IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-936

No. COA22-518

Filed 29 December 2022

Columbus County, No. 19 CRS 478

STATE OF NORTH CAROLINA

v.

ERNEST PAUL JONES

Appeal by defendant from judgment entered 24 September 2021 by Judge James G. Bell in Columbus County Superior Court. Heard in the Court of Appeals 30 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.

Glenn Gerding Appellate Defender, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Ernest Paul Jones ("defendant") appeals from judgment entered upon his conviction for indecent liberties with a child. Defendant contends the trial court erred by denying his motion to dismiss for insufficient evidence and allowing certain

testimony by the State's expert. For the following reasons, we reverse and remand for a new trial.

I. Background

¶ 2 In early 2019, Jennifer Melvin ("Ms. Melvin"), the human resources business manager for Rust Enterprises, received a complaint related to one of the company's nine McDonald's. Both a customer and an employee's assistant aide made complaints regarding defendant, a seventy-three-year-old male, for incidents occurring at the company's Whiteville McDonald's location. After speaking with the complainants and store manager, Ms. Melvin reviewed the security footage at the business from the date and time in question.

¶ 3 On the recording from 28 January 2019, Ms. Melvin observed defendant enter the store with a "manilla type envelope" and go to sit down with a group, two adults and one female child, who were already inside at one of the tables. After he sat down, defendant handed over the envelope and the group started "chang[ing] chairs several times." After spending some time in the restaurant, defendant left with the child through one door while the adults from the group left through another door.

¶ 4 After watching the surveillance tape, Ms. Melvin felt that police intervention was necessary and contacted the Whiteville Police Department to file a report. To assist with the investigation, Ms. Melvin provided the police with the existing security camera footage and live access to the cameras.

¶ 5 On 8 February 2019, Ms. Melvin was notified that defendant was in the store again and, after notifying law enforcement so they could view the livestream, she also "began observing[.]" On this occasion, defendant arrived at the McDonald's with the same child in his vehicle and they entered the store together. Defendant and the child "had an interaction" with the "family" and then defendant and the child left together, and the family left separately. At this point, Ms. Melvin turned the case over to law enforcement and ended her involvement in the investigation.

¶ 6 Thereafter, the Whiteville Police Department contacted the SBI to assist with their investigation. Agent Timothy Dean Saunders ("Agent Saunders") was assigned the case, and through investigation identified the child from the videos as J.A.R.[1], a fifteen-year-old female at that time, and the adults as her parents. Agent Saunders learned it was not unusual for J.A.R. and her family to spend time at McDonald's with defendant. Additionally, Agent Saunders conducted surveillance of defendant and his interactions with J.A.R. at the McDonald's.

¶ 7 During surveillance on 18 February 2019 at approximately 2:30 p.m., Agent Saunders watched defendant leave the McDonald's with J.A.R., alone, and go to defendant's residence. Agent Saunders could not say how long defendant and J.A.R. were at the residence since surveillance was discontinued at 6:00 p.m. that evening.

---

[1] Initials are used throughout to protect the identity of the minor child.

¶ 8 On 20 February 2019, Agent Saunders and Will Campbell ("Detective Campbell"), with the New Hanover County Sheriff's Office, interviewed defendant, while other agents interviewed J.A.R.'s parents with a translator since they only "spoke a little bit of English[.]" During his interview, defendant stated that he was very close with J.A.R.'s family, and knew them since J.A.R. was a baby. Although defendant stated in the interview he had never touched J.A.R., he did admit to kissing her on the lips on two occasions.

¶ 9 Defendant told law enforcement that one kiss happened while they were in his car at her house less than a week prior and the other kiss happened at a laundromat. Defendant further stated that on one occasion where he kissed J.A.R., she "resisted" and "didn't act like [he] wanted her to do it so [he] didn't mess with her anymore." Defendant stated that when he kissed J.A.R. at the laundromat, her mother saw it and said nothing. Defendant stated he kissed J.A.R. because "she look[ed] good."

¶ 10 Defendant told investigators J.A.R. was not an "innocent" girl and had been "conning him" out of money and items, such as a car, for years. Defendant stated that J.A.R.'s parents wanted her to marry defendant and "make a baby" with defendant. Lastly, defendant denied that J.A.R. had ever been alone in his residence. Although law enforcement drove defendant back to his residence after the interview, before they left defendant's residence that day he was placed under arrest. J.A.R. was interviewed by a specialist who was specifically trained to conduct child interviews.

¶ 11 On 21 September 2021, the matter came on for trial in Columbus County Superior Court, Judge Bell presiding. At trial, J.A.R. and her family testified for the State. J.A.R.'s father testified that the family had known defendant for about seventeen years, and stated he was not concerned defendant and his daughter had more than a friendship because he was "always with them[,]" and he never left his daughter alone with defendant. Furthermore, J.A.R.'s father and mother testified they only knew of one time their daughter left McDonald's with defendant but denied knowing of any kissing on the lips, talk of marriage between J.A.R. and defendant, or of any time their daughter visited defendant's residence alone.

¶ 12 J.A.R. testified that there were two instances where defendant kissed her on the mouth. J.A.R. testified that on both occasions, defendant was attempting to kiss her on the check, like "he would usually" and she "moved [her] head accidently" causing him to kiss her on the mouth instead and she felt responsible. J.A.R. testified that she did not want defendant to kiss her on the mouth, but that she was not alarmed by his actions. J.A.R. also denied telling the specialist during her interview that there was a time defendant moved her face to kiss her and her mother was present and saw it.

¶ 13 The State's last witness was physician's assistant Becky Herrmann ("Ms. Herrmann"), who conducted a medical examination of J.A.R. and wrote a report summarizing her findings. The defense vehemently objected to the admission of Ms.

Herrmann's report into evidence. Over defense's objection, the court admitted "redacted portions of the" report.

¶ 14 Ms. Herrmann testified that she provided "child medical exams with the North Carolina Child Medical Evaluation Program at UNC-Chapel Hill." A child medical exam is a "comprehensive medical evaluation" for children referred to the program when there is concern that they "have experienced some sort of abuse[.]" The report produced after such an exam contains information about why the child was referred, completed by law enforcement and DSS, notes from interviews with the child's caregivers, and details from the child's interview and medical examination.

¶ 15 After being qualified as an expert in child medical examinations and child abuse, Ms. Herrmann began testifying as to her examination of J.A.R. and the conclusions she made based on this examination, over defense's objection. In the report, Ms. Herrmann noted that J.A.R.'s parents' only concern was that she lost interest in school, but otherwise they were unconcerned about the "special interest" defendant had taken in their daughter when he had no relationship with their other children. When interviewing J.A.R., Ms. Herrmann found her to be "guarded[,]" and she had concerns J.A.R. had been "groomed."

¶ 16 At this point, defense counsel asked to do a *voir dire* of the witness before the introduction of her testimony for the jury. Defense counsel specifically objected to the testimony regarding "grooming" and stated that how the witness could "draw

conclusions from two kisses that [defendant was] grooming [J.A.R.] [wa]s a major issue[.]" Over defense's objection, Ms. Herrmann's testimony was allowed.

¶ 17 Ms. Herrmann testified that she had concerns about child abuse and grooming since defendant had a "long-established relationship with the family, with progressive attempts to isolate the child" and gave gifts to J.A.R. and her family. In her "professional opinion[,]" Ms. Herrmann testified that J.A.R. was "a victim of a sexual offense" and "had experienced sexual victimization." Defense's objection and motion to strike were both overruled. No physical evidence of abuse was presented or noted in Ms. Herrmann's report.

¶ 18 At the close of the state's evidence, defendant made a motion to dismiss arguing there was "no evidence" and the State "failed to prove anything" other than defendant "kissed [J.A.R.] twice[.]" However, the State argued dismissal was inappropriate since they presented evidence defendant kissed J.A.R. because she was "a good-looking girl" and such evidence showed intent under the definition of indecent liberties. Defendant's motion was denied. Defendant did not present any evidence, and his renewed motion to dismiss at the close of all evidence was likewise denied.

¶ 19 On 24 September 2021, the jury returned a verdict of guilty of indecent liberties with a child and defendant was sentenced to 19-32 months, which was suspended, and defendant was placed on 24 months of supervised probation. The trial court also imposed special conditions of probation which included serving an

active term of 60 days and registering as a sex offender. On 29 September 2021, defendant filed notice of appeal.

II. Discussion

¶ 20 On appeal, defendant argues the trial court erred by: (1) allowing the State's expert to testify J.A.R. was the victim of a sexual offense and had been sexually victimized; (2) allowing the State's expert to testify about "grooming," and (3) denying defendant's motion to dismiss. Finding that defendant is entitled to a new trial based on his first issue, we do not address his other arguments.

A. State's Expert

¶ 21 On appeal, defendant contends the trial court erred by allowing the State's expert to testify that in her "professional opinion[,]" J.A.R. "was a victim of a sexual offense" and "had experienced sexual victimization." Specifically, defendant argues that such "opinions invaded the province of the jury." Defendant argues the admission of this testimony was prejudicial and entitles him to a new trial. We agree.

1. Standard of Review

¶ 22 "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021). It is the trial court's role to decide preliminary questions concerning the qualifications

of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2021). "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (citation omitted). However, "[w]here the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citations omitted).

2. Ms. Herrmann's Expert Testimony Lacked Proper Foundation

¶ 23 Although the trial court enjoys "wide latitude of discretion when making a determination about the admissibility of expert testimony[,]" such discretion is not without limitations. *State v. Bullard*, 312 N.C. at 140, 322 S.E.2d at 376. This is especially true in the context of sex offenses against minors since the opinions provided by "expert[s] in treating sexually abused children . . . h[o]ld significant weight with the jury." *State v. Ryan*, 223 N.C. App. 325, 338, 734 S.E.2d 598, 607 (2012), *writ denied*, *disc. review denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

¶ 24 Although qualified experts can discuss "the profiles of sexually abused children" and whether children display "symptoms or characteristics consistent" with abuse, "absent physical evidence supporting a diagnosis of sexual abuse" the trial court *should not* "admit expert opinion that sexual abuse has *in fact* occurred." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam). Such testimony, where a physician testifies as an expert that a child was sexually abused with no physical evidence, "lack[s] a proper foundation and should not [be] admitted." *State v. Bates*, 140 N.C. App. 743, 748, 538 S.E.2d 597, 601 (2000) (citations omitted), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 20 (2001).

¶ 25 Here, Ms. Herrmann's testimony certainly goes beyond a discussion of characteristics, since she testified definitively that J.A.R. "was a victim of a sexual offense," and "had experienced sexual victimization." Furthermore, the State did not provide, nor did Ms. Herrmann testify to, any physical evidence that would support the conclusion that abuse occurred. Accordingly, our precedent has held such contentions are impermissible since they lack foundation and the trial court therefore erred in allowing Ms. Herrmann's testimony.

¶ 26 Additionally, Ms. Herrmann's testimony that J.A.R. was the "victim of a sexual offense" and "had experienced sexual victimization" was improper because it constituted testimony as to the guilt of defendant. In *State v. Brigman*, this Court agreed with the defendant that the State expert's conclusion that the victim had

"suffered sexual abuse by [defendant]" was improper because it "constituted expert testimony on the guilt of the defendant." *State v. Brigman,* 178 N.C. App. 78, 91-92, 632 S.E.2d 498, 507, *appeal dismissed*, *petition for disc. review denied*, 360 N.C. 650, 636 S.E.2d 813 (2006). Here, although Ms. Herrmann did not specifically state J.A.R was the victim of a sex offense *by defendant*, he was the only defendant in the case and no other sex offense was presented other than the one defendant was on trial for. We agree with defendant that in this context, Ms. Herrmann's testimony was "equivalent to saying that [defendant] was guilty of sexually abusing J.A.R." and was thus improper testimony as to defendant's guilt.

3. The Expert Testimony was Prejudicial

¶ 27 Generally, evidentiary errors do "not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (citation omitted), *cert. denied*, 559 U.S. 1074, 176 L. Ed. 2d 734 (2010). "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2021).

¶ 28 Here, we find the admission of Ms. Herrmann's testimony was prejudicial, necessitating a new trial. As this Court has acknowledged, "expert[s] in treating sexually abused children . . . h[o]ld significant weight with the jury[,]" and therefore

it is likely their conclusions will have an impact on the jury's findings. *See State v. Ryan*, 223 N.C. App. 325, 338, 734 S.E.2d 598, 607 (2012), *writ denied*, *disc. review denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

¶ 29 Our Supreme Court has held that when there is no " 'definitive' physical evidence" of sexual abuse, the testimony of an expert "to the effect that the victim was sexually abused" based on the victim's interview and behaviors, "is likely to weigh heavily" on the credibility of the State's witnesses and thus be prejudicial. *See State v. Clark*, 380 N.C. 204, 2022-NCSC-13, ¶ 24. "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." *Ryan*, 223 N.C. App. at 337, 734 S.E.2d at 606 (citations omitted).

¶ 30 The evidence in this case, being sparse, only further exacerbated the prejudicial nature of Ms. Herrmann's testimony. The only sexual evidence in this case was that there were two kisses on the mouth that occurred. However, the victim testified that the kisses were inadvertent. The only other evidence presented by the State was the fact that J.A.R. and defendant spent significant time together with her

family, and possibly spent an undetermined amount of time alone at defendant's residence. However, J.A.R.'s parents testified that their daughter had never been alone with defendant and had not been at defendant's residence alone. No physical evidence was presented.

¶ 31 The evidence in this case was disputed and scarce and Ms. Herrmann's testimony provided the only substantive evidence that J.A.R. was the "victim of a sexual offense" and "had experienced sexual victimization." Given the likely impact of Ms. Herrmann's conclusory statements that can be equated to commenting on defendant's guilt, we find there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises[.]" N.C. Gen. Stat. § 15A-1443(a). Accordingly, we find defendant was prejudiced by the improper admission of Ms. Herrmann's statements and is therefore entitled to a new trial. As a result, we do not reach defendant's other issues on appeal.

III. Conclusion

¶ 32 For the foregoing reasons, we hold that the trial court erred in allowing the State's expert to testify J.A.R. "was a victim of a sexual offense" and "sexual victimization." Such testimony was not permissible by our precedent and there is a reasonable probability that, had this testimony not been admitted, a different result

would have been reached by the jury. Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Judge COLLINS concurs.

Judge JACKSON dissents by separate opinion.

Report per Rule 30(e).

No. COA22-518—*State v. Jones*

JACKSON, Judge, dissenting.

¶ 33 The majority holds that the trial court erred in allowing the State's expert witness, Becky Herrmann, to testify that "in her professional opinion, J.A.R. was a victim of a sexual offense, and had experienced sexual victimization." The majority further holds that this error was prejudicial, and that Defendant is therefore entitled to a new trial.

¶ 34 While I concur with the majority that the admission of Ms. Herrmann's testimony was error, for the reasons detailed below I disagree that Defendant was prejudiced by this admission and is entitled to a new trial, and on this issue I respectfully dissent.

I. Prejudicial Error

¶ 35 "[E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Jacobs*, 363 N.C. 815, 825, 689 S.E.2d 859, 865 (2010). An error is prejudicial "when there is a reasonable probability that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* (quoting N.C. Gen. Stat. § 15A-1443(a)). "[The] [d]efendant bears the burden of demonstrating prejudice." *State v. Lopez*, 264

N.C. App. 496, 506, 826 S.E.2d 498, 505 (2019). I would hold that Defendant has not shown that, without the erroneous admission of Ms. Herrmann's testimony, a different result would have been reached at his trial.

¶ 36 Defendant was indicted on one count of taking indecent liberties with a child. N.C. Gen. Stat. § 14-202.1 provides, in relevant part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral or improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

¶ 37 Our Supreme Court has held that a defendant's purpose in committing an "immoral, improper, or indecent act in the presence of a child" is the "gravamen of this offense" and that the particular act itself is immaterial. *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990).

¶ 38 Even if Ms. Herrmann's testimony was excluded in its entirety, there was substantial evidence presented at trial to support a conviction of taking indecent liberties with a child. The SBI agent assigned to the case, Agent Timothy Dean Saunders, testified that Defendant was 73 years old at the time of the relevant conduct. J.A.R. testified that when she was 15 years old Defendant kissed her on the mouth twice.

¶ 39 Defendant's interview with Agent Saunders and New Hanover County Detective Will Campbell was submitted to the jury for their consideration. In this interview, Defendant told the officers that J.A.R.'s parents wanted him to marry J.A.R. when she got a little older, and that he would have been okay with that. Defendant said that approximately three days before the interview he was in the car with J.A.R. waiting for her younger sister's school bus when he kissed her. Defendant told Agent Saunders and Detective Campbell that "it kindof overtook [Defendant] a little bit" and that "[J.A.R.] looks good." When the officers asked Defendant if it was J.A.R.'s sexuality that made Defendant want to kiss her, Defendant replied "yeah." The officers asked if Defendant was aroused and if that was what "overtook him," Defendant responded, "mm. Yeah, well she's pretty."

¶ 40 Agent Saunders and Detective Campbell further asked Defendant about the second time he kissed J.A.R., when they were at a laundromat together. Defendant responded that he "couldn't help it, she's a pretty girl."

¶ 41 I would hold that this evidence was sufficient for a jury to find that Defendant kissed J.A.R. "for the purpose of arousing or gratifying sexual desire." Therefore, I would further hold that there was not substantial likelihood that, in the absence of Ms. Herrmann's erroneously allowed testimony, the jury would have reached a different result in Defendant's trial.

II. Conclusion

¶ 42 For the foregoing reasons, I disagree with the majority's holding that the admission of Ms. Herrmann's testimony constituted prejudicial error, and I respectfully dissent. I would hold that Defendant is not entitled to a new trial.