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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-871

Filed 05 September 2023

Brunswick County, No. 19 CRS 163

STATE OF NORTH CAROLINA

v.

AULDEN MATTHEW WHITCHER, JR.

Appeal by defendant from judgment entered 1 April 2022 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 22 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

Mark Montgomery for defendant-appellant.

ARROWOOD, Judge.

Aulden Matthew Whitcher, Jr. ("defendant"), appeals from judgment entered upon his conviction for second-degree forceable rape. On appeal, defendant argues the trial court erred in allowing certain expert testimony. Alternatively, defendant contends he received ineffective assistance of counsel when his trial counsel failed to object to the admission of this testimony. For the following reasons, we hold the trial

court did not err.

I. Background

Defendant was indicted on 24 February 2020 for second-degree forcible rape and counts of second-degree forceable sex offenses against Sonia[1], a friend of his daughter. The case came on for trial in Brunswick County Superior Court on 28 March 2022, Judge Disbrow presiding. At trial, Sonia testified about the assault.

Sonia testified that in the summer of 2018, when she was sixteen, she worked at an ice cream shop, and befriended defendant's daughter. The girls planned a sleepover on the night of 15 June 2018 at defendant's home. During the evening, defendant served the girls several alcoholic drinks and drank with them. Sonia, who had never been intoxicated before, felt "dizzy, woozy" and went upstairs with defendant's daughter. Once upstairs, defendant's daughter "immediately" "collapsed on the floor" and went to sleep, and Sonia vomited and was "laying in [her] throw-up on the bed[.]" Sonia changed her shirt, got back into bed, and was trying to sleep when she heard defendant enter the room.

Once inside the room, defendant kissed his daughter goodnight on the forehead, "rubbed [Sonia's] arm[,]" and left. Shortly after defendant left, he returned and removed Sonia's shorts and underwear. Sonia testified that defendant then left and re-entered the room several times every few minutes, repeatedly performing sex

[1] A pseudonym is used to protect the juvenile's identity.

acts on her. Sonia specifically testified that defendant put his penis on her mouth, performed cunnilingus on her, and raped her vaginally and anally. She testified that she had been unable to move or speak during the assault.

Sonia testified that defendant then took her to his room, and when he started to touch her back, she said, "No. Stop." Defendant "took his hands off" Sonia and said, "What are you talking about? You were all over me." Sonia replied, "That's not true. You're lying." Defendant then briefly left the room before re-entering and asking Sonia what she was doing in his room and stating that he "found [her] like this." Although she tried to call out to defendant's daughter, Sonia testified she "couldn't get [her] voice to go that loud." After Sonia called out twice, defendant left, and she returned to defendant's daughter's room.

Sonia testified that once she returned, defendant's daughter woke up, and they cleaned up and went to bed. Sonia testified she "was scared[,]" "in shock[,]" and "didn't know what to do." She did not disclose what happened to defendant's daughter. The next morning, Sonia's father picked her up. Sonia did not mention the assault to her family but testified she spoke about it with a friend.

The next day, Sonia told her parents that at the sleepover defendant raped her. Following her disclosure, Sonia's parents took her to the emergency room for an examination. At the hospital, Sonia spoke with law enforcement and was examined by Amy Yastremski ("Ms. Yastremski"), a Sexual Assault Nurse Examiner ("SANE

nurse"), who administered a rape kit. Sonia was later interviewed by Alexandra Hayson Bollinger ("Ms. Bollinger") at a sexual assault clinic.

During her testimony, Sonia acknowledged that she had given more details during her testimony than in her initial interviews with law enforcement since "different questions prompt[ed] different . . . memories." Sonia further testified that she had never had sexual relations before the assault and had no sexual activity between the assault and the administration of the rape kit.

Ms. Yastremski testified for the State regarding her findings from Sonia's medical examination. Ms. Yastremski testified that while examining Sonia, she observed redness on the "inner lining of her vagina" and "small linear abrasions" on her hip.

Ms. Bollinger testified for the State "as an expert in child forensic interviewing, counterintuitive victim behaviors, delayed disclosures, and grooming or manipulation." In her testimony, Ms. Bollinger defined and explained counterintuitive victim behaviors, delayed disclosures, and grooming or manipulation as they pertain to sexual assault victims generally. Furthermore, Ms. Bollinger explained that it was "not uncommon at all" for her subsequent interviews with child sexual assault victims to have more details than their initial interviews since "kids disclose in increments." Although Ms. Bollinger testified some of Sonia's behavior was "normal victim behavior," at no time did she specifically refer to Sonia as a victim.

Cynthia Morris ("Ms. Morris"), Sonia's therapist following the assault, testified as an expert in mental health therapy on behalf of the State. Ms. Morris testified as to the symptoms of "dysregulation[,]" which she explained were common in victims of trauma. Ms. Morris went on to describe the "features" of dissociation she had seen from Sonia and stated she had observed some evidence of dysregulation during her therapy sessions with Sonia. Ms. Morris further testified the behaviors she observed in Sonia were "consistent" with those typically seen in victims of sexual assault.[2]

Lastly, Andrew Walker ("Mr. Walker"), an expert in forensic science and DNA analysis, testified as to the lab results from Sonia's rape kit. Mr. Walker testified that male DNA was detected on the "internal" and "external vaginal swab[s]" taken from Sonia during the exam. Male DNA was also found in the underwear collected from Sonia on the day of her exam. However, because the amount of DNA was "only a detectable amount and not amplifiable amount[s]," the DNA could not be compared to defendant's DNA and Mr. Walker could not say who the DNA belonged to.

Defendant testified on his own behalf, denying the allegations. At the close of the State's evidence and at the close of all evidence, defendant made motions to dismiss. Both motions were denied. On 1 April 2022, the jury found defendant guilty of second-degree forceable rape, but not guilty of all other charges. Defendant was

[2] Defendant's counsel objected to the question eliciting this testimony on the basis of "leading[,]" but not to the content of the question.

sentenced to a term of 80-156 months of imprisonment. Defendant gave oral notice of appeal in open court following the sentencing.

II. Discussion

On appeal, defendant argues the trial court erred in allowing some of the expert witnesses to "vouch for the truthfulness of" Sonia. Defendant specifically contends the State's witnesses' use of the term "victim" in their testimony referring to Sonia and while discussing sexual assault victims generally, and Ms. Morris's testimony that Sonia displayed symptoms "consistent with a victim of sexual trauma," were plain error. In the alternative, defendant argues that he received ineffective assistance of counsel when his trial counsel failed to object to this testimony. We address each argument in turn.

A. Expert Testimony

Defendant first contends the trial court erred in allowing the State's experts to "vouch" for Sonia's truthfulness. Specifically, defendant argues that reference to Sonia as a "victim" and experts' testimony that Sonia displayed symptoms "consistent with a victim of sexual trauma" "communicated to the jury" Sonia was testifying truthfully and amounted to improper vouching. This argument is without merit.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2023). However, "[i]n

criminal cases, an issue that was not preserved by objection . . . 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). Because defendant did not preserve any errors related to the testimony in question, this Court's review is limited to whether the trial court's actions constituted plain error.

Our Supreme Court has stated:

> For error to constitute 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 affect[s] the fairness, integrity[,] or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (citations and quotation marks omitted).

"It is well settled that expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Frady*, 228 N.C. App. 682, 685, 747 S.E.2d 164, 167 (citation, internal quotation marks, and brackets omitted), *writ denied*, *review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013). In the context of child sexual assault cases, experts cannot testify "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) (emphasis in original). "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." *Id.* at 267, 559 S.E.2d at 789. "For expert testimony to amount to vouching for a witness's credibility, that expert testimony must present 'a definitive diagnosis of sexual abuse' in the absence of 'supporting physical evidence of the abuse.' " *State v. Perdomo*, 276 N.C. App. 136, 140, 854 S.E.2d 596, 600 (2021) (citation omitted), *review denied*, 868 S.E.2d 859 (Mem) (2022). Furthermore, "[t]his Court has rejected the premise that the use of the term 'victim' by prosecution witnesses represents a 'reinforcing the complainant's credibility at the expense of defendant.' " *State v. Womble*, 272 N.C. App. 392, 400, 846 S.E.2d 548, 554 (2020).

Here, despite defendant's contentions, no expert witness specifically referred to Sonia as a victim. Although State Bureau of Investigations Agent Patrick Higgins ("Agent Higgins") referred to Sonia as a "victim" when testifying that another officer reported to him that they "had made contact with the victim" at the hospital, this Court has found such testimony is not improper vouching. *Id.* Furthermore, it follows that if specifically referring to a complainant as a "victim" is not vouching for the complainant's credibility, general references to sexual assault victims cannot amount to improper vouching. Defendant makes no legal argument for why general

references to victims of sexual abuse constitutes improper vouching, and we decline to create precedent that would not allow such testimony. Accordingly, this argument is likewise without merit.

Additionally, defendant contends Ms. Morris improperly vouched for Sonia's credibility in her testimony. Ms. Morris's testimony that behaviors she observed in Sonia were "consistent" with those typically seen in victims of sexual assault is not a "definitive diagnosis" of sexual assault amounting to improper vouching. *Perdomo*, 276 N.C. App. at 140, 854 S.E.2d at 600. Rather, Ms. Morris testified "as to the profiles of sexually abused children" and that Sonia had "symptoms or characteristics consistent therewith[,]" which this court has repeatedly held is admissible testimony from a qualified expert. *Id.* at 142, 854 S.E.2d at 601; *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789; *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987) (holding experts may testify as to "symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse" and such testimony is "a proper topic for expert opinion"). Accordingly, defendant's argument that the State's expert witness testimony was improper vouching for Sonia is without merit.

Lastly, defendant contends a new trial is warranted because there was insufficient evidence to find Sonia was sexually assaulted, and absent the alleged impermissible vouching by experts, the jury probably would have found defendant

not guilty. In support of this contention, defendant cites *State v. Towe*, 366 N.C. 56, 732 S.E.2d 564 (2012). However, defendant's reliance on *Towe* is misplaced.

In *Towe*, at the defendant's trial for various sexual offenses, an expert witness testified for the State that "approximately 70 to 75 percent of the children who have been sexually abused have no abnormal findings" during physical examinations and opined that she would "place" the victim in that category. *Towe,* 366 N.C. at 60, 732 S.E.2d at 566. Our Supreme Court found the admission of this testimony was plain error, since it amounted to a "conclusory assertion" "that, even absent physical symptoms, the victim had been sexually abused[.]" *Id.* at 62-64, 732 S.E.2d at 568-69.

Here, as established above, Ms. Morris did not state Sonia was the victim of sexual assault. Ms. Morris testified "as to the profiles of sexually abused children" and that Sonia had "symptoms or characteristics consistent therewith[,]" which is admissible testimony from a qualified expert under our case law. *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. Furthermore, in addition to Sonia's testimony, the State presented evidence that her sexual assault examination revealed redness in the inner lining of her vagina and two abrasions on her hip. Additionally, the State presented evidence that male DNA was found on internal and external vaginal swabs taken from Sonia during her rape kit as well as in her underwear which was collected on the day of her exam. Although there is no physical evidence to establish that the

male DNA belonged to defendant, this is distinguishable from *Towe* in that there was some physical evidence presented by the State.

By failing to show there was any error, let alone plain error, defendant cannot demonstrate there was a "fundamental error" that "had a probable impact on the jury's finding" of his guilt, as required to establish plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, this contention is without merit.

B. Ineffective Assistance of Counsel

In the alternative, defendant contends that he received ineffective assistance of counsel when his trial counsel failed to object to the testimony in question. Although defendant raised this issue in his brief, he did not make an argument for ineffective assistance of counsel. The only explanation of this contention is in defendant's conclusion, which states defendant's trial "counsel was ineffective for failing to object to the testimony" since "[t]here could have been no reasonable trial strategy for counsel to have remained silent as these three witnesses improperly vouched for [Sonia]." Defendant did not present any legal argument for this contention in his brief nor did he provide any further explanation as to why his trial counsel's actions amounted to ineffective assistance. Accordingly, this issue is abandoned, and we do not address defendant's contention. N.C.R. App. P. 28(b)(6) (2023) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

III. Conclusion

For the foregoing reasons, we hold defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).