IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-381

No. COA20-316

Filed 20 July 2021

Brunswick County, No. 16CRS055122-27, 129-33

STATE OF NORTH CAROLINA

v.

GERAD MICHAEL CHRISTMAN, Defendant.

Appeal by Defendant from judgments entered 28 August 2019 by Judge James G. Bell in Brunswick County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany Pinkham Edwards, for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

¶ 1 Gerad Michael Christman ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of committing thirty (30) sex crimes with his stepchild. More specifically, he was convicted of fifteen (15) counts of indecent liberties with a child, six (6) counts of statutory sexual offense, and nine (9) counts of statutory sexual offense with a child by an adult.

I. Background

¶ 2 The evidence at trial tended to show as follows: In 2016, the victim "Alice"[1] lived with her mother and Defendant, her stepfather. Defendant watched Alice while her mother worked. Almost every day Alice's mother worked, Defendant would show Alice pornography, touch her genitals, and sometimes force her to touch his genitals. Defendant told Alice not to tell anyone of this conduct, threatening to kill her and her family if she did.

¶ 3 After several months, Alice finally told her mother about Defendant's abuse. Alice's mother contacted the police, and Defendant was charged with numerous sex crimes for his abuse of Alice.

¶ 4 Alice testified in detail at trial. Mary Beth Koehler ("Nurse Koehler"), a pediatric nurse practitioner, testified for the State as an expert in the field of child medical examination. Defendant testified in his own defense, denying any abuse.

¶ 5 The jury returned guilty verdicts against Defendant on all counts. Defendant timely appealed to our Court.

II. Analysis

¶ 6 Defendant's two arguments on appeal concern the testimony of the State's

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[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

expert witness, Nurse Koehler. We address each in turn.[2]

A. Expert Witness' Use of Term "Disclosure"

¶ 7 Defendant argues that the trial court erred or committed plain error by allowing the State's expert witness to vouch for Alice's truthfulness. Specifically, Defendant argues that Nurse Koehler's use of the term "disclosure" in her testimony amounted to her vouching for Alice. We disagree.

¶ 8 Because counsel did not timely object to each instance of the use of the word "disclose" or "disclosure" during Nurse Koehler's questioning from the State, we review this issue for plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

¶ 9 In the context of child sexual abuse cases, our Supreme Court has clearly

[2] Under both of Defendant's arguments, he argues in the alternative that he was denied effective assistance of counsel. We have reviewed the record and conclude that Defendant was not deprived of effective assistance of counsel.

stated that an expert should not give an opinion that sexual abuse, in fact, had occurred, as such testimony is essentially an opinion that the child victim is truthful:

> [T]he trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (internal citation omitted) (emphasis in original). The question of credibility is reserved "for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995).

¶ 10 Notwithstanding, "our appellate courts have generally upheld the admission of testimony from a medical expert in a sexual abuse case that her observations are consistent with sexual abuse." *In re Butts*, 157 N.C. App. 609, 618, 582 S.E.2d 279, 285 (2003) (internal quotation marks and citation omitted).

¶ 11 Here, the State elicited testimony from Nurse Koehler about her examination of Alice. Defendant takes issue with Nurse Koehler's use of the word "disclosure" in characterizing the statements made by Alice to her regarding Defendant's alleged, inappropriate conduct, arguing that the connotation of the word indicated truthfulness. In support of this contention, Defendant relies on *State v. Jamison*, a case in which we stated that the term "disclose" indicated "a comment on the

declarant's credibility[.]" 262 N.C. App. 708, 821 S.E.2d 665, 2018 N.C. App. LEXIS 1168 at *13 (2018). We note that *Jamison* is an unpublished case and therefore not binding on this panel.

¶ 12 For instance, in *State v. Betts*, we decided that there was "nothing about [the] use of the term 'disclose', standing alone, that conveys believability or credibility. *Jamison* should not be viewed as persuasive on this point[.]" 267 N.C. App. 272, 281, 833 S.E.2d 41, 47 (2019).

¶ 13 In any event, our Supreme Court has recently held that "[a]n expert witness's use of the word 'disclose,' standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made." *State v. Betts*, ___ N.C. ___, ___, 2021-NCSC-68, ¶20. Our Court, in a published case, likewise recently held the same. *See State v. Worley*, 268 N.C. App. 300, 307, 836 S.E.2d 278, 284 (2019). We conclude that Nurse Koehler's use of the word "disclosure" was no more prejudicial than the use of that word by witnesses in *Betts* and *Worley*. Accordingly, we conclude that the trial court did not commit reversible error in this regard.

B. Expert Witness' Testimony Concerning "Penetration"

¶ 14 Defendant further argues that the trial court committed reversible error by allowing Nurse Koehler to testify regarding the meaning of the term "penetration,"

an element of several of the crimes for which Defendant was convicted. On this point, we must agree with Defendant as Nurse Koehler gave a description of the term that is broader than its legal definition, as explained below.

¶ 15 "[A] trial court's ruling on the admissibility of expert testimony will not be reversed on appeal absent a showing of abuse of discretion." *State v. Godwin*, 369 N.C. 605, 610-11, 800 S.E.2d 47, 51 (2017) (internal quotation marks and citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

¶ 16 With respect to most of the crimes for which Defendant was ultimately convicted, the State was required to prove that Defendant not only touched Alice's genitals, but that he *penetrated* Alice's genital opening. While the crime of taking indecent liberties with children does *not* require penetration, both the crimes of statutory sexual offense and statutory sexual offense with a child by an adult – crimes of which Defendant was convicted – require proof of a "sexual act" with a victim. N.C. Gen. Stat. §§ 14-27.28, 30 (2017). And the relevant statute defines a "sexual act" as "the penetration, *however slight*, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (emphasis added).

¶ 17 Interpreting this statutory definition, our Supreme Court has instructed that there must be more than mere touching, that "there must be some penetration of at

least the outer labia" to establish that a defendant has committed a sexual act. *State v. Ludlum*, 303 N.C. 666, 670, 281 S.E.2d 159, 161 (1981). It is, therefore, a misstatement of the State's burden that only proof of touching the genitals is required to meet the definition of "penetration."

¶ 18 But, here, Nurse Koehler was allowed to offer, over Defendant's objection, testimony that penetration occurs whenever someone merely touches the labia. Specifically, she was allowed to state, "[s]o anytime there is skin-to-skin contact, whether that is fingers or [a] penis going across a labia of a child's genital area, there is penetration. Because the labia is not a hard surface. It moves. And there is penetration." It was an abuse of discretion for the trial court to allow Nurse Koehler to offer this opinion which lessens the State's burden of proof.

¶ 19 We further conclude that the error was prejudicial in this particular case. Specifically, the only direct evidence of what actually happened between Defendant and Alice was Alice's testimony. And Alice merely testified that Defendant "touched" her "no no." There was no eyewitness or medical evidence that actual penetration had occurred. Perhaps the evidence was sufficient to allow an inference of penetration, and the error would not rise to the level of plain error. But, here, Defendant did object. We therefore conclude that there is a reasonable possibility that at least one juror would have had reasonable doubt that penetration occurred but for Nurse Koehler's testimony. Defendant is entitled to a new trial on all

statutory sexual offense charges and all but one charge of statutory sexual offense with a child by an adult.[3]

III. Conclusion

¶ 20 We hold that the State's expert witness' use of the term "disclosure" did not rise to the level of plain error. However, we hold that the trial court committed reversible error by allowing the State's expert witness to misstate the law as to "penetration" in her testimony. Therefore, the portions of the judgments convicting Defendant of six (6) counts of statutory sexual offense and eight (8) counts of statutory sexual offense with a child by an adult must be vacated. On remand, the State is free to retry Defendant on these charges.

NO ERROR IN PART; VACATED IN PART, REMANDED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).

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[3] The crime of taking indecent liberties with children does not require penetration. *See* N.C. Gen. Stat. § 14-202.1. The crime of statutory sexual offense with a person who is fifteen (15) years of age or younger requires penetration as charged in Defendant's case. *See* N.C. Gen. Stat. § 14-27.30. The crime of statutory sexual offense with a child by an adult requires penetration as charged in Defendant's case, except for one count which was charged with the sexual act being cunnilingus. *See* N.C. Gen. Stat. § 14-27.28.