IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-66

Filed: 3 November 2020

Catawba County, No. 16 CRS 52677

STATE OF NORTH CAROLINA

v.

CLYDE GARY WHISNANT

Appeal by defendant from judgment and order entered 2 April 2018 by Judge Carla Archie in Catawba County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant.

DIETZ, Judge.

Defendant Clyde Whisnant appeals his conviction for rape of a child. Whisnant argues that the trial court committed plain error by admitting testimony that vouched for the credibility of the child victim. He also challenges a civil order requiring him to enroll in lifetime satellite-based monitoring.

We reject Whisnant's appeal of his criminal judgment. The challenged testimony was not impermissible vouching and certainly did not rise to the level of plain error. But we agree that, under recent precedent from this Court, the imposition of lifetime satellite-based monitoring at the time of criminal sentencing was unreasonable under the Fourth Amendment and we therefore reverse the trial court's satellite-based monitoring order.

Facts and Procedural History

On 24 August 2009, Defendant Clyde Whisnant was watching his twelve-year-old granddaughter Sarah and her brother John while their mother Amanda was at work.[1] Sarah was in her bedroom watching television when Whisnant came into the room, closed the door behind him, and sat on Sarah's bed. Whisnant then removed Sarah's underwear, climbed on top of her, and raped her. When Sarah's brother John opened the door, he saw Whisnant on top of Sarah with his penis out. Whisnant told John to "get out."

Later that day, Sarah's mother Amanda returned home from work and Sarah told her what happened. Amanda then took Sarah for medical treatment and reported the assault to authorities.

The State later brought multiple sex offense charges against Whisnant. After a trial, a jury convicted Whisnant of first-degree statutory rape and taking indecent

[1] We use pseudonyms to protect the identities of the juveniles.

liberties with a child. This Court affirmed those convictions on appeal. *State v. Whisenant*, 222 N.C. App. 319, 729 S.E.2d 730, 2012 N.C. App. LEXIS 970 (2012) (unpublished). Later, in response to a motion for appropriate relief, this Court vacated Whisnant's conviction for first-degree statutory rape because of a jurisdictional defect in the indictment. *State v. Whisenant*, 244 N.C. App. 545, 781 S.E.2d 349, 2015 N.C. App. LEXIS 1022, at *1 (2015) (unpublished).

Whisnant was re-indicted, this time for rape of a child by an adult offender. The case went to trial and the jury found Whisnant guilty. The trial court sentenced Whisnant to 345 to 423 months in prison, with credit for 2,235 days of pretrial confinement. At sentencing, the court also conducted a satellite-based monitoring hearing and imposed lifetime satellite-based monitoring upon Whisnant's release from prison.

Whisnant failed to timely appeal either the criminal judgment or the order imposing satellite-based monitoring. He later filed two petitions for writs of certiorari, one directed at the criminal judgment and one directed at the satellite-based monitoring order.

This Court issued a writ of certiorari with respect to the criminal judgment on 17 June 2019. In our discretion, we likewise allow Whisnant's second petition and issue a writ of certiorari with respect to the satellite-based monitoring order. *See* N.C. R. App. P. 21.

Analysis

I. Vouching for the victim's credibility

Whisnant first argues that the trial court plainly erred by allowing witnesses to vouch for Sarah's credibility through testimony indicating that Sarah was telling the truth. We reject this argument.

Whisnant did not object to the admission of the challenged testimony and concedes that we therefore review it solely for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error should be "applied cautiously and only in the exceptional case" where the error seriously impacts "the fairness, integrity or public reputation of judicial proceedings." *Id.*

Ordinarily, the State may not present testimony suggesting that "a prosecuting witness is believable, credible, or telling the truth." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). "The 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).

Thus, commenting on a witness's credibility in this type of child sex offense case—a form of testimony often called "vouching"—is impermissible. But witnesses

generally are permitted to describe what the alleged child victim told them and to explain their own observations of the alleged victim or evidence gathered in the case. *See*, *e.g.*, *State v. Betts*, __ N.C. App. __, __, 833 S.E.2d 41, 47 (2019); *State v. Worley*, __ N.C. App. __, __, 836 S.E.2d 278, 283 (2019). Likewise, an expert in a child sexual abuse case may testify "with respect to the characteristics of sexually abused children and whether the particular complainant has symptoms consistent with those characteristics." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002).

All of the testimony in this case falls squarely within these permissible categories. First, several witnesses made stray references to "the incident" or "the sexual assault" in describing events surrounding the alleged victim. But none did so in a way that signaled a belief that the alleged victim was telling the truth. Rather, these were shorthand references, a practice commonly used in ordinary English, to avoid repeating the story or series of events to which the speaker is referring. The trial court's failure, on its own initiative, to intervene when witnesses sporadically used these phrases was not error and certainly not plain error.

Second, Sarah's mother testified that she explained to Sarah, a young child, the "consequences of making a false accusation" because she wanted to "make sure this happened" before reporting the sexual assault to the authorities. Again, in context, Sarah's mother was not commenting on her daughter's credibility. Instead,

she was explaining to the jury what she told Sarah about the importance of truthfulness and why. That is not impermissible vouching.

Finally, an expert witness testified that Sarah described being raped by Whisnant, that Sarah had not "ever wavered as to what happened," and that Sarah had provided "detail" of the events surrounding the sexual assault. Once again, these statements are not a comment on the truthfulness of what Sarah said. These were observations made by the expert describing Sarah's examination and treatment. This testimony is not impermissible vouching. *See Worley*, __ N.C. App. at __, 836 S.E.2d at 283. Accordingly, we find no error, and certainly no plain error, in the trial court's judgment.

II. Satellite-based monitoring

Whisnant next challenges the trial court's imposition of lifetime satellite-based monitoring. We reverse the trial court's order for the reasons discussed in *State v. Gordon*, __ N.C. App. __, 840 S.E.2d 907 (2020).

In *Gordon*, this Court reversed the imposition of lifetime satellite-based monitoring, imposed at the time of criminal sentencing, for a defendant who would first serve time in prison. *Id.* at __, 840 S.E.2d at 913–14. The Court held that the State failed to meet its burden to show reasonableness under the Fourth Amendment because there was "a lack of knowledge concerning the unknown future circumstances relevant to that analysis" such as whether "the nature and extent of

the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison." *Id.* at __, 840 S.E.2d at 912–13.

Here, as in *Gordon*, the trial court imposed lifetime satellite-based monitoring on Whisnant at criminal sentencing and that monitoring would not begin until he is released from prison many years in the future. The State acknowledges that it presented no evidence showing that lifetime satellite-based monitoring upon Whisnant's eventual release from prison was reasonable. Accordingly, under *Gordon*, we must reverse the trial court's imposition of satellite-based monitoring.

Conclusion

We find no error in the trial court's criminal judgment. We reverse the trial court's satellite-based monitoring order.

NO ERROR IN PART; REVERSED IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

Report per Rule 30(e).