IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-857

Filed: 18 August 2020

Forsyth County, Nos. 17 CRS 57244-45

STATE OF NORTH CAROLINA

v.

RONDAL LEE SWEET, JR.

Appeal by defendant from judgments entered 18 March 2019 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 29 April 2020.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.

Sean P. Vitrano for defendant-appellant.

ZACHARY, Judge.

Defendant Rondal Lee Sweet, Jr., appeals from judgments entered upon a jury's verdicts finding him guilty of statutory sex offense with a child by an adult; statutory rape of a child by an adult; two counts of felony child abuse by a sexual act; and two counts of taking indecent liberties with a child. On appeal, Defendant argues that the trial court erred by excluding relevant evidence of an alternative basis for

his daughter's sexual knowledge, and committed plain error by permitting an expert witness to vouch for his daughter's credibility. After careful review, we hold that Defendant received a fair trial, free from error.

Background

Defendant and his former wife, Heather Sweet, are the parents of two daughters: Lily, born in 2007, and Catherine, born in 2011.[1] While Heather worked two jobs, Defendant stayed home and cared for their children. When Heather and Defendant separated in 2015, Defendant moved from the family home in Alexander County, North Carolina, to Winston-Salem, North Carolina. Pursuant to the parties' Parenting Agreement, during the school year, Defendant had visitation privileges with the children at his home every other weekend from Friday night until Sunday night. Heather and Defendant divorced in 2016.

On 17 October 2016, when Lily was eight years old, she told her school guidance counselor, Kimberly Curry, that Defendant had been sexually abusing her. Lily reported that her father had forced her to engage in oral and vaginal sex with him, and had taken pornographic pictures and video of her. Curry notified the Alexander County Department of Social Services ("DSS") of Lily's allegations. DSS referred the matter to the Alexander County Sheriff's Office, which contacted

[1] We employ pseudonyms to protect the identities of the minor children.

Corporal Aaron Jessup of the Winston-Salem Police Department's Juvenile Special Victims Unit on 20 October 2016.

Corporal Jessup began an investigation and arranged for Lily to be interviewed at a child advocacy center on 25 October 2016, prior to her next scheduled visit with Defendant. During the interview, Lily stated that she was afraid to be in the home with Defendant. Corporal Jessup's investigation spurred assessments by a number of medical professionals, many of whom were of the opinion that Lily manifested symptoms or characteristics consistent with those exhibited by children who have suffered sexual abuse. Although the assessments did not reveal any physical evidence of sexual abuse, Lily's allegations of abuse could not be discredited.

During the course of the assessments, Lily shared her history of sexual abuse by Defendant. Defendant began inappropriately touching her when she was five years old, and had continued to do so for years. When her parents were together, Defendant sexually abused Lily in his bedroom while Heather was at work. After the couple separated and Defendant moved to Winston-Salem, Defendant continued to sexually abuse Lily when he had visitation.

Lily alleged that Defendant engaged in various sexual acts with her, including oral, vaginal, and anal sex. Defendant also forced Lily to watch pornographic movies and videos, and he used his phone to take a pornographic picture of Lily, as well as to "record[ ] an incident in which he was sexually abusing her." Lily told the child

forensic interviewer, Fulton McSwain, that she did not tell anyone right away because she was scared.

On 3 August 2017, a magistrate issued warrants for Defendant's arrest. On 27 November 2017, a Forsyth County grand jury returned true bills of indictment charging Defendant with statutory sex offense with a child by an adult; statutory rape of a child by an adult; two counts of felony child abuse by sexual act; and two counts of taking indecent liberties with a child.

On 11 March 2019, Defendant's case came on for a jury trial before the Honorable Richard S. Gottlieb in Forsyth County Superior Court. At the conclusion of the evidence, the jury found Defendant guilty of all charges.

The trial court entered judgment crediting Defendant for 583 days of time served and sentencing him to the following active terms of imprisonment in the custody of the North Carolina Division of Adult Correction: 300-372 months for statutory sex offense with a child by an adult; 300-372 months for the statutory rape of a child by an adult; 73-100 months for each of the two charges of felony child abuse by sexual act; and 19-32 months for the each of the two charges of taking indecent liberties with a child. In addition, the trial court ordered that a "[satellite-based monitoring] hearing . . . be conducted at or near [the] time of Defendant's release from custody[.]"

Defendant timely filed notice of appeal.

Discussion

On appeal, Defendant argues that the trial court (1) "erred in excluding evidence that [Lily] viewed pornography in school in 2018," and (2) "committed plain error in permitting [Lily's] therapist, who testified as an expert witness, to vouch for her credibility."

I. Exclusion of Evidence

Defendant first argues that the trial court erred by excluding as irrelevant, pursuant to Rule 401 of the North Carolina Rules of Evidence, evidence that Lily "viewed pornography in school in 2018," after Defendant's arrest and indictment in this matter. Specifically, Defendant submits that the evidence "was relevant because it showed another source of [Lily's] sexual knowledge[,]" and that the exclusion of this evidence "was prejudicial to the defense." We disagree.

A. Standard of Review

"Whether evidence is relevant is a question of law[;] thus[,] we review the trial court's admission of the evidence de novo." *State v. Kirby,* 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). "[W]ith regard to a determination on the relevancy of evidence, a trial court's rulings technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403; nonetheless, such rulings are given great deference on appeal." *State v. Murray*,

229 N.C. App. 285, 287-88, 746 S.E.2d 452, 454 (2013) (citation and internal quotation marks omitted).

B. Analysis

Rule 401 of our Rules of Evidence defines relevant evidence as "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 (2019). "In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). By contrast, irrelevant evidence has no tendency to prove a fact at issue and must be excluded. *See* N.C. Gen. Stat. § 8C-1, Rule 402.

In the present case, Defendant sought to introduce a comment that Lily made to her therapist, which the therapist noted in her records as "I don't want to get into trouble so I blame other people at school. I blamed another little girl . . . for looking at pornographic images on a computer[.]" In short, in 2018, Lily was discovered viewing pornography at school, and she lied to school personnel about the incident. Defendant maintains that the trial court erred in excluding this evidence in that it was relevant and admissible "to explain an alternative basis for [Lily's] sexual

knowledge[,]" noting that the State "repeatedly emphasized that, but for sexual abuse, a nine-year-old would not know anything about sex." After conducting a voir dire and hearing arguments of counsel, the trial court determined that the evidence of Lily lying was relevant and admissible, but it excluded as irrelevant the evidence of Lily viewing pornography at school.

To support his argument that the evidence was erroneously excluded, Defendant primarily relies on this Court's decision in *State v. Rorie*, 242 N.C. App. 655, 776 S.E.2d 338 (2015), *disc. review denied*, 368 N.C. 823, 784 S.E.2d 482 (2016). In *Rorie*, the defendant rented a room in Ms. Williams's house. 242 N.C. App. at 657, 776 S.E.2d at 340. A couple of months after the defendant moved out, Ms. Williams's 6-year-old daughter "mentioned to the [other] kids that [the] defendant had raped her." *Id.* at 658, 776 S.E.2d at 341. At trial, the defendant "sought to present evidence of [the child's] sexual knowledge by introducing evidence that he found [her] watching a pornographic video." *Id.* at 659, 776 S.E.2d at 341. The trial court sustained the State's objection on the ground that "the evidence was irrelevant and [wa]s not admissible, particularly given the fact that in this case there [wa]s evidence consistent with sexual abuse, physical evidence consistent with sexual abuse." *Id.*

On appeal, the defendant argued that the trial court had erred by excluding this evidence because it "was relevant and admissible to establish an alternative basis for [the child's] sexual knowledge, from which [she] could fabricate the

allegations against [the] defendant." *Id.* at 660, 776 S.E.2d at 342. This Court agreed, noting that the jury likely "concluded [her] allegations were true because [she] was a critical witness against [the] defendant and there was no known basis from which she could have had the knowledge to fabricate the allegations." *Id.* at 662, 776 S.E.2d at 343. Moreover, we further concluded that the exclusion of this evidence prejudiced the defendant because "attacking [the child's] credibility was central to [his] defense." *Id.* at 663, 776 S.E.2d at 344.

The present case is manifestly distinguishable from *Rorie*. Unlike in *Rorie*, in which the child's allegations were made *after* viewing pornography, here, Lily made her allegations of abuse against Defendant *months before* the pornography incident at school occurred. Therefore, Defendant's argument that "this evidence was relevant to explain an alternative source [for her] sexual knowledge, from which she could have fabricated the allegations[,]" *id*., is inapt.

"[K]eeping in mind the great deference we give to a trial court's rulings in this context," *State v. Davis*, 237 N.C. App. 481, 487, 767 S.E.2d 565, 569 (2014) (citation and internal quotation marks omitted), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 565 (2015), we conclude that the trial court did not err in excluding the challenged evidence as irrelevant. Because the evidence was irrelevant, the trial court was not required to conduct a Rule 403 balancing test of the probative and prejudicial value of the evidence. N.C. Gen. Stat. § 8C-1, Rule 403.

II. Expert-Witness Testimony

Defendant next argues that the trial court committed plain error by permitting Lily's therapist to vouch for Lily's credibility. We disagree.

A. Standard of Review

Although Defendant did not object at trial during the testimony of Lily's therapist, he contends that he is entitled to relief because the trial court's admission of this evidence constituted plain error. In criminal cases, certain unpreserved issues may be reviewed "for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted).

> The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citations and internal quotation marks omitted).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id*. at 518, 723 S.E.2d at 334. "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 [fact finder's] finding that the defendant was guilty." *Id.* (citations and internal quotation marks omitted).

B. Analysis

On appeal, Defendant contends that Lily's therapist, Ashley Houck, "impermissibly vouched for [Lily's] credibility" throughout her testimony. Defendant maintains that Houck's testimony "went well beyond describing the characteristics of sexually abused children and whether [Lily] had symptoms consistent with those characteristics." Rather, he asserts, Houck's statements "were tantamount to telling the jurors she believed [Lily], and therefore they should too."

Our Supreme Court has held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (citations omitted). "[T]he testimony of an expert to the effect that a prosecuting

witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted).

"Examples of impermissible vouching for a child victim's credibility include a clinical psychologist's testimony that a child victim was 'believable,' and an expert witness's statement, based on an interview with the child, that she 'was a sexually abused child.' " *State v. Crabtree*, 249 N.C. App. 395, 401-02, 790 S.E.2d 709, 714 (2016) (citations omitted), *aff'd per curiam,* 370 N.C. 156, 804 S.E.2d 183 (2017). "But where the expert's testimony relates to a diagnosis derived from the expert's examination of the witness in the course of treatment[,] it is not objectionable because it supports the credibility of the witness[,] or identifies the perpetrator[,] or states an opinion that abuse has occurred." *State v. Speller*, 102 N.C. App. 697, 701, 404 S.E.2d 15, 17 (citations omitted), *appeal dismissed and disc. review denied*, 329 N.C. 503, 407 S.E.2d 548 (1991). Thus, in tendering an expert opinion in court, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (citations omitted).

In the instant case, the trial court accepted Houck as an expert in "pediatric counseling and pediatric trauma therapy," without objection by Defendant. Houck testified that she diagnosed Lily with post-traumatic stress disorder based on her

reported symptoms, including anxiety; intrusive thoughts; panic attacks; nightmares; negative views of herself and the world; dissociation; and flashbacks.

Defendant challenges certain of Houck's statements at trial as impermissibly vouching for Lily's credibility. First, Defendant highlights Houck's testimony while explaining Lily's "negative view of herself":

> [HOUCK:] So a lot of her perceptions were, I'm bad, I did something wrong. It was a lot of she was at fault. It was a lot of negative emotions and a lot of guilt and shame that she carried pretty consistently.
>
> [THE STATE:] Was that related to the acts by [Defendant]?
>
> A. According to her they started around the age of five after the first incident.
>
> Q. After [Defendant] started to sexually abuse her, she began to have these negative feelings about herself?
>
> A. Correct.
>
> Q. She began to blame herself for what she was experiencing?
>
> A. Correct.

Defendant also asserts that Houck impermissibly vouched for Lily's credibility when she testified concerning the persistence of Lily's trauma symptoms:

> Q. And at that time what concerns were you addressing?
>
> A. So we were looking at a lot of anxieties, some panic attacks. There was some reexperiencing symptoms, some intrusive symptoms, and there was also concerns with a little bit of dissociation as well.

> Q. Was that related to the allegations of sexual abuse by [Defendant]?
>
> A. They correlated together. I can't say that it was directly caused by it. According to [Lily] though, when she was working with me, the incidents with [Defendant] happened then the symptoms happened.
>
> Q. Is that what you mean by correlated together?
>
> A. Yes. I don't determine if something actually happened or not, I just go off the patient report.
>
> Q. So according to [Lily] there was sexual abuse by [Defendant] and then these symptoms started?
>
> A. Correct.

Finally, Defendant maintains that Houck further vouched for Lily when Houck testified that some of the characteristics exhibited by children who have been sexually abused were apparent in Lily's difficulty in discussing the alleged sexual abuse:

> [THE STATE:] What acts has [Lily] described to you that she is saying occurred with [Defendant]?
>
> [HOUCK:] Very briefly she let me know that there was vaginal penetration, anal penetration, oral sex where she was giving and she was also receiving.
>
> . . . .
>
> Q. And has it been difficult for [Lily] to talk about these acts?
>
> A. It has. When she talks about it or, you know, mentions it, it's – she kind of checks out. She dissociates a little bit on me. So we've got the flat affect, the glazy look. She's

> looking not at my face, but she's looking behind me. And it's very robotic, very mechanical. And so then that's showing me that the events are still causing high levels of distress.

Upon review, it is evident that Houck was testifying to her diagnosis and treatment of Lily, and to Lily's statements and demeanor during therapy, which informed Houck's ultimate opinions in this matter. Houck repeatedly prefaced her statements with "according to Lily," and emphasized, "I don't determine if something actually happened or not, I just go off the patient report." Significantly, Houck's "testimony was not that [Lily] was believable or that [Defendant] was guilty or innocent. Her testimony related to her expert knowledge of [pediatric counseling and pediatric trauma therapy] in general and her personal examination of the victim." *Speller*, 102 N.C. App. at 701-02, 404 S.E.2d at 17-18. Thus, "[t]he testimony at issue was derived from information obtained by [Houck] in the course of [Lily's] treatment and evaluation and is admissible." *Id.* at 702, 404 S.E.2d at 18 (citations omitted).

"Because there was no error by the trial court, there can be no fundamental error that occurred at trial. Thus, by definition, there cannot be plain error." *State v. Betts*, __ N.C. App. __, __, 833 S.E.2d 41, 46 (2019) (internal citation and quotation marks omitted), *appeal docketed*, No. 376A19, __ N.C. __, __ S.E.2d __ (2020). Accordingly, Defendant's contention is without merit. *Id.*

Conclusion

For the reasons stated herein, we hold that the trial court (1) did not err in excluding as irrelevant evidence that the child viewed pornography in school, months after making allegations against Defendant; and (2) did not err in permitting the State's expert witness to testify to information obtained in the course of the child's treatment and evaluation. Defendant received a fair trial, free from error.

NO ERROR.

Judge DIETZ concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).