VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 2020-305

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

OCTOBER TERM, 2021

State of Vermont v. Richard M. Lee*	}	APPEALED FROM:
	}	Superior Court, Addison Unit,
	}	Criminal Division
	}	CASE NO. 171-5-18 Ancr
		Trial Judge: Alison S. Arms

In the above-entitled cause, the Clerk will enter:

Defendant appeals his convictions by a jury of four counts of aggravated sexual assault of victims less than thirteen years of age. We affirm.

In May 2018, defendant was charged with aggravated sexual assault based on allegations that he abused his stepdaughters.[*] At trial, which took place in January 2020, the State's first witness was the father of the complainants. Father testified that he and the girls' mother had been married for approximately ten years and had three children, a son and two daughters. They divorced in 2007 or 2008. Mother later married defendant. The children initially lived with mother and defendant during the week and with father on the weekends. When the older daughter was in eighth grade, she and son went to live with father because they were unhappy in mother's home and because mother was moving and they did not want to switch schools. The younger daughter stayed with mother; she did not want to leave her little brother, who had been born to mother and defendant.

Father testified that in August 2017 he received a call from a neighbor reporting that the younger daughter had made some disturbing disclosures about defendant to the neighbor's daughter. Father contacted the Department for Children and Families (DCF). A meeting was arranged between the younger daughter and a detective. Father brought the younger daughter to the interview without telling her why. Afterward, the detective told father that the younger daughter had reported some arguing but had not mentioned any sexual incidents.

The younger daughter testified that she lied to the detective because she was afraid. Soon afterward, she began to see a counselor at school for depression. In January 2018, she told her counselor that defendant had touched her inappropriately, and the counselor contacted DCF. The

[*] At the time of trial, the younger stepdaughter used a masculine name and the pronouns he/him. To avoid ambiguity, the Court uses the pronouns by which the younger stepdaughter was known at the time of the abuse.

younger daughter met again with the detective and told him that defendant had sexually abused her.

The younger daughter testified that she was seven or eight years old the first time that she was abused by defendant. She was sitting on her bed playing with toys when defendant came in, sat on her bed, and put his hand on her leg. He told her to take her clothes off and she complied. He made her lie down and started licking her vagina. He eventually stopped and left the room.

On another occasion, the younger daughter was in her mother's bedroom watching television when defendant came in and asked her if she had told anyone about the first incident. She said no. He then told her to lie down and pulled off her pants. She asked him what he was doing, and he told her to be quiet. She said she didn't want to see what was happening and he took the blanket and covered her eyes. He then started to lick her vagina and finger her. At that point they were interrupted by the younger brother, who knocked on the door and announced that the younger daughter's friend had come to visit her. The younger daughter went out and told her friend what had happened. This friend, as well as two other friends, testified that the younger daughter had told them that defendant was touching her sexually.

On a third occasion, the younger daughter was in her room when defendant came in and said he wanted to try something. He pulled down his pants and boxers and told her to put her mouth on his penis. She said no, but he forced his penis into her mouth. He said to do it or he would hurt one of her siblings. She put her mouth on the tip, then withdrew. He grabbed her head and forcefully shoved his penis back in her mouth. Then he stopped on his own and told her she would like it when she was older. He told her not to tell her mother or siblings. She had told her mother after the second incident, but her mother did not believe her.

After disclosing this information in January 2018, the younger daughter went to live with her father and older siblings. The older daughter subsequently told her father that defendant had abused her as well. The older daughter testified that when she was ten or eleven, she was home from school because she was sick. Defendant came into her room and told her that he and mother were concerned that she and the younger daughter were being sexually touched by their step-grandfather, meaning father's wife's father. The older daughter did not know why they would think that, because she and her sister had never been alone with step-grandfather and he had never done anything inappropriate. Defendant told her that he needed to check her private area to make sure everything was okay. She didn't recall how, but her pants and underwear came off. Defendant told her to lie back on the bed. He said that he had dealt with stuff like this before because he was a firefighter. He told her that she didn't have to watch and could put a pillow over her face, and she did. He put his finger inside her vagina for a few seconds. He then got up and walked out.

When mother returned home, the older daughter immediately told her what happened. Mother later told her that she had discussed it with defendant and told him that it was not okay, and that if it was a serious issue, they should have taken her to the doctor. The older daughter never discussed the incident with mother or defendant again.

The State's final witness was a pediatrician who was qualified as an expert in pediatrics and child abuse. The pediatrician had evaluated the younger daughter in February 2018. The evaluation consisted of an interview and physical examination. The pediatrician testified:

> Can I just add one thing to the story, because I said there were two things that were . . . of interest to me. [The younger daughter]

> told the story of her stepfather, [defendant], coming to her room and performing oral sex on her, and there were some aspects of the story and specifics that she added to it that were—that made it quite compelling, quite clear. And I thought she was finished, and I was stopping and thinking about what next question I wanted to ask, and—and without any questioning or comment on my part, she said— . . . and she just continued and she said—and I put this in quotes in my note: "One time he put his penis in my mouth. It was in so far it was choking me. I pushed him off and I was coughing. He said to me, when you are older, you will love this. I said, well, I am younger and I don't like this." And what was significant in this investigation is—is that it's unusual that a child will—even a young adolescent like that—will tell that story so clearly. You know, now, I won't say that it is unusual to have that kind of story come out, but it usually requires, you know, us to say, well, did anything else happen? Do you have any other concerns? Trying not to . . . lead the child or . . . or push the story, but making sure that I give them the opportunity to . . . bring that story forward. And so it was of significance that she became comfortable, I think, in—in our clinic, and out it came.

The pediatrician then testified that he did not observe any signs of injury or scarring during the physical examination, but that this was not unusual given the length of time since the abuse had taken place and the younger daughter's age.

The jury found defendant guilty on all counts. He received four concurrent sentences of ten years to life imprisonment.

On appeal, defendant argues that the State's expert impermissibly vouched for the credibility of the younger daughter, prejudicing the jury and depriving him of a fair trial. Under Vermont law, "experts in child sexual abuse cases are not permitted to comment directly on their personal perceptions or beliefs regarding the credibility of the child victim." State v. Leggett, 164 Vt. 599, 599 (1995) (mem.). Expert mental-health testimony is permitted "to help jurors 'understand the emotional antecedents of the victim's conduct' so that they 'may be better able to assess the credibility of the complaining witness.' " State v. Wetherbee, 156 Vt. 425, 432 (1991) (citation omitted). But "[w]e do not permit the expert to usurp from the jury its role as fact-finder, and we will reverse a conviction if the expert's testimony is 'tantamount to a direct comment that the complainant was telling the truth.' " Leggett, 164 Vt. at 599 (citation omitted).

We have held previously that an expert's comments about a child victim's demeanor or tone during a forensic interview do not necessarily amount to the expert vouching for the child's credibility. See State v. Bergquist, 2019 VT 17, ¶ 96, 210 Vt. 102 (concluding that admission of expert's testimony that child victim's description of her sexual abuse was "significant," "clear," and "graphic" was not erroneous where expert was simply describing his reason for not asking about victim's history); State v. Oscarson, 2004 VT 4, ¶ 65-66, 176 Vt. 176 (holding description of child's demeanor as "remarkably declaratory, remarkably specific" was not tantamount to vouching for child's credibility). The pediatrician's statements that the younger daughter's description of abuse was "clear" and "compelling" are not, by themselves, impermissibly suggestive. Moreover, it is not at all clear that the pediatrician's summary of the younger daughter's account about what happened to her, including naming defendant as the perpetrator,

and his statements that her account was unusually clear, "amounted to a comment on the credibility of the victim." State v. Ross, 152 Vt. 462, 468 (1989) (citation omitted) ("To the extent that the testimony amounted to a comment on the credibility of the victim, it would ordinarily be inadmissible.").

We need not decide whether the expert's testimony constituted impermissible vouching because defendant did not object to the expert's testimony. "Reversal is thus justified only if we find that plain error occurred in the court's failure to exclude these statements [on its own initiative]." State v. DeJoinville, 145 Vt. 603, 605 (1985); see V.R.Cr.P. 52(b). Under the plain-error standard, reversal is appropriate when the error "is obvious, affects substantial rights bringing prejudice to the defendant, and seriously affects the fairness, integrity or public reputation of judicial proceedings." State v. Myers, 2011 VT 43, ¶ 29, 190 Vt. 29 (quotation omitted).

When confronted with similar challenges in the past, we have frequently concluded the admission of an expert's impermissible comment on a child sexual abuse complainant's credibility was not plain error. See id. (finding no plain error even though expert expressly testified about credibility of child victims); see also State v. Sims, 158 Vt. 173, 182 (1991) (holding expert's testimony that abuse occurred, which implied that expert believed victim, was error, but was not reversible); Ross, 152 Vt. at 470 (finding no plain error where expert testified that abuse had occurred and identified defendant as perpetrator). We have reasoned that "the duty to exclude objectionable data lies squarely upon the shoulders of defense counsel." Ross, 152 Vt. at 469 (quotation and alteration omitted). Otherwise, counsel might "be tempted to remain silent about some fault on the part of the trial court and so, without giving it a chance to correct the situation, arm themselves with ground for reversal if the verdict should go against them." Id. at 470 (quotation and alteration omitted).

Defendant argues that this case is like State v. Weeks, in which we held that the admission of a psychologist's testimony regarding the child victim's credibility did amount to plain error. 160 Vt. 393, 403 (1993). We disagree. Although the credibility of the victims was central to the trial in both cases, the facts are otherwise distinguishable. In Weeks, the victim was a six-year-old child, whose testimony was brief, monosyllabic, and vague. The State's expert "literally made sense of the child's testimony": "[h]e testified abuse had occurred, gave details about the abuse that the child could not relate, and explained away discrepancies in her various accounts and her recantation." Id. at 401. By contrast, in this case the victims were both teenagers and were able to provide detailed and extensive descriptions of what happened. The pediatrician was not the person to whom they first reported the abuse or the person who disclosed the abuse to DCF. The pediatrician's testimony briefly repeated the younger daughter's account of one of the incidents of abuse to which she had testified and described her demeanor in making her disclosure, but did not add details or explain away discrepancies. And the jury convicted defendant of all charges, not just those covered by the pediatrician's testimony. Cf. id. at 402 (reasoning that jury found defendant guilty only of charges that expert verified, which was additional evidence of prejudice).

Furthermore, unlike in Weeks, the pediatrician's testimony was not the main focus of the State's case. Cf. id. at 401 (describing how psychologist's testimony took up more than one-third of entire trial testimony and was "a richly detailed roadmap of how he elicited and came to believe the child's allegations of abuse"). The pediatrician was the final witness, but his testimony was brief, and much of it focused on his qualifications as an expert. At closing the State focused primarily on the testimony of the two complainants. It referred to the

pediatrician's testimony that signs of physical injury were uncommon in child victims, but did not mention his account of the interview with the younger daughter at all. Cf. id. at 401-02 (explaining that State made "extensive use of the expert's reputation and his judgment about fabrications" during closing argument).

We conclude that defendant has not established plain error in this case. Even assuming the pediatrician's testimony here was impermissible, the nature and scope of the testimony was limited, and his description of the abuse was merely cumulative of the younger daughter's testimony. The pediatrician was not the primary witness and the State did not focus on his statements in closing argument. Under these circumstances, we conclude that the admission of the testimony did not deprive defendant of a fair trial.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice