IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-808

Filed: 3 April 2018

Wake County, Nos. 14 CRS 224665–66

STATE OF NORTH CAROLINA

v.

FABIAN RAMOS

Appeal by defendant from judgments entered 4 November 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin O'Kane Scott, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Paul M. Green, for defendant.

DIETZ, Judge.

Defendant Fabian Ramos appeals his conviction on kidnapping charges related to the sexual abuse of his eight-year-old niece. Ramos argues that the trial court committed plain error when it admitted testimony from the State's expert, a child

therapist who counseled the victim. Ramos contends that the expert vouched for the credibility of the victim.

As explained below, we find no plain error. This was not a case in which impermissible vouching occurred with no warning to the parties and the court. At trial, the court guarded against any improper vouching by instructing the expert to use the word "alleged" when recounting the victim's description of the abuse; the expert explained to the jury that she took the victim's testimony at "face value" and did not try to determine whether the victim was telling the truth; and the purported vouching Ramos identifies in the trial transcript either is not vouching as a matter of law, or has a plausible alternative interpretation that is not vouching. We therefore hold that, even assuming some error by the trial court, that error did not rise to the level of plain error.

Facts and Procedural History

Defendant Fabian Ramos is the uncle of M.M.,[1] who was in second grade when she, her mother, and her siblings moved in with Ramos and his partner. M.M.'s mother always locked her daughters' doors at night because several girls from the family had been abused by other relatives. Nevertheless, M.M.'s mother initially saw nothing concerning about Ramos's relationship with M.M.

[1] We use initials to protect the juvenile's identity.

In late 2014, M.M. made remarks to her mother about "someone doing something" to her. M.M.'s mother tried several times to get M.M. to talk about it, but M.M. would always reply that "she had forgotten." On 18 October 2014, M.M.'s mother entered her daughter's room and urged her to speak out. Believing that her daughter "was going to say something very interesting," M.M.'s mother recorded the conversation on her phone. Between sobs, M.M. told her mother that Ramos had sexually abused her. The alleged incidents took place between 15 September 2013 and 19 October 2014.

M.M.'s mother took the phone recording to the police station. In the days that followed, M.M. was interviewed by an investigator with Wake County Child Protective Services, an officer with the Raleigh Police Department's Juvenile Unit, and an interviewer with Safe Child Advocacy Center. M.M. discussed the sexual abuse in each interview. M.M. also underwent two complete physical examinations which yielded no physical evidence of sexual abuse.

On 17 November 2014, the State indicted Ramos on two counts of first-degree kidnapping, two counts of taking indecent liberties with a child, and one count of first-degree sexual offense with a child. The case went to trial on 31 October 2016.

M.M., then ten years old, testified remotely for the State. She testified that Ramos sexually molested her twice. M.M. was hesitant while testifying, often saying "I forgot" when asked detailed questions about the incidents. M.M.'s testimony also

had some inconsistencies concerning the details of the abuse. M.M.'s mother and several other witnesses testified as well, but their testimony was based on what M.M. told them.

The State also presented expert testimony from Alison Burke, a child and adolescent therapist, who counseled M.M. using a form of therapy called Trauma Focused Cognitive Behavioral Therapy. As part of this therapy, Burke worked with M.M. on a "trauma narrative," which entailed writing a "story" about the alleged abuse. The State offered a copy of the narrative into evidence.

During her testimony, Burke repeatedly emphasized that she took M.M.'s story at "face value" and did not try to determine if M.M. was telling the truth. In addition, following instructions from the trial court, Burke added the word "alleged" whenever she discussed M.M.'s sexual abuse. But Burke frequently referred in her testimony to "the trauma" or "the event" when discussing M.M.'s therapy. At one point, when discussing how she reviews the trauma narrative with the victim to change any "cognitive distortions" or an "inaccurate thought," Burke explained that "I don't think we had that in this." Ramos did not object to this testimony at trial.

The trial court dismissed the sexual offense charge at the close of evidence. The jury found Ramos guilty of the remaining charges on 4 November 2016. The trial court arrested judgment on both indecent liberties convictions on double jeopardy grounds because those charges were the basis for the first-degree kidnapping

convictions. The court sentenced Ramos to two consecutive sentences of 60 to 132 months in prison. Ramos timely appealed.

Analysis

Ramos argues that Alison Burke, the State's expert, improperly vouched for M.M.'s credibility while describing the trauma therapy she provided to M.M. Ramos concedes that he did not timely object to the challenged testimony and this Court therefore reviews it for plain error.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

In sex abuse cases involving child victims, trial courts "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." *State v. Stancil,* 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (per curiam) (emphasis in original). An expert need not explicitly say that she finds the child credible in order to improperly vouch for that child; rather,

we analyze whether there is any "appreciable difference between [the challenged] statement and a statement that [the child] is believable." *State v. Frady,* 228 N.C. App. 682, 685–86, 747 S.E.2d 164, 167 (2013).

With this precedent in mind, we turn to Burke's testimony. As an initial matter, both Burke and the trial court took steps to ensure that the jury did not interpret Burke's testimony as vouching. Early in Burke's testimony, as the prosecutor asked her to explain Trauma Focused Cognitive Behavior Therapy, Burke emphasized that she was not determining if M.M. actually was sexually abused, but instead evaluating the symptoms M.M. displayed:

> And again, during the assessment I am not trying to find out details if there is alleged sexual abuse—it's not my job to figure out all that, and I am just—my purpose was to see what are the symptoms that she is exhibiting.

Later in her testimony, Burke explained that she was "solely relying" on what M.M. or her mother told her to create the narrative and that there was no way for Burke to know if M.M. was telling the truth "because I am not an investigator."

Moreover, early in Burke's testimony, when Burke stated that she asked M.M. "what were her feelings that she was feeling related to the sexual abuse or at the time of the sexual abuse," Ramos's counsel objected and the trial court sent the jury out of the courtroom. After discussing the objection with counsel, the trial court instructed Burke to clarify that the sexual abuse for which she provided therapy is merely an allegation, not a fact:

> THE COURT: And Mr. Melo, how do you believe that that is vouching for?
>
> MR. MELO: Well, I mean, if she had used the term alleged, that [M.M.] had alleged this abuse, I think it would be better, but just to say [M.M.] said sexual abuse, I think that is vouching for [M.M.]'s credibility in that she is saying, and hence her stating the term sexual abuse that she was, in fact, sexually abused. Because that is up to the jury to determine whether, in fact, [M.M.] was sexually abused.
>
> . . .
>
> THE COURT: All right. I will sustain the objection and I think it is a matter of wording. I think that the witness is permitted to testify about that she was aware of allegations of sexual abuse or descriptions of sexual abuse that had been provided by [M.M.] and that she asked questions about her feelings, related how she felt on those occasions. But I think it's a matter of semantics. But out of abundance of caution, I will sustain the objection and just ask the witness to consider a way of describing the course of your treatment and therapy in a way that is not vouched for whether or not you believed [M.M.]'s descriptions of sexual abuse or whether the conduct that she was subjected to was, in fact, sexual abuse.
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> MS. BURKE: Okay.

After this exchange, Burke repeatedly referred to the "alleged trauma" or "alleged sexual abuse."

Despite these efforts to ensure the jury did not misinterpret Burke's testimony as vouching, Ramos argues that Burke implicitly vouched for M.M. in her description of the therapy she provided. Specifically, Ramos argues that Burke vouched for M.M. when she told the jury that the purpose of the trauma narrative "is not to find out

what happened for any purposes, but to help the child discuss difficult parts of what happened." Ramos contends that, by referencing "what happened," Burke indicated that the sexual abuse was a "historical fact."

Similarly, Ramos argues that Burke vouched for M.M. by referring to "the trauma" or "the event" at various points in her testimony and by discussing her efforts to "find out more" through the trauma narrative. Ramos contends that terms like "finding out" when referencing an event or trauma are "words that apply to objective facts."

We reject these arguments. Burke's description of her trauma therapy made clear that she relies on a narrative provided by the alleged victim. Thus, the narrative necessarily will describe an "event" or a "trauma" and Burke necessarily will work to "find out more" about the victim's story by encouraging the victim to write the narrative. Nothing in Burke's testimony indicated that Burke *believed* M.M.'s narrative. Moreover, Burke conceded on cross-examination that she took everything M.M. told her at "face value" and did not attempt to determine if M.M. was telling the truth.

Simply put, this testimony is not vouching because there is an obvious, "appreciable difference" between Burke's testimony about her trauma narrative therapy and expert testimony that the child victim's allegations are believable. *Frady,* 228 N.C. App. at 686, 747 S.E.2d at 167.

Ramos also argues that Burke vouched for M.M. when discussing M.M.'s opportunity to "correct any cognitive distortions" in the trauma narrative by stating that "I don't think we had that in this":

> Q. And once the narrative itself is completed, can you tell us therapeutically what you do with that?
>
> A. After that is done we look through it to point out any mastery moments or moments when she did things well, like, for example, telling, or something like that. Times when she had mastery. We also correct any cognitive distortions. We call it—any times when children might have an inaccurate thought, and I don't think we had that in this.

We agree that one interpretation of this testimony is that Burke did not believe there were any inaccuracies in M.M.'s story of sexual abuse—that is, that Burke *believed* M.M.'s story. And that certainly would be impermissible vouching. But another—indeed, a fairer—interpretation of this testimony is that, once a trauma narrative is completed, Burke and the patient go through the narrative and correct any "cognitive distortions" or inaccuracies in the story, but in this case there were none because M.M. stuck to her story. This says nothing about whether Burke actually believed the story, only whether M.M. made any changes to the story along the way.

Had Ramos timely objected to this testimony, the trial court could have instructed Burke to clarify her answer, or provided an appropriate limiting instruction. But Ramos concedes that he did not object and we must therefore review

for plain error. Even assuming there is error here, it does not rise to the level of plain error.

As explained above, the trial court admonished Burke not to say anything that might unintentionally vouch for the victim and Burke followed the court's instructions by using the word "alleged" when describing the abuse M.M. recounted. Burke herself also emphasized in her testimony that she took M.M.'s story at "face value" and did not attempt to determine if M.M. was telling the truth. Indeed, during cross-examination, Burke repeatedly conceded that there was no way for her to know if M.M. was telling the truth, and that she had to rely solely on what M.M. told her, "because I am not an investigator."

In light of these facts, Burke's ambiguous statement that "I don't think we had that in this" when discussing correcting inaccuracies in the trauma narrative, even if error, is not the type of "exceptional case" where the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. The trial court guarded against any improper vouching; the witness explained to the jury that she was not vouching for the victim; and the challenged statement has a plausible, alternative interpretation that is not vouching. This case does not present the sort of "fundamental error" that rises to the level of plain error. *Id.*

Conclusion

For the reasons explained above, we find no plain error in the trial court's judgments.

NO PLAIN ERROR.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).