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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-939

Filed 05 September 2023

Forsyth County, Nos. 20CRS62383-87, 20CRS62389-94, 20CRS62396

STATE OF NORTH CAROLINA

v.

DALE BERNARD HAIRSTON, Defendant.

Appeal by Defendant from Judgment entered 22 March 2022 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 6 June 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General John F. Oates, Jr., for the State.*

*J. Clark Fischer for Defendant-Appellant.*

RIGGS, Judge.

Defendant Dale Bernard Hairston appeals from a judgment entered after a jury found him guilty on fourteen counts of statutory sexual offense with a child, sixteen counts of taking indecent liberties with a child, and one count of statutory rape of a child by an adult. On appeal, Mr. Hairston argues that the trial court erred when it found the State's expert witness was qualified to testify about the

characteristics of a sexually abused child. Mr. Hairston argues that he was prejudiced by the error because had the trial court excluded the testimony, there was a reasonable possibility of a different outcome at trial. After careful review, we discern no prejudicial error.

### **I. FACTS & PROCEDURAL HISTORY**

In January of 2018 when Lila<sup>1</sup> was eleven years old, she received bad grades on her report card. As punishment for the bad grades, Lila's mother took away Lila's phone. Lila's mother discovered an advertisement for a pornography site on the phone. When her mother confronted her, Lila said that Defendant, Mr. Hairston who is Lila's step-grandfather, put the pornographic site on her phone. After this admission, Lila's mother threw the phone out the window.

A few days later, Lila's mother asked Lila if Mr. Hairston had ever touched her. Lila stated that he had. Lila's mother took her to the hospital that evening for an examination, but the medical professions did not perform an examination. Lila's father reported the allegations to the police in February 2018, and Lieutenant James Rae ("Lt. Rae") of the Forsyth Police Department contacted Lila's mother to investigate the complaint.

As part of the investigation, Lt. Rae: (1) scheduled a forensic interview for Lila with forensic interviewer Amber Benson ("Ms. Benson"); (2) performed a search of the

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<sup>1</sup> "Lila" is a pseudonym for the minor child used to protect her identity.

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woods outside the mother's home for Lila's phone; and (3) obtained a warrant to search Mr. Hairston's home.

On 13 March 2018, Lila had a ninety-minute recorded forensic interview with Ms. Benson, at the Children's Advocacy Center in Forsyth County. After the interview, Ms. Benson generated a report documenting the finding from the interview, which she submitted to law enforcement.

On 20 March 2018, after the forensic interview, the police performed a search of the woods outside Lila's mother's home to locate Lila's phone. The police found the phone, but it was damaged and not operational. On 22 March 2018, the police executed a search warrant on Mr. Hairston's home and seized computers; flash drives; tablets; CDs; and vibrators. The police did not find child pornography on any of the devices, and the police did not test the vibrators for physical evidence.

On 2 December 2020, Mr. Hairston was arrested and charged with sixteen counts of taking indecent liberties with a child, nine counts of first-degree sex offense, six counts of statutory sex offense, and five counts of rape of a child by an adult. The State voluntarily dismissed four of the rape charges and one of the statutory sex offense charges.

Both Lila and Mr. Hairston testified during the trial. Lila testified that Mr. Hairston sexually abused her over the course of five years when she was between the ages of six and eleven. She testified to multiple specific incidents of sexual assault, including incidents at the apartment where Mr. Hairston and her grandmother lived,

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the home that she lived in with Mr. Hairston and her grandmother, and Mr. Hairston's friend's apartment. Additionally, she testified that Mr. Hairston sexually assaulted her when Mr. Hairston drove her to the school bus stop, to Walmart, and to church. Lila also testified that Mr. Hairston showed her sexually explicit videos. Lila was able to describe details from the videos, which depicted Mr. Hairston, her grandmother, and another woman engaging in sexual acts and strangers engaging in sexual acts.

During the trial, Mr. Hairston testified and denied that he ever touched Lila in any inappropriate manner, stating that he was rarely even alone with her. Mr. Hairston confirmed that Lila would stay at their house periodically on weekends and that in 2013, Lila lived with Mr. Hairston and her grandmother for four to six months while her mother lived in Charlotte. Mr. Hairston testified that he did not take Lila to the bus stop because he left for work early. However, he testified that on four or five occasions, he drove Lila to church alone and on one occasion he picked Lila up during a snowstorm to take her to his house. Mr. Hairston admitted to having sexually explicit videos on his computer devices but testified that the videos were made by consenting adults. Finally, he testified to his belief that Lila, during one instance when he found her using his computer without permission, might have accidentally gained access to those videos.

Both Lila's mother and grandmother testified that they had never observed Mr. Hairston behaving inappropriately with Lila. Lila's grandmother testified that

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she always drove Lila to the bus stop and Mr. Hairston did not take Lila to the bus stop. Lila's mother also testified she could only remember one snow day occasion when Mr. Hairston picked Lila up from the school bus.

Lt. Rae, the lead officer on the case, testified about the scope of the investigation. Because of Lila's age, Lt. Rae did not interview Lila in 2018 at the time of the disclosure; however, Lt. Rae interviewed Lila with the district attorney three times as part of the trial preparation in 2022, and he testified to her disclosures during those interviews. Lt. Rae testified that Lila recounted additional instances of sexual abuse during the interviews in 2022 that she had not disclose during her forensic interview in 2018. Lt. Rae testified that Lila took him and another investigator to several locations where she alleged that incidents of sexual abuse occurred including secluded parking lots and Mr. Hairston's friend's apartment. Lt. Rae also testified that he watched the videos on the hard drives seized from Mr. Hairston's home and confirmed that Lila's descriptions matched what was depicted on the videos. On cross-examination, Lt. Rae acknowledged that there were inconsistencies in Lila's story between what she told Ms. Benson in 2018 and what she testified to at trial in 2022.

During the trial, the State called the forensic interviewer, Ms. Benson, as an expert witness. As part of her expert qualification, Ms. Benson provided testimony about her education, including a Bachelor of Science degree in criminal justice and a Master of Science degree in criminal justice with a concentration in the analysis of

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criminal behavior. She also testified that she obtained three certifications in forensic interviewing: a National Children’s Advocacy Center certification, a state RADAR<sup>2</sup> certification, and a RADAR Jr. certification. She explained that she had “close[] to three-and-a-half” years of experience and conducted about five hundred interviews with children. She stated that most of these interviews involved sexual abuse. When discussing the nature of her task as a forensic interviewer, Ms. Benson stated that her primary purpose was to engage the child to talk about their experiences. Ms. Benson could not recall or give an estimate as to what degree her training focused on recognizing characteristics of child sexual abuse. The trial court accepted her as an expert witness in forensic interviewing.

Over the objection of the defense, the court allowed Ms. Benson to testify as to the typical ways in which abused children disclosed their abuse. Additionally, Ms. Benson was allowed to give an opinion as to whether Lila’s disclosure was consistent with the disclosure patterns of sexually abused children. Ms. Benson testified, while referring to her report, that in her “professional opinion . . . [Lila] did exhibit or display the characteristics that we typically would see, or some of the characteristics that we typically would see aligned with children that have been exposed to child maltreatment.” Ms. Benson also opined that Lila's relationship with her grandmother and Mr. Hairston and the monetary incentives she received from them

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<sup>2</sup> RADAR stands for Recognizing Abuse Disclosures and Responding.

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were likely roadblocks to the disclosure of the abuse. Ms. Benson gave her opinion that Lila's disclosure in the forensic interview was consistent with delayed disclosure.

During the trial, the State did not present any physical evidence or psychological evaluations that indicated abuse beyond the testimony of Ms. Benson.

On 22 March 2022, a jury found Mr. Hairston guilty of all thirty-one of the charges. The trial court entered judgment on these charges on 23 March 2022 and sentenced Mr. Hairston to ten (10) active terms; each term a minimum of 300 and a maximum of 420 months. The ten terms were ordered to run consecutively for a total sentence of 250 to 350 years. Mr. Hairston gave oral notice of appeal on the record during the sentencing hearing on 23 March 2022.

**II. ANALYSIS**

**A. Expert testimony**

On appeal, Mr. Hairston argues that the trial court erred when it found the forensic interviewer was qualified to testify about the characteristics of sexually abused children. He argues that this error was prejudicial and had the error not been committed, there was a reasonable possibility of a different outcome at trial. We disagree.

**1. Standard of Review**

This Court reviews whether expert testimony complies with the requirements of qualification, relevance, and reliability found in N.C. R. Evid. 702(a) under the abuse of discretion standard. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11

(2016). A trial court abuses its discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

For an error by the trial court to rise to the level of prejudicial error, defendant bears the burden of showing that “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); *see also*, *State v. McPhaul*, 256 N.C. App. 303, 316, 808 S.E.2d 294, 305 (2017), *review dismissed as improvidently allowed*, 371 N.C. 467, 818 S.E.2d 102-03 (2018).

## **2. No Prejudicial Error**

We first consider Ms. Benson’s expert testimony regarding the characteristics of sexually abused children to determine if any of this testimony was prejudicial such that, if it was excluded, there was a reasonable possibility of a different outcome at trial.

This Court has held that 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 so as to inform the jury that the lack of physical evidence of abuse is not conclusive that abuse did not occur.” *State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004) (emphasis added). However, under North Carolina precedent and statutory law, experts may not opine on the credibility of another witness. *State v. Register*, 206 N.C. App. 629, 642-43, 698



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S.E.2d 464, 473-74 (2010) (citing *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 567-68 (1986) (“Rules 608 and 405(a), read together, forbid an expert's opinion as to the credibility of a witness.”)). “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).

To determine if impermissible expert testimony is prejudicial and warrants a new trial, we consider whether the balance of the evidence is sufficient to support the jury verdict. *See Kim*, 318 N.C. at 622, 350 S.E.2d at 352 (holding that absent expert opinion that the victim was telling the truth there was a “reasonable possibility” that a different result would have been reached and granted a new trial when the weight of the State’s case hinged “almost totally on the credibility of the victim.”); *State v. Aguallo*, 318 N.C. 590, 599-600, 350 S.E.2d 76, 82 (1986) (holding that absent pediatrician’s testimony saying she found the victim to be “believable” there was a reasonable possibility that the jury would have reached a different result); *State v. Heath*, 316 N.C. at 343-44, 341 S.E.2d at 569 (holding that because the evidence was conflicting and weighty on both sides, absent expert’s testimony that she believed a witness lied, there was a reasonable possibility the jury would have reached a different conclusion). Put another way, the defendant must show a reasonable probability that the result of the jury trial would have been different if the statement objected to was excluded. *State v. Register*, 206 N.C. App. at 644, 698 S.E.2d at 474.

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Therefore, we consider whether Ms. Benson's statements about the characteristics of a sexually abused child, if excluded, would reasonably result in a different outcome.

In this case, Ms. Benson provided testimony narrowly addressing whether Lila's delayed disclosure was consistent with the patterns of sexually abused children, and her testimony was specifically related to her observations during the 2018 forensic interview. Ms. Benson testified, after reviewing the report she generated shortly after the interview, that in her professional opinion, "the child did exhibit or display the characteristics that we typically would see, or some of the characteristics that we typically would see aligned with children that have been exposed to child maltreatment." Ms. Benson also opined that Lila's close relationship with her grandmother, and the gifts that she received from Mr. Hairston, including a phone, were likely roadblocks that kept her from disclosing the abuse to her parents or another adult. Finally, Ms. Benson offered her opinion that Lila's disclosure in the forensic interview was consistent with delayed disclosure. Notably, Ms. Benson testified that she was not providing an opinion as to the truth of the allegations.

The North Carolina Supreme Court has held that impermissible expert testimony is prejudicial and ordered a new trial when the expert provided their opinion about the truthfulness of the victim. *State v. Heath*, 316 N.C. at 343, 341 S.E.2d at 569. That did not happen in this case. In *Heath*, the trial court allowed the expert to opine whether the victim had been lying about the sexual assault at issue—such testimony was improper because it went to the credibility of the witness. *Id.* at

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340-42, 341 S.E.2d at 567-69. The Court reinforced that the expert’s testimony went beyond the scope of her expertise, was irrelevant to the topic of the victim’s mental state, and instead addressed the victim’s credibility or record for truth and veracity. *Id.* at 342, 341 S.E.2d at 568. The Court held that because the evidence in that case was conflicting and substantial on both sides, the basic issue became whether the jury believed the victim or the defendant, and expert testimony about the victim’s truthfulness carried considerable weight such that there was “a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]” *Id.* at 343-44, 341 S.E.2d at 569.

The expert testimony in this case is quite different—Ms. Benson did not testify about the credibility of Lila’s testimony at trial or even about the credibility of her disclosure in 2018. Significantly, the jury watched the ninety-minute recording of Ms. Benson’s forensic interview with Lila. The jury had the opportunity to observe the statements, demeanor, and body language of Lila during the 2018 forensic interview and to use that information to weigh the credibility of Ms. Benson’s opinion testimony.

Even if Ms. Benson’s opinion testimony were excluded, the record contains sufficient evidence upon which a jury could reasonably find Mr. Hairston guilty. The jury had the testimony of Lila and the video of her forensic interview in 2018. Lila’s testimony at trial in 2022, coupled with the video of her disclosure four years prior, allowed the jury to assess her credibility and compare her earlier disclosure to this

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testimony. This Court has held that improperly admitted credibility testimony is not prejudicial when the jury “assess[es] for themselves the credibility of [the victim]” based upon the victim’s testimony. *State v. Davis*, 191 N.C. App. 535, 541, 664 S.E.2d 21, 25 (2008). *See also State v. Register*, 206 N.C. App. 629, 644-45, 698 S.E.2d 464, 475 (2010) (holding that the improper testimony was not prejudicial given the weight of all the other evidence, including the victim’s testimony). Even though there were inconsistencies between Lila’s 2018 disclosure and her 2022 testimony, “[e]vidence that contains inconsistencies can still support a factual finding based upon the factfinder's assessment of the evidence and the credibility of its proponents.” *State v. Reid*, 380 N.C. 646, 656, 869 S.E.2d 274, 283 (2022).

Additionally, Mr. Hairston also testified, and the jury, as the fact finder, was able to assess his credibility. Both sides presented additional witnesses, including Lila’s mother, grandmother, and church friends, to corroborate or impeach the testimony of Lila and Mr. Hairston. The credibility of the witnesses and the weight to be given to their testimony are matters exclusively within the province of the jury. *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012).

Finally, the jury here had independent evidence which corroborated Lila’s testimony. Police found the sexually explicit videos that she testified to being shown by Mr. Hairston in Mr. Hairston’s custody. The police also found the vibrators which Lila described in Mr. Hairston’s home. Lila provided descriptions of secluded parking lot locations where specific incidents occurred and took law enforcement to those

locations. Therefore, even without Ms. Benson's opinion that Lila displayed characteristics of a sexually abused child and her delayed disclosures were consistent with sexually abused children, there is sufficient evidence upon which a jury could reasonably conclude that Mr. Hairston was guilty.

In light of the narrowness of Ms. Benson's testimony, the jury's ability to assess the truthfulness of both Lila and Mr. Hairston, and other independent corroborating evidence, Mr. Hairston has not met his burden on appeal of showing that absent Ms. Benson's testimony about the characteristics of sexually abused children, there was a reasonable possibility that the jury would have reached a different verdict. We therefore hold that even if the trial court erred by allowing Ms. Benson's testimony, there was not a reasonable possibility of a different outcome at trial.

### ***3. Qualifications of the Expert Witness***

Because we hold that there was not a reasonable possibility that the exclusion of Ms. Benson's narrow testimony regarding the characteristics of sexually abused children would have resulted in a different outcome at trial, we do not need to address whether Ms. Benson's qualifications were sufficient under North Carolina Rule of Evidence 702(a) (2021).

## **III. CONCLUSION**

After careful review, we hold that the admission of Ms. Benson's opinion testimony regarding the characteristics of a sexually abused child was not prejudicial

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such that had it been excluded, there was a reasonable possibility of a different outcome at trial. Therefore, we find no prejudicial error.

NO PREJUDICIAL ERROR.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).