towe*, 366 N.C. 56, 61, 732 S.E.2d 564, 567 (2012).

Analysis

I. "Profile" Testimony

Defendant first argues that the trial court plainly erred by not giving a limiting instruction to the jury regarding McSwain and Masola's "profile" testimony. We disagree.

Initially, we note that experts are permitted to testify about the profiles of victims of sexual abuse. *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002); *see also State v. Hall*, 330 N.C. 808, 817, 412 S.E.2d 883, 887 (1992) (permitting the use of expert testimony "that a particular child's symptoms were consistent with those of sexual or physical abuse victims, but only to aid the jury in assessing the complainant's credibility."); *State v. Ware*, 188 N.C. App. 790, 656 S.E.2d 662 (2008). This type of profile evidence should be limited to its "permissible uses," and if admitted, the trial court should generally provide a limiting instruction. *See Hall*, 330 N.C. at 822, 412 S.E.2d at 891.

However, our courts have consistently held that "[t]he admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions." *State v. Allen*, 141 N.C. App. 610, 616, 541 S.E.2d 490, 495 (2000) (citation and quotation marks omitted); *see also State v. Cox*, 303 N.C. 75, 83, 277 S.E.2d 376, 381-82 (1981) (holding that, where a witness's testimony was admissible for corroborative purposes, there was no error when the defendant failed to request an instruction limiting that testimony to those permissible purposes).

Here, both McSwain and Masola provided versions of what is considered profile testimony. Defendant contends that the following testimony from McSwain required a limiting instruction:

> [Prosecutor]. And through the course of your employment, are you familiar with characteristics of children that have been sexually abused?
>
> [McSwain]. Yes, ma'am.
>
> [Prosecutor]. And what are those characteristics?
>
> [McSwain]. There's a number of different characteristics. For example, a lot of times children who've been exposed to sexual maltreatment, they're fearful of the offender. A lot of times, shame, they're embarrassed or feel a sense of guilt about the abuse happening to them. In some instances, kids may display signs of depression or anxiety, so there's a number of different characteristics that may come out. The thing about it is the characteristics are varied for each child. Not every child displays the exact same characteristics.

> [Prosecutor]. And are you trained to observe those characteristics when you're conducting forensic interviews?
>
> [McSwain]. Yes, ma'am.
>
> [Prosecutor]. And what, if any, characteristics did you observe during your forensic interview of [M.C.]?
>
> [McSwain]. [M.C.] expressed being fearful of [Defendant], feeling in danger, not feeling safe around him.

In addition, Defendant takes issue with Masola's testimony that she was familiar with characteristics of children who had been sexually abused, including anxiousness and nervousness, and that M.C. was hesitant to talk about sex, nervous, anxious, and worried.

As Defendant concedes, our case law is clear that experts may provide testimony regarding symptoms and characteristics of children that have been sexually abused. *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987). However, Defendant takes issue with the trial court's failure to limit the testimony to its permissible use, and argues that the jury may have treated the testimony as substantive evidence. While it is true that the court did not offer a limiting instruction with respect to the experts' profile testimony, it is also true that Defendant never requested such an instruction. As our case law indicates, there is no error in neglecting to give the limiting instruction when the Defendant fails to request it. Because there was no error by the trial court, there can be no "fundamental error [that] occurred at trial."

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citations omitted). Thus, by definition, there cannot be plain error.

II. Vouching

A. "Disclosure"

Defendant next asserts that the trial court plainly erred by admitting testimony from the State's experts and lay witnesses into evidence during which the witnesses repeatedly used the term "disclose," or variations thereof, when summarizing M.C.'s statements to them. Defendant contends use of the word "disclose" amounted to vouching for M.C.'s credibility. We disagree.

"[T]estimony 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) (citations omitted). Our Supreme Court has held "[t]he jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial—determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). "In child sexual abuse cases, where there is no physical evidence of the abuse, an expert witness's affirmation of sexual abuse amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony." *State v. Crabtree*, ___ N.C. App. ___, ___, 790 S.E.2d 709, 714 (2016), *review on additional issues denied*, *appeal dismissed*, 369 N.C. 195, 793 S.E.2d 687 (2016), *and aff'd*, 370 N.C. 156, 804 S.E.2d 183 (2017).

Based upon this principle, this Court held "[i]t is fundamental to a fair trial that the credibility of witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted). Therefore, expert witnesses may not vouch for the credibility of victims in child sex abuse cases when there is no evidence of physical abuse. *Stancil*, 355 N.C. at 266-267, 559 S.E.2d at 789. Our Supreme Court "has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988).

Defendant relies on the unpublished opinion of *State v. Jamison*. In that case, a panel of this Court determined that use of the term "disclose" "lent credibility to [the victim's] testimony" and "is itself a comment on the declarant's credibility and the consequent reliability of what is being revealed." *State v. Jamison* ___ N.C. App. ___, 821 S.E.2d 665 (2018) (unpublished), *review denied*, ___ N.C. ___, 826 S.E.2d 701 (2019). In reaching this result, the *Jamison* panel relied almost exclusively on *State v. Frady*.

Frady, as here and in *Jamison*, involved a child sexual assault case with no physical evidence. There, the expert testified as follows:

> Q. Did you form an opinion as to whether [Debbie's] disclosure was consistent with sexual abuse?
>
> . . . .
>
> [Expert Witness]. Yes.

> Q. And what was your opinion?
>
> [Expert Witness]. Our report reads that her disclosure is consistent with sexual abuse.
>
> Q. And what did you base your opinion on?
>
> [Expert Witness]. The consistency of her statements over time, the fact that she could give sensory details of the event which include describing being made wet and the tickling sensation.... [a]nd her knowledge of the sexual act that is beyond her developmental level.

State v. Frady, 228 N.C. App. 682, 684, 747 S.E.2d 164, 166, *review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013). This Court granted a new trial because the expert stated "that [the victim]'s 'disclosure' was 'consistent with sexual abuse.' The alleged 'disclosure' was [the victim]'s description of the abuse. . . . [Thus, the expert] essentially expressed her opinion that [the victim] is credible. We see no appreciable difference between this statement and a statement that [the victim] is believable." *Id.* at 685-86, 747 S.E.2d at 167.

Defendant contends *Jamison* is persuasive.[1] However, the *Jamison* panel's reliance on *Frady* was misplaced as the reasoning in *Frady* was not based on defining "disclose" or prohibiting use of the word "disclose." As illustrated by this Court's

[1] The Defendant highlights questions by the prosecutor and testimony which Defendant contends demonstrates the improper use of variations of the term "disclose" at trial. However, in each of these instances, "disclose" is synonymous with: admit, divulge, reveal, tell, communicate, bring to light, and make known. *See* DISCLOSE, www.thesaurus.com/browse/disclose. Each of these examples, and the uses throughout the trial, involve M.C. communicating to another individual what took place.

discussion in *Frady,* the term "disclosure" merely means the content of the victim's description of abuse. *Id.* at 685, 747 S.E.2d at 167 ("The alleged 'disclosure' was [the victim's] description of the abuse."). It does not go to believability or credibility of the information provided, or the witness' opinion as to whether or not that information was believable. Contrary to the analysis in *Jamison*, *Frady* does not stand for the proposition that use of the word "disclosure" was error. Rather, the expert's testimony in *Frady* that the victim's description of the abuse "was consistent with sexual abuse" was the equivalent of testifying the victim was credible.

There is nothing about use of the term "disclose", standing alone, that conveys believability or credibility. *Jamison* should not be viewed as persuasive on this point and this Court is unaware of any opinion prior to *Jamison* that held that use of the word "disclose" amounted to error because that term was tantamount to testimony that a victim was "believable, had no record of lying, and had never been untruthful." *Aguallo*, 322 N.C. at 822, 370 S.E.2d at 678. Because *Jamison* is not controlling, not persuasive, and as discussed above, did not properly analyze *Frady*, we decline to follow that panel's reasoning.

Even if we assume there was error when the trial court did not intervene when the term "disclose" was used, Defendant has not demonstrated plain error. The victim testified about two incidents of sexual assault in which Defendant placed his hand under her clothing and rubbed her vagina, and one incident in which Defendant

placed his hand in her shirt and rubbed her chest. The victim provided details and descriptions of these incidents and surrounding circumstances which the jury could consider and weigh in light of the other evidence presented. In addition, the jury also observed the forensic interview of the victim by McSwain which was preserved on video, and considered the McSwain Report which is discussed further herein.

That there may have been inconsistencies in the victim's accounts is not the issue. The jury had the opportunity to observe the victim's testimony and make its own independent determination about her believability and credibility, and it is not for this Court to reweigh the evidence. There was substantial evidence from which the jury could find Defendant touched M.C. inappropriately. The jury had the opportunity to make its own independent assessment concerning the victim's credibility consistent with the trial court's instructions, and Defendant has not demonstrated that use of the word "disclose" had a probable impact on the jury's finding.

B. The McSwain Report

Defendant next argues plain error in the trial court's admission of the McSwain Report. We disagree.

Defendant argues the "trial court plainly erred because the opinions and recommendations in the [McSwain Report] clearly establish McSwain found M.C. and her sexual abuse allegations credible and believed in [Defendant's] guilt."

As noted, McSwain was tendered and admitted as an expert in conducting forensic interviews of children. McSwain defined a "forensic interview" as "a structured conversation with the child designed to elicit details about a specific event or events that the child has . . . experienced." McSwain's report summarized the information M.C. had told him during the forensic interview, and contained his conclusions and recommendations. After Defendant's initial objections, a redacted version was also admitted into evidence.

Defendant highlights numerous portions of the McSwain Report that he contends improperly vouch for M.C.'s credibility, including the following sentences within a section entitled "Impressions":

> [M.C.] displayed age appropriate competencies across all spheres of functioning. . . . [M.C.] appeared resistant to suggestion, unaffected by the primacy-recency effect, with *appropriate* memory recall and a willingness to correct the clinician as needed. . . . [M.C.] engaged *appropriately* in dialogue, stayed focused and followed commands. . . . [M.C.'s] language skills . . . appeared *appropriate* for information gathering purposes. . . . [M.C.] demonstrated that she understood the difference between *telling the truth and telling a lie*. [M.C.] reported an acceptance of the obligation to report information truthfully.

(Alterations in original).

Defendant also asserts the following paragraph from a section entitled "Summary/Conclusion" as improper vouching:

> The interview notes that during the forensic interview session, [M.C.] appeared to be consistent with the

> information . . . about [Defendant] sexually abusing her. In addition, she reported to being truthful and did not appear to display any overt signs of deception. [M.C.]'s assessment was consistent with that of someone who has been sexually abused.

Defendant contends the use of "assailant" in the following sentence from a section entitled "Recommendations" constitutes an improper comment upon Defendant's guilt:

> 2. The interviewer would strongly encourage that [M.C.] remain inaccessible to the alleged assailant until the reasonable conclusion to this investigation and determination is made that [M.C.] is emotionally and physically safe when in *the assailant's* presence[.]

(Alteration in original).

However, upon review of the trial transcript, we must conclude Defendant is unable to show plain error with respect to any portion of the McSwain Report. At trial, defense counsel initially objected to the State's motion to introduce the McSwain Report. Following a colloquy with the trial court, defense counsel stated she would not object to the McSwain Report, if the State were to make certain redactions. The trial court permitted the State, with Defendant's consent, to review the McSwain Report during an evening recess and address statements within the report Defendant had found objectionable. The trial court took Defendant's objection under advisement and deferred ruling upon the objection until the State had reviewed and redacted portions of the McSwain Report, and Defendant had the opportunity to review the redacted version.

The next day, the State informed the trial court that it had made the redactions to the report. After reviewing the redacted version of the McSwain Report, defense counsel told the trial court, "The objectionable materials have been removed." The State renewed its motion to admit the McSwain Report and the following exchange occurred:

> [Prosecutor]: Your honor, at this time, the state would move to introduce [the McSwain Report], which is the report from Fulton McSwain, the forensic interviewer.
>
> THE COURT: Any objection?
>
> [Defense Counsel]: No, your honor.
>
> THE COURT: Without objection, [the McSwain Report] is hereby admitted.

Under Section 15A-1443 of the North Carolina General Statutes, "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Bice*, ___ N.C. App. ___, ___, 821 S.E.2d 259, 264-65 (2018) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)), *disc. review denied,* ___ N.C. ___, ___ S.E.2d ___ (Aug. 14, 2019).

Defendant's counsel not only failed to renew Defendant's objection to the admission of the McSwain Report, but she affirmatively and explicitly represented

that she had no objection to the admission of the McSwain Report after the State had made the requested redactions. To the extent there was error by the trial court in admitting the McSwain Report, including the statements Defendant takes issue with on appeal, it was invited error. *Id.* Defendant's arguments on appeal concerning the McSwain Report are waived.

III. PTSD Testimony

Defendant also argues that the trial court plainly erred by giving the jury an impermissible limiting instruction with respect to Masola's testimony regarding M.C.'s PTSD diagnosis. We disagree.

Our Supreme Court addressed the question of admissibility of PTSD testimony in *State v. Hall*. While the Court declined to offer an "exhaustive" list of acceptable uses of such testimony, it did explicitly address a few: "For example, testimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent." *Hall*, 330 N.C. at 822, 412 S.E.2d at 891. The Court also noted that "[i]f admitted, the trial judge should take pains to explain to the jurors the limited uses for which the evidence is admitted. In no case may the evidence be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *Id.*

Here, the trial court gave the following instruction to the jury after the admission of the PTSD testimony:

> THE COURT: Let me interrupt for just a minute. Members of the jury, with regard to the testimony regarding the alleged victim having some type of post-traumatic stress disorder, that testimony is being admitted for two purposes for your consideration.
>
> One, is to corroborate the alleged victim's testimony, to the extent that you find it does so corroborate her testimony. The other purpose is to explain a delay of reporting crimes in this case. Except as it bears on one of those two decisions, you're not to consider that particular evidence for any other purpose. Sorry for the interruption. Go right ahead.

At the conclusion of the trial, the judge gave a virtually identical instruction to the jury. Defendant takes issue with the second part of this instruction, specifically the language about "explain[ing] a delay." He argues that the jury cannot consider the evidence for this purpose without also concluding that the sexual assault actually occurred. However, the *Hall* court specifically designated "explain[ing] delays" as a permissible purpose for PTSD evidence. *Id.*

The trial court's limiting instruction to permissible uses of the PTSD evidence clearly indicated that the evidence was not to be used for substantive purposes. Because the trial court did not err, Defendant cannot establish plain error.

IV. Evidence of Domestic Violence

Defendant next argues that the trial court plainly erred by admitting evidence of Defendant's past incidents of domestic violence against Luck and M.C in violation of North Carolina Rules of Evidence 401 and 403. We disagree.

Rule 401 states that " 'Relevant evidence' means evidence having 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." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2017).

"[T]he balance under Rule 403 favors admissibility of probative evidence." *State v. Peterson*, 179 N.C. App. 437, 460, 634 S.E.2d 594, 612 (2006). This Court has held that incidents of domestic violence are "probative of the victim's motivation not to immediately report crimes" in sexual assault cases. *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 491 692 S.E.2d 145, 151 (2010).

Here, Defendant argues that the domestic violence evidence "was of no consequence to the determination of whether [he] took indecent liberties with M.C." Yet *Espinoza* recognizes that this evidence can be permissible in cases like, as here, where the victim has delayed in reporting the alleged sexual abuse. The evidence of domestic violence was not substantially more prejudicial than probative, and went directly to the victim's fear or apprehension in reporting the sexual abuse. Thus, the

trial court did not err in admitting the evidence of Defendant's domestic violence incidents.

Conclusion

Defendant received a fair trial, free from prejudicial error. [2]

NO PLAIN ERROR.

Chief Judge MCGEE concurs.

Judge TYSON dissents with separate opinion.

2 Because we find no prejudicial error, we need not address Defendant's argument that the cumulative effect of the purported errors rendered his trial fundamentally unfair.

TYSON, Judge, concurring in part and dissenting in part.

The State's entire case against Defendant rests wholly upon the uncorroborated and inconsistent reconstructed memories of a witness, who was six years old when these events purportedly occurred. The evidence also shows the witness expressed motivations to lie. The credibility of the complainant was the sole evidence and issue before the jury. The State failed to call or present any one of a number of other persons named as either present or aware, who could have corroborated complainant's allegations, if true.

The State produced no other physical evidence, eyewitness testimony or anything else to corroborate these allegations, other than improper bolstering babble restating M.C.'s allegations. The trial court plainly erred in admitting evidence that improperly vouched for the credibility of the complainant, the sole province of the jury. This inadmissible testimony prejudiced Defendant to grant a new trial. I respectfully dissent.

I. Background

The majority's opinion details some factual background, but omits many critical facts, which directly impact the deliberation and outcome of this case. Charity Luck lived with her six-year old daughter, M.C., and a younger daughter, H.C., in a two-bedroom apartment. M.C is the sole complaining witness. Luck and her two

daughters shared the two-bedroom apartment with a male roommate, Michael, between January to March 2013, the perimeter of times of M.C's allegations.

During this time, Luck was engaged in a relationship with Defendant. Defendant has no prior record of any sexual offenses. In the fall of 2013, Luck gave birth to another daughter, B.C. Defendant was excluded as the father of B.C. Post-natal testing conducted on B.C. revealed the presence of illegal drugs in her body at birth.

The Forsyth County DSS was informed and began an investigation of Luck, and her children. DSS social worker, Melony Archie was assigned to investigate the case. During Archie's initial interview on 25 October 2013, M.C. purportedly asserted Defendant had touched her inappropriately. When Archie asked M.C. additional questions, she denied being touched inappropriately by Defendant.

Archie conducted a second interview on 4 November 2013 with M.C. at her elementary school. During this interview, M.C. alleged one incident of inappropriate touching, which purportedly occurred as she was taking a nap in the bedroom. In this incident, M.C. alleged Defendant touched her near her vagina. Based upon her comment recounting the allegedly inappropriate touching, Archie referred M.C. to VPC for a forensic interview. Archie also reported M.C.'s allegation to Police Sergeant Prichard on 2 December 2013.

VPC's program manager, Fulton McSwain, conducted a "forensic interview" of M.C., from which he prepared in the McSwain Report. In asserting an instance of domestic violence, M.C. told McSwain: "My mom talks to this guy [Defendant] and one day I was joking around with him and he got really mad and he slapped me on the leg really hard." M.C. also asserted Defendant had stated, "F[**]k you b[*]tch," when he slapped her. M.C stated this incident occurred sometime in March 2013. As noted by the majority opinion, M.C. also asserted Defendant had punched her mother, and had alleged another incident asserting Defendant had tried to break into their apartment while holding a gun. None of these allegations were either reported, independently documented, verified, or corroborated.

M.C. initially said the first incident of inappropriate touching had occurring in the summer of 2012, but later stated all incidents had occurred between January and March 2013. M.C. also told McSwain Defendant had "never penetrated her vagina."

Regarding alleged sexual contact, M.C. "disclosed" a purported incident on an unspecified date when she had slept in the bed with Luck and Defendant. During the night, Luck left the bed and while in the bathroom, M.C. alleged Defendant purportedly "rolled over" and "pulled up her nightgown then went inside of her underwear and touched her vagina . . . . in a circular motion."

M.C. rolled over, fell off the bed, and struck her head on a small refrigerator located next to the bed. Luck returned from the bathroom, picked her up off the floor,

carried her to the living room, and placed her on the couch. M.C. alleged Defendant exited the bedroom shortly thereafter, approached her, and whispered, "If you tell anybody that I did this, I'm going to hurt you."

McSwain reported M.C. also asserted Defendant had "touched her private more than [one] time but was unable to state the exact number of times it happened." McSwain asked M.C. if Defendant had ever touched her on another part of her body. M.C. did not report the alleged "leg slapping" allegation, but recounted "one incident in which [Defendant] reached his hand inside of her shirt and rubbed her breasts" on the living room couch while Luck was outside the home smoking a cigarette.

In his report documenting his interview with M.C., McSwain concluded M.C. had "disclosed that the alleged assailant, [Defendant], sexually abused her on multiple occasions" and opined of M.C's credibility that she "reported to being truthful and did not appear to display any overt signs of deception."

In addition to reporting M.C.'s allegations to Sergeant Prichard on 2 December 2013, Archie also referred M.C. to Mary Katherine Mazzola, a DSS licensed clinical social worker. Mazzola diagnosed M.C. with post-traumatic stress disorder.

Mazzola encouraged M.C. to prepare a written "trauma narrative" to help M.C. "process [her] trauma." Mazzola reported three occasions when Defendant had purportedly touched M.C. inappropriately inside Luck's apartment, including one

time in the bedroom, and twice in the living room. The first occasion allegedly occurred when M.C. was sleeping between Defendant and Luck.

> I was in the middle and [Defendant] rolled over to me and touched me in my private part with his hand. [H]e put his hand in my pants. . . . He started moving his fingers around on top of my private parts. Then he took his hand out of my pants and rolled over and went back to sleep. . . . My mom [Luck] was facing the other way. . . . I went to the bathroom but I didn't really go to the bathroom, I went back to the living room. The next morning [Defendant] left and my mom asked me where I went and I told her that I thought I went to the bathroom but I went to the living room.

M.C. alleged the second event in her trauma narrative occurred as follows:

> About two weeks later I was sitting [o]n the floor and [Defendant] was helping me with my homework at the coffee table and he reached over and put his hand inside my shirt. . . . He pulled his hand out and I pretended I had to go to the bathroom and I went to the bathroom and I cried. . . . I came back out and I waited until [Defendant] was gone and I told [Luck]. She said she was going to call Grandma Sue and talk to her about it. But we forgot about it again.

M.C. alleged the third occasion in the trauma narrative occurred as follows:

> One day I was taking a nap on the couch and [Luck] was in the bathroom. [Defendant] came over and put his hand in my pants and touched me. I felt worried. He didn't say anything. . . . My mom came out of the bathroom and [Defendant] rushed over to the recliner. I went back to sleep and when I woke up [Defendant] was acting weird. He was talking fast and he was shaky and acting like he did something wrong. He left[.]

The narrative also asserted domestic violence between Luck and Defendant that M.C. reported to Mazzola. According to Mazzola, M.C. "reported several incidents of her mom . . . getting a black eye, having a bloody nose, [and] having to call the ambulance" on occasions when Luck had been hit by Defendant. M.C. also told Mazzola of a time when Defendant had purportedly attempted to break into Luck's apartment with a firearm. No evidence was introduced by the State to corroborate any of these allegations or incidences.

Defendant was arrested and charged with taking indecent liberties with a child on 10 November 2015, two years after M.C. had first met with Archie at DSS and stated, then denied, Defendant had inappropriately touched her. The 25 April 2016 indictment alleged Defendant had committed three "lewd and lascivious acts" upon M.C. on three occasions between January and March, 2013, more than three years prior to the indictment

The State did not present any physical evidence or call Luck, Grandma Sue, Aunt Tory or Luck's roommate, Michael, as witnesses to corroborate any of M.C.'s allegations at trial. McSwain and Mazzola were qualified and admitted as expert witnesses. After defense counsel's objections and later agreement, the trial court admitted a redacted version of the McSwain Report into evidence. The trauma narrative was also admitted into evidence without objection.

II. Issues

Defendant argues the trial court committed plain error by: (1) permitting the State's witnesses and the prosecutor to repeatedly use the terms "disclosure," "disclose," and "disclosed" to describe how M.C. had recounted the alleged incidences; (2) admitting portions of the McSwain Report; (3) not issuing a limiting instruction to the jury regarding certain profile testimony of McSwain and Mazzola; (4) permitting Mazzola to improperly vouch for M.C.'s credibility by testifying that M.C. had, in fact, experienced a number of traumas; (5) instructing the jury it could consider Mazzola's testimony regarding how M.C. having PTSD may have caused her to delay reporting Defendant's alleged acts of inappropriate touching; (6) permitting the State to introduce evidence and testimony regarding alleged incidents of domestic violence between M.C.'s mother and Defendant. and, (7) the cumulative effects of errors are prejudicial to award a new trial.

Defendant's appellate counsel concedes his trial counsel did not object to the admission of evidence and instruction he now challenges. Defendant acknowledges these issues are reviewed on appeal for plain error, except the prejudice from cumulative effects of the errors.

III. Standard of Review

The majority opinion sets forth the proper standard of plain error review under Rule of Appellate Procedure 10(a)(4) and our case law.

Plain error review is applied in the absence of an objection "to a trial court's failure to strike, on its own motion, improper testimony from an expert witness vouching for the credibility of an alleged sexually abused child. *State v. Towe*, 366 N.C. 56, 61, 732 S.E.2d 564, 567 (2012).

IV. Disclosure

Defendant argues the trial court committed plain error by admitting testimony from the State's experts and lay witnesses during which the witnesses repeatedly used the terms "disclose" or "disclosed," or variants thereof, when summarizing M.C.'s allegations to them. Defendant contends these witnesses' uses of "disclose" or "disclosed" bolstered and constituted improper vouching for M.C.'s credibility.

A. *Rule Against Improper Vouching*

The Supreme Court of North Carolina has held "[t]he jury is the lie detector in the courtroom and is the *only proper entity* to perform the ultimate function of every trial—determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (emphasis supplied). Following our Supreme Court's long-standing rule this Court has held "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted).

Prior precedents have repeatedly admonished: "a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504,

508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858-59 (2010). This prohibition against vouching for the credibility of another witness applies during the testimony of either an expert *or* a lay witness. *State v. Coble*, 63 N.C. App. 537, 541, 306 S.E.2d 120, 121 (1983). *See also State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) ("Expert opinion testimony is not admissible to establish the credibility of the victim as a witness" (citation omitted)), *aff'd per curium*, 356 N.C. 428, 571 S.E.2d 584 (2002).

The Supreme Court of North Carolina "has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) (citations omitted). "This Court has held that it is fundamental to a fair trial that a witness's credibility be determined by a jury, that expert opinion on the credibility of a witness is inadmissible, and that the admission of such testimony is prejudicial when the State's case depends largely on the testimony of the prosecuting witness." *Dixon*, 150 N.C. App. at 53, 563 S.E.2d at 599 (citation omitted).

B. *Vouching Testimony by Use of "Disclose"*

The record and transcript show numerous instances in the testimony of the State's witnesses, and questions by the prosecutor of repeated uses of the terms "disclose," "disclosed," "disclosure" and variants thereof, to refer to what M.C. had asserted as sexual abuse by Defendant.

McSwain testified chiefly about the VPC forensic interview he had conducted with M.C. All through this testimony, he and the prosecutor repeatedly used the terms "disclosed," "disclose," and "disclosure." McSwain testified in relevant part, as follows:

> [McSwain]: I asked [M.C.] about how her *disclosure* came about, how the allegations of abuse came out in the open or if she ever told anybody, and she did make a comment that she eventually did tell her mom about the alleged abuse.
>
> . . . .
>
> [McSwain]: I asked [M.C.], well, what did her mom say or how did her mom respond after her *disclosure*, and she stated that her mom said, "Well, I guess he did. Life has moved on."
>
> . . . .
>
> [Prosecutor]: And after she gave you this particular *disclosure*, did she move on to another topic or did y'all continue to talk about *disclosure*?
>
> [McSwain]: Well, I questioned her about her concern. . . why she was concerned about her grandmother seeing the [forensic interview], the particular DVD [recording].
>
> . . . .
>
> [Prosecutor]: And was there any other *disclosure* that she made about being touched anywhere else on her body?
>
> [McSwain]: [M.C.] stated that she had not been touched any where else on her body outside of her private area and her breasts.
>
> . . . .

> [Prosecutor]: And what, if anything, did [M.C.] say about why she didn't *disclose*?
>
> [McSwain]: She stated she didn't tell anybody because [Defendant] had threatened to hurt her.
>
> . . . .
>
> [Defense counsel]: And, at that point in time, you started asking her questions about the alleged touching; is that right?
>
> [McSwain]: After she *disclosed* that when [Defendant] spends the night, sometimes he touches her private area. [Emphasis supplied].

The State's other expert witness, DSS social worker Mazzola, testified, in response to the prosecutor's questions, in relevant part:

> [Prosecutor]: And when you made the statement that you thought a lot of the trauma had to do with the domestic violence and the gun incident, and things of that nature, did that, in any way, *discount her disclosure* of sexual abuse? [Emphasis supplied]
>
> [Mazzola]: No.

In addition to the State's expert witnesses, the State elicited the testimony of lay witnesses, Archie and Sergeant Prichard, who used the terms "disclose," "disclosure," and "disclosed" numerous times during their testimonies:

> [Archie]: At a later interview, [M.C.] *disclosed* . . . . Oh. On this incident right here, she did not – at that time, she did not *disclose* anything during the first interview about – not saying anything to me or telling anyone (sic).

> . . .
>
> [Archie]: . . . [M.C.] also *disclosed* that he had – when I asked her about touching her vagina, I asked her, you know, what did he do, and she stated that he rubbed and poked at it.
>
> . . .
>
> [Prosecutor]: And after this initial interview, what, if any, reports did you make based on [M.C.'s] *disclosure*? [Emphasis supplied]
>
> [Archie]: A report was made to law enforcement.

The prosecutor and Sergeant Prichard also repeatedly used the terms "disclosed" and "disclosure" to describe what M.C. had alleged:

> [Prichard]: In the course of [Archie's] investigation, additional information was *disclosed* by [M.C.] that she had been touched inappropriately by [Defendant], which was identified as Ms. Luck's boyfriend.
> . . .
> [Prichard]: Other than the biological information for the family, [Archie] had also indicated that a forensic interview had already been conducted prior to contacting me in which [M.C.] *disclosed*.
> . . .
> [Prosecutor]: What, if anything, else did you ask Ms. Archie with regard to the *disclosure* of sexual abuse?
>
> [Prichard]: What the details of the *disclosure* were?
>
> [Prosecutor]: And what details were you given at that time?
>
> [Prichard]: That [M.C.] had been touched by [Defendant] on her private area.
> . . .

> [Defense Counsel]: But you were aware that Ms. Archie had interviewed [M.C.] a couple of times prior to that?
>
> [Prichard]. I wasn't aware of how many times. Like I said, at that point, I was not given her dictation. She just advised that [M.C.] had *disclosed* in the neglect investigation some form of inappropriate touch, so she made the referral to Vantage Point. [Emphasis supplied].

Defendant argues this Court's opinion in *State v. Jamison* prohibits witnesses' frequent use of the term "disclose," and variations thereof, to describe M.C.'s allegations. *State v. Jamison*, __ N.C. __, 821 S.E.2d 665, 2018 WL 6318321 (2018) (unpublished) , *review denied*, __ N.C. __, 826 S.E.2d 701 (2019). Defendant complied with North Carolina Rule of Appellate Procedure 30(e)(3) and attached a copy of *Jamison* to his brief, and served a copy on the State. N.C. R. App. P. 30(e)(3).

In *Jamison*, the defendant was convicted of first-degree sex offense with a child, indecent liberties with a child, and felony child abuse by a sexual act. 2018 WL 6318321 at *1. On appeal, the defendant argued the trial court plainly erred by allowing an expert witness to bolster and vouch for the credibility of the child victim. *Id.* at *4.

As with McSwain here, the expert witness in *Jamison* was admitted as a specialist in child forensic interviews. *Id.* This Court highlighted the relevant portions of the expert's testimony, in part, as follows:

> [The expert witness] explained that when she conducts a forensic interview with a child, she assesses for "any kind of barriers there might be for their disclosure." [The child

> victim] provided [the expert witness] with "five separate episodic detailed events of times that she had been inappropriately touched." *At one point during [the expert witness's] testimony, the prosecutor repeatedly used the word "disclose" in her questions.* When asked, "Did [the child victim] disclose another incident to you?", [the expert witness] responded by parroting the prosecutor's wording, answering that [the child victim] "*disclosed* an incident." Later, [the expert witness] 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." [The expert witness] noted several barriers in [the child victim'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."

Id. (Emphasis supplied).

This Court concluded and held the admission of the expert's testimony was plain error, in part, under the following reasoning:

> 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*. [The expert witness's] repeated use of this term lent credibility to [the child's] testimony.

Id. (Emphasis supplied).

This Court ultimately held other substantial and properly admitted evidence of guilt overcame this prejudice and sustained the conviction. *Id.* The other evidence

of guilt in *Jamison* included, in part, the defendant never denying the child victim's accusation to police, and a video interview of the defendant with police in which the defendant told an officer he "should believe any kid that makes these allegations, and that [the child victim]—that it could be that [the child victim] was just crying out for help." *Id.* at *5.

This Court's analysis in *Jamison* confirmed the definitions and use of "disclose," "disclosure" or variants thereof by expert and lay witnesses to specifically refer to a child's statements alleging sexual abuse constitutes inadmissible bolstering and vouching. Comparing the very similar manner of the expert witness' use in *Jamison* of "disclosure" and as was used by the prosecutor and numerous witnesses here, this testimony clearly bolstered and improperly vouched for M.C.'s credibility. Unlike *Jamison,* here, there is absolutely no physical evidence or other substantial and properly admitted corroborating evidence of guilt to overcome this prejudice and sustain Defendant's conviction. *See id.*

Black's Law Dictionary's definition of disclosure quoted in *Jamison* is consistent with the meanings contained in other standard dictionaries of the English language. *See., e.g.*, *American Heritage Dictionary* 395 (3d ed. 1993) ("1. The act or process of revealing or uncovering; 2. Something uncovered; a revelation."); *Webster's New World College Dictionary* 419 (5th ed. 2014) ("1. A disclosing or being disclosed; 2: a thing disclosed; revelation.").

"Jurors are . . . presumed to understand the meaning of English words as they are ordinarily used." *State v. Withers*, 2 N.C. App. 201, 203, 162 S.E.2d 638, 640 (1968). The pervasive and repeated use of "disclosure" by the prosecutor and expert witnesses, Mazzola and McSwain, and the lay witnesses, Archie and Sergeant Prichard, "suggest[ed] that there was something factual to divulge, and [was] a comment on [M.C.'s] credibility and the consequent reliability of what [she had] revealed." *Jamison*, 2018 WL 6318321 at *4.

The majority's opinion quotes a thesaurus to support their reasoning, which only provides similar words and not a definition, instead of defining "disclose" or "disclosure" by using a dictionary. The witnesses' repeated use of "disclosure" and variants thereof to describe M.C.'s allegations of indecent liberties by Defendant conveys the message to bolster and vouch that M.C.'s statements were "revelations" and were to be accepted and treated as factually true. *Id.*

The State's and its witnesses' pervasive he use of "disclosure" and its variants, especially by the expert witnesses, amounted to testimony "to the effect that [M.C. was] believable, credible, or telling the truth[,]" which this Court has consistently held to be inadmissible. *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1987) (citation omitted); *see State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (1987) ("our courts have held expert testimony inadmissible if the expert testifies that the prosecuting child-witness in a trial for sexual abuse is believable, or to the effect that

the prosecuting child-witness is not lying about the alleged sexual assault." (citations omitted)).

McSwain and Mazzola repeatedly used the terms "disclose" and "disclosure" at other times in their testimony to refer to revelations of fact of sexual abuse by children in a general sense, and not specifically to M.C.'s statements of sexual abuse. For instance, McSwain also testified in relevant part:

> [Prosecutor]: Are you familiar with the ways in which children *disclose* sexual abuse?
>
> [McSwain]: Yes, ma'am.
>
> [Prosecutor]: And is *disclosure* an event or is it a process?
>
> [McSwain]: *Disclosure of abuse is a process.*
>
> . . . .
>
> [Prosecutor]: What types of factors, based on your training and experience, can affect how or when a child *discloses*?
>
> [McSwain]: There are a number of different factors that affect when a child *discloses* . . . [.]
>
> . . . .
>
> [McSwain]: I am aware of *patterns of disclosure* and things such as delayed *disclosure*.
> [Emphasis supplied].

Following this Court's holding in *Jamison* and reviewing the definitions and plain meanings of "disclose" and "disclosure," and their variants, the admission of the witnesses' testimony, in which "disclosure" and its variants was pervasively and

repeatedly used by the State and its witnesses to describe M.C.'s allegations of inappropriate touching by Defendant, was error. *See Jamison*, 2018 WL 6318321 at *4; *Dick*, 126 N.C. App. at 315, 485 S.E.2d at 89. *See also Oliver*, 85 N.C. App. at 11, 354 S.E.2d at 533.

C. *Prejudicial Impact*

The erroneous admission of the witnesses' repeated and improper use of "disclosure" to bolster and vouch for M.C.'s credibility was prejudicial error to award Defendant a new trial under plain error review.

In *State v. Ryan*, this Court concluded and held that the following testimony from a doctor admitted as an expert witness bolstered and improperly vouched for the credibility of a child victim:

> [Prosecutor]. [H]ave you ever diagnosed or made a finding that [a] child is not being truthful?
>
> [Doctor]. I have done that on several occasions.
>
> [Prosecutor]. Can you explain to the jurors what you look for, the clues that you look for, and do you do that in every case?
>
> [Doctor]. I do it in every case.
> ....
>
> [Prosecutor]. Was there anything about your examination of [the child] that gave you any concerns in this regard?
>
> [Doctor]. That gave me concerns that she was giving a fictitious story?

> [Prosecutor]. Yes.
>
> [Doctor]. Nothing. There was nothing about the evaluation which led me to have those concerns. And again, as I was getting into her history and considering this as a possibility, nothing came out.

State v. Ryan, 223 N.C. App. 325, 334, 734 S.E.2d 598, 604 (2012), *disc. review denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

This Court concluded the doctor's testimony stating she had no "concerns" that the child was giving "a fictitious story" was "tantamount to her opinion that the child was not lying about the sexual abuse." *Id.* As with Defendant here, the defendant in *Ryan* did not object to the doctor's admitted testimony. *Id.*

This Court reviewed whether the admission of this disputed testimony constituted plain error. *Id.* In assessing the doctor's testimony, this Court prefaced its analysis by stating:

> Notably, a review of relevant case law reveals 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*, *. . . 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. *See Aguallo*, 318 N.C. at 599-600, 350 S.E.2d at 82; *State v. Trent*, 320 N.C. 610, 615, 359 S.E.2d 463, 466 (1987); *State v. Bush*, 164 N.C. App. 254, 259-60, 595 S.E.2d 715, 718-19 (2004); *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002); *State v. Parker*, 111 N.C. App. 359, 366, 432 S.E.2d 705, 710 (1993). [Emphasis supplied].

Id. at 337, 734 S.E.2d at 606.

This Court further noted that the credibility of the child victim was central to the State's case in *Ryan* because:

> [T]he State's evidence consisted of testimony from the child, her family members, her therapist, the lead detective on the case who was an acquaintance of the family, and an expert witness. *All of the State's evidence relied in whole or in part on the child's statements concerning the alleged abuse*. The only physical evidence presented that bolstered the State's case that the child had been sexually abused was a deep hymenal notch in the child's vagina and the presence of bacterial vaginosis. However, [the child's mother] testified that the child's symptoms of bacterial vaginosis predated the alleged sexual assaults by the defendant. In addition, more than two years had elapsed since the alleged sexual contact and the child's medical examination. Further, there was no physical evidence that bolstered the State's case that the child was anally assaulted or that defendant was the perpetrator of any such abuse. *There was no testimony presented by the State that did not have as its origin the accusations of the child.*

Id.

In *Ryan*, all of the evidence presented by the State "amounted to conflicting accounts from the child, defendant, and their families," except for the erroneously admitted testimony of the doctor, who had improperly vouched for the alleged child victim's testimony. *Id.* at 338, 734 S.E.2d at 607. This Court noted "[t]he child's account of what happened evolved over time[.]" *Id.* The Court concluded that, because the doctor was admitted as an expert witness in the treatment of sexually abused

children, "her opinion likely held significant weight with the jury" and "had a probable impact on the jury's finding defendant guilty by enhancing the credibility of the child in the jurors' minds." *Id*.

D. *Absence of Other Evidence of Guilt - Motivation to Fabricate*

In other cases where defendants have: (1) admitted guilt; (2) physical evidence was presented; (3) eyewitnesses testified they had observed defendants having sexual or inappropriate contact with victims; or, (4) other properly admitted evidence corroborated the allegations, this Court has found defendant's showed insufficient prejudice in improperly admitted vouching credibility testimony in child sex offense cases to warrant a new trial on plain error review. *See, e.g.*, *State v. Crabtree*, __ N.C. App. __, __, 790 S.E.2d 709, 716-17 (2016) (holding the defendant had failed to show prejudice under plain error review from erroneous admission of expert testimony vouching for the victim where several eyewitnesses testified that they had observed the defendant and the victim sexually touching each other on several occasions); *State v. Black*, 223 N.C. App. 137, 146-47, 735 S.E.2d 195, 200-01 (2012) (holding the defendant had failed to show prejudice under plain error review from the erroneous admission of expert testimony vouching for the victim where other evidence showed defendant had given the victim a vibrator, shaved the victim's pubic hair, and sexually molested other children); *State v. Davis*, 191 N.C. App. 535, 540-41, 664 S.E.2d 21, 25 (2008) (holding the defendant had failed to show prejudice under plain

error review from the erroneous admission of a statement in expert's report, which bolstered victim's credibility, where evidence showed the defendant's sperm was located on victim's skirt).

As distinguished from these cases noted above and similarly to the facts and evidence in *Ryan*, the entire foundation of the State's evidence here relies *solely* upon M.C.'s uncorroborated allegations of indecent liberties taken by Defendant or other acts of domestic violence. *See id.* No physical evidence or eyewitness testimony, or prior reports or incidents or interventions recounted by M.C. was presented or admitted to corroborate her accusations that Defendant had touched her inappropriately or to support her other allegations of domestic violence had ever occurred.

In addition to M.C.'s uncorroborated and inconsistent accounts, other evidence tended to show M.C. was motivated to fabricate her claims of inappropriate touching against Defendant. In her trauma narrative, M.C. described the first time she had met Defendant.

Defendant had introduced himself to M.C. as Luck's boyfriend. M.C. wrote Luck had given Defendant a shirt for his birthday "and he opened it and he and my mom started kissing. I felt mad because I started to think about my mom and dad and I was afraid that [Defendant] and my mom would get married and I would have to call him dad."

M.C. also testified she had told her mother she did not like Defendant staying with them. M.C. recounted incidences of domestic violence between her mother and Defendant in her testimony, forensic interview, and trauma narrative. None of these alleged incidents were independently reported, corroborated or verified. M.C.'s stated ill motivations against Defendant placed her credibility directly into issue.

E. *Inconsistent Allegations - Credibility*

M.C.'s "disclosures" and accounts of alleged indecent touching by Defendant are inconsistent in the number of times, manner, and places Defendant allegedly touched her and whether M.C. had informed her mother, grandmother, aunt, friends, other family members, or teachers of the alleged incidences. These inconsistencies further call her credibility into question and shows prejudice to Defendant from the improper bolstering and vouching. *Id.* at 338, 734 S.E.2d at 607. A brief review is instructive.

DSS social worker Archie testified M.C. denied being touched inappropriately by Defendant when Archie initially interviewed her on 25 October 2013. When Archie interviewed M.C. a second time, in November 2013, M.C. "disclosed" and alleged only one act of Defendant's inappropriate touching. Defendant allegedly came into the bedroom while M.C. was taking a nap, touched M.C. near her vagina, and walked into the living room to watch television.

M.C. told Archie that she had spoken with her mother, Luck, about the incident. Luck allegedly responded for M.C. to tell her if it happened again. M.C. did not recount this incident again to anyone else, either in her interviews with McSwain, in her trauma narrative, with Mazzola, to Sergeant Prichard, or in her testimony at trial.

The next time M.C. alleged any indecent liberties were taken by Defendant, occurred during McSwain's forensic interview on 26 November 2013. M.C. "disclosed" and described two incidences where Defendant had allegedly "made her feel uncomfortable."

In the first incident, Luck asked M.C. to "get in the bed with her and [Defendant]." M.C. was positioned in the bed between Luck and Defendant. Luck got out of bed and went into the bathroom. While Luck was in the bathroom, Defendant purportedly rolled over and started rubbing near M.C.'s vagina. M.C. "disclosed" she rolled away from Defendant, fell off the bed, and hit her head on a refrigerator next to the bed. Luck came out of the bathroom and asked "What was that?" M.C. described Defendant to McSwain as pretending to be asleep. She was on the floor crying and Luck picked her up and carried her to the living room couch.

In the forensic interview, M.C. stated she told Luck about Defendant touching her "private area" when they were at her "Aunt Tory's house." Luck's alleged response was, "Well, I guess he did it. And life has moved on." M.C. initially indicated

that the abuse "would always occur in the bedroom" at Luck's home in the forensic interview.

In the second incident where M.C. "disclosed" in the forensic interview, she and Defendant were sitting on the living room couch. Defendant allegedly reached inside of her shirt and rubbed her chest. M.C. alleged this incident occurred while her mother, Luck, was outside of the home, smoking a cigarette.

The next version of M.C.'s allegations of inappropriate conduct by Defendant are asserted within the trauma narrative she allegedly prepared as part of her therapy with Mazzola. The writing and narrative appears well advanced beyond M.C.'s age and education. M.C. "disclosed" three incidences asserting Defendant had inappropriately touched her.

In the first incidence, M.C. stated she became scared one night when she was sleeping by herself in the living room. She went to Luck's bedroom and told her she did not want to sleep in the living room by herself. Luck told her she could sleep with Luck and Defendant. Luck did not tell M.C. she had to sleep in the bed with her and Defendant, as M.C. had told McSwain. M.C. laid between Defendant and Luck in the bed. Defendant allegedly rolled over and put his hands inside her pants and touched her private parts. Defendant then rolled over and went back to sleep.

M.C. wrote she arose from the bed and pretended to go to the bathroom, but instead went back to the living room to sleep. The next morning, Luck asked M.C.

about her going back into the living room. M.C. told her "I thought I went to the bathroom[.]" M.C. stated Luck responded with "I know you're not telling me the truth." M.C. then wrote she told her mother about Defendant touching her "in the private part last night." Luck then called Defendant and got into an argument with him about touching M.C. inappropriately. M.C. then wrote "And then we ate breakfast and forgot about it for the day."

In this version, M.C. did not recount falling out of bed and hitting her head on a refrigerator, her mother being in the bathroom, nor Defendant allegedly coming into the living room afterwards and threatening to hurt her if she told anyone about what had allegedly happened.

The second incidence M.C. recounted in her trauma narrative occurred "[a]bout two weeks later[.]" M.C. was sitting on the living room floor in front of the coffee table. Defendant was reportedly helping M.C. with her homework and "he reached over and put his hand inside [M.C.'s] shirt." M.C. went to the bathroom and waited until Defendant had left. She came out of the bathroom and told Luck about what had happened. Luck "said she was going to call Grandma Sue and talk to her about it. But we forgot about it again."

In the third incidence, M.C. said she had been taking a nap on the couch in the living room. Luck was in the bathroom. "Defendant came over and put his hand in [M.C.'s] pants and touched [her]." According to M.C.:

> My mom came out of the bathroom and [Defendant] rushed over to the recliner. I went back to sleep and when I woke up [Defendant] was acting weird. He was talking fast and he was shaky and acting like he did something wrong. He left and my mom asked me "Where did he touch you? and I told her "on my private part." She got mad and went outside and told Grandma Sue and she got mad too. . . . the next day we forgot about it again. My mom never did anything about [Defendant], she didn't care.

F. *Testimony at Trial*

The final time M.C. accused Defendant of inappropriately touching her was during her direct testimony at trial. M.C. described the first incident had occurred at a time when she was sleeping in the bed between Luck and Defendant. Luck got out of bed and went to the bathroom. Defendant rolled over, wrapped his arm around M.C., placed his hand inside of her pajama pants, and rubbed her vagina. M.C. was eventually able to roll away from Defendant. M.C. initially testified she got out of the bed and went into the living room.

The prosecutor asked M.C. if she recalled anything else occurring before she went into the living room, to which she replied, "I guess he was trying to stop me. And. . . I kind of fumbled over. . . the mini refrigerator in the room. . . I fell out of the bed and the refrigerator tipped over because I hit my head on it."

M.C. testified Defendant followed her into the living room and told her "that if [she] told anyone, that he would hurt me." M.C. stated her mother remained in the bathroom when she fell out of bed and when Defendant followed her into the living

room. M.C. testified she told her mother of the incident the next day, but her mother responded that she "needed to move on with life."

M.C. testified Defendant had touched her vagina on a second occasion. She stated, "we were in bed and my mom was asleep and I was in the middle of the bed and [Defendant] had rolled over and did the same thing[,]" that is, rubbed her vagina. M.C. testified she did not tell her mother nor anybody else about this incident. This testimony was inconsistent with what she had written in her trauma narrative about telling her mother the following morning and her mother getting into an argument with Defendant over the alleged incident.

The third, and final, incident M.C. testified to at trial involved Defendant allegedly touching her chest underneath her clothes. M.C. stated, "[Defendant] was sitting on the couch and I was at the coffee table sitting on the floor doing my homework[.]" M.C.'s mother was in the kitchen cooking dinner. M.C. testified Defendant "leaned over and put his hand in [M.C.'s] shirt" and "just kind of rubbed." M.C. stood up and Defendant took his hand out of her shirt. M.C. went to the bathroom and waited. When she left the bathroom, Defendant was gone. Inconsistent with what she had written in her trauma narrative, M.C. testified she did not actually tell her mother about this incident.

Aside from these three incidences, M.C. testified at trial that she did not recall any other time when Defendant had touched her inappropriately, and Defendant had

not touched her any other times either in the bedroom or living room. M.C. testified she did not tell her maternal grandmother, Sue, or her school guidance counselor about Defendant touching her, which testimony is inconsistent with what she had "disclosed" to McSwain in her forensic interview. Neither Sue nor the school guidance counselor testified at trial. M.C. did not testify about an incident when Defendant had allegedly touched her vagina while she was taking a nap on the couch in the living room, as she had described in her trauma narrative.

The record shows many other inconsistencies in M.C.'s disparate recollections of inappropriate touching by Defendant, a total lack of any physical evidence, a six-to-eight month delay in "disclosing" the alleged indecent liberties and a lack of eyewitness testimony or corroboration of the alleged incidences. The record also includes evidence of M.C.'s motive to fabricate the allegations, due to disliking Defendant because of his relationship with her mother.

The State's evidence and case is based *entirely* upon M.C.'s credibility. Neither her mother, grandmother, roommate Michael, her aunt, school counselor nor anyone else M.C. recounted as being present or having been contemporaneously told about Defendant's alleged acts of inappropriate touching testified. No physical evidence was introduced, as was present in other cases.

The State presented McSwain as an expert witness in the forensic interviewing of abused children, and Mazzola as an expert witness in sexual abuse and pediatric

counseling. The jury heard McSwain's testimony involving his training in forensic interviewing and his two Master's degrees, including one in forensic psychology. The jury heard Mazzola's testimony involving her training in counseling, her Master's degree in social work, and how she had treated over 1,000 children for sexual abuse.

Based upon their qualifications, McSwain and Mazzola's expert testimonies was likely given significant weight by the jury. Additionally, the improper use of "disclosure" by all four of the State's witnesses and prosecutor placed particular significance upon the witnesses' descriptions and interpretations of M.C.'s statements. With the absence of *any* corroborative witnesses, documents, or physical evidence, the witnesses' improper bolstering testimony and vouching for M.C.'s credibility was prejudicial to Defendant and had a probable impact upon the jury's finding of guilt. *See Ryan*, 223 N.C. App. at 338, 734 S.E.2d at 607.

As with the State's evidence in *Ryan*, the State's case rested entirely on M.C.'s accounts and allegations of what had occurred. *See id.* (holding admission of expert's improper vouching testimony constituted plain error where there was a lack of corroborating evidence). Following our analysis and conclusion in *Jamison* and holding in *Ryan*, the admission of the witnesses' testimony, which improperly vouched for M.C.'s credibility by referring to her statement's alleging sexual abuse as "disclosures" prejudiced Defendant, and constitutes plain error. *See id.* Defendant's

conviction and the judgment entered is properly reversed and remanded for a new trial.

V. The McSwain Report

The majority's opinion addresses Defendant's argument regarding the trial court's admission of the "McSwain Report" into evidence. Defendant argues the "trial court plainly erred because the opinions and recommendations in the [McSwain Report] clearly establish McSwain found M.C. and her sexual abuse allegations credible and believed in [Defendant's] guilt."

As noted above, McSwain was tendered and admitted as an expert witness in conducting forensic interviews of children. McSwain defined a "forensic interview" as "a structured conversation with the child designed to elicit details about a specific event or events that the child has . . . experienced." McSwain prepared his Report, which summarized information M.C. had "disclosed" or "revealed" to him during the forensic interview, and his conclusions, opinions, and recommendations. After Defendant's initial objections, a redacted written McSwain Report was also admitted into evidence.

Defendant highlights numerous portions of the McSwain Report he contends improperly bolster and vouch for M.C's credibility, including the following sentences within a section of the report, entitled "Impressions":

> [M.C.] displayed age appropriate competencies across all spheres of functioning. [M.C.] appeared resistant to

> suggestion, unaffected by the primacy-recency effect, with appropriate memory recall and a willingness to correct the clinician as needed. . . . [M.C.] engaged appropriately in dialogue, stayed focused and followed commands. [M.C.'s] language skills. . . appeared appropriate for information gathering purposes. . . . *[M.C.] demonstrated that she understood the difference between telling the truth and telling a lie. [M.C.] reported an acceptance of the obligation to report information truthfully.* (Emphasis supplied).

Defendant also casts the following paragraph from a section entitled "Summary/Conclusion" as improper bolstering and vouching:

> The interviewe (sic) notes that during the forensic interview session, [M.C.] appeared to be consistent with the information . . . about [Defendant] sexually abusing her. In addition, *she reported to being truthful and did not appear to display any overt signs of deception. [M.C.'s] assessment was consistent with that of someone who has been sexually abused*. (Emphasis supplied).

Defendant also contends the use of "assailant" in the following sentence from a section entitled "Recommendations" in the Report constitutes an improper comment upon Defendant's guilt:

> 2. The interviewer would strongly encourage that [M.C.] remain inaccessible to the alleged assailant until the reasonable conclusion to this investigation and determination is made that [M.C.] is emotionally and physically safe when in the assailant's presence[.]

With regards to the "Summary/Conclusion" section of the McSwain Report, this Court has held very similar expert testimony constitutes improper vouching for the credibility of a witness and was erroneously admitted in *State v. Frady*, 228 N.C.

App. 682, 747 S.E.2d 164, *disc. review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013).

In *Frady*, a medical doctor, Dr. Brown, was admitted as an expert witness and testified that a six-year-old child, Debbie's, "disclosure" was "consistent with sexual abuse." *Id.* at 684, 747 S.E.2d at 166. Dr. Brown testified that her opinion was based upon "[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).

This Court stated:

> In order for an expert medical witness to render an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse. *Without physical evidence, expert testimony that sexual abuse has occurred is an impermissible opinion regarding the victim's credibility*.

Id. at 685, 747 S.E.2d at 1667 (emphasis supplied) (citation omitted).

Reviewing Dr. Brown's testimony, 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. The testimony neither addressed the characteristics of sexually abused children nor spoke to whether Debbie exhibited symptoms consistent with those characteristics.

Id. at 685-86, 747 S.E.2d at 167 (citation omitted).

This Court held "the contested testimony amounted only to an impermissible

opinion regarding the victim's credibility, and the trial court erred in admitting it." *Id.* at 686, 747 S.E.2d at 167; *see also Oliver*, 85 N.C. App. at 11, 354 S.E.2d at 533.

The State argues *Frady* is inapplicable to support Defendant's appeal because, unlike McSwain, Dr. Brown did not personally interview the child victim. This Court noted "the record contains no physical evidence indicating that Debbie was sexually abused, and Dr. Brown never personally examined or interviewed her; she merely reviewed the forensic interview and the case file." *Frady*, 228 N.C. App. at 686, 747 S.E.2d at 167.

A close reading of this Court's analysis indicates Dr. Brown's failure to interview or personally examine the child was not a determinative factor of this Court's holding that her testimony constituted inadmissible opinion testimony vouching for the child's credibility. *Id.*

Before noting Dr. Brown had not personally interviewed or examined the child, this Court held Dr. Brown "essentially expressed her opinion that Debbie is credible. We see no appreciable difference between this statement and a statement that Debbie is believable." *Id.*

Even if Dr. Brown had personally interviewed or examined the child, no testimony established her opinion that the child's "'disclosure' is consistent with sexual abuse" was based upon a comparison of the victim's characteristics to the known characteristics of sexually-abused children. *Id.* at 685, 747 S.E.2d at 166.

In *Frady,* this Court held the doctor's expert testimony, concerning her opinion on the credibility of the child, was not dependent upon whether that doctor had interviewed or examined the child witness. In the present case, the State's characterization and limiting of this Court's holding in *Frady* is inconsistent with that opinion's analysis. *See id.*

No meaningful distinction exists between the expert testimony excluded in *Frady* and the "Summary/Conclusion" paragraph challenged in the McSwain Report. McSwain based his conclusion asserting "[M.C.'s] assessment was consistent with that of someone who has been sexually abused" upon his opinion that "[M.C.] appeared to be consistent with the information . . . about [Defendant] sexually abusing her" and "she reported to being truthful and did not appear to display any overt signs of deception."

Like the inadmissible testimony in *Frady*, this paragraph in the McSwain Report "essentially expresse[s] [his] opinion that [M.C.] is credible." *See Frady*, 228 N.C. at 685, 747 S.E.2d at 167. Following our opinion in *Frady*, I "see no appreciable difference between [McSwain's] statement and a statement that [M.C.] is believable. The [statement] neither addressed the characteristics of sexually abused children nor spoke to whether [M.C.] exhibited symptoms consistent with those characteristics." *See id.* at 686, 747 S.E.2d at 167.

The "Summary/Conclusion" section from the McSwain Report constitutes inadmissible expert testimony attesting to the credibility of M.C. *See In re T.R.B.,* 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 *(2003)* ("An 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.").

VI. Invited Error

The majority's opinion correctly concludes Defendant cannot show plain error with respect to the erroneous admission of any portion of the McSwain Report on this appeal. Based upon Defendant's invited error, I concur with the majority's opinion that he is unable to establish plain error on the otherwise erroneous, but invited admission of the McSwain Report on this ground.

VII. Conclusion

Defendant's arguments concerning the erroneous admission of the McSwain Report are waived. Based upon Defendant counsel's invited error, I concur with the majority's opinion that Defendant cannot to establish plain error on this ground.

The State's case rested entirely upon M.C's credibility and lacked any corroborating physical evidence or independent testimony. The trial court's admission of bolstering testimony by McSwain, Mazzola, Archie, and Sergeant Prichard to vouch for M.C.'s credibility was error. The witnesses' bolstering testimony likely had a probable impact on the jury's verdict, given the shifting and

inconsistent versions of alleged incidents M.C. "disclosed" and motivations for M.C. to fabricate against and prejudice Defendant.

The State's introduction of alleged domestic violence by Defendant, without any corroborating evidence, was also error. These errors are prejudicial and constitute plain error. Plain error and the cumulative effect of the errors at trial prejudiced Defendant, and necessitates reversal.

I vote to reverse Defendant's conviction and judgment and remand for a new trial. I concur in part and respectfully dissent in part.