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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-257

Filed: 17 November 2020

Jones County, Nos. 16 CRS 50395-97

STATE OF NORTH CAROLINA

v.

WILLIAM CHARLES MELTON

Appeal by Defendant from Judgments entered 27 September 2019 by Judge William W. Bland in Jones County Superior Court. Heard in the Court of Appeals 20 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Mark Montgomery for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

William Charles Melton (Defendant) appeals from Judgments entered upon jury verdicts convicting Defendant of three counts of Taking Indecent Liberties with a Child, two counts of Statutory Rape of a Child Younger than Fifteen, two counts of Sex Act by a Custodian, one count of Statutory Rape of a Person more than Six Years

Younger, and one count of a Sex Act by Person in a Parental Role. The Record, including evidence adduced at trial, reflects the following:

On 4 August 2017, a Jones County Grand Jury indicted Defendant in 16 CRS 50393, and 50395-97 on charges of Taking Indecent Liberties with a Child, Rape of a Child, Sex Offense by a Sub Parent/Custodian, Statutory Rape of a Person more than Six Years Younger, and Sex Offense by Person in a Parental Role.¹ Defendant's case came to trial in Jones County Superior Court on 23 September 2019. The State's first witness was the alleged victim (Sylvia).²

On direct examination, Sylvia, now an adult, testified Defendant was her stepfather and had lived with Sylvia and her mother for approximately eight years. Sylvia stated Defendant first touched her in a way that "did not feel right" when she was approximately ten years old. After Defendant's dog died, Sylvia alleged she went to check on Defendant and as she returned to bed, Defendant asked Sylvia for several "gentle" kisses. Sylvia further testified this incident was not the only time Defendant would "touch" her. She stated Defendant subsequently "grope[d] [her] breasts" and "caress[ed] [her] arms" with his hands. Sylvia testified this type of touching happened intermittently for several years "until [Sylvia] was like 14."

¹ On 27 September 2019, the State dismissed the charges associated with 16 CRS 50393.

² Because the alleged victim was a child at the time of the alleged incidents, we refer to the alleged victim by the pseudonym "Sylvia."

Sylvia then testified Defendant began asking her to engage in sexual intercourse, starting when Sylvia was in the seventh grade. She stated she began having intercourse with Defendant “somewhere around the end of 7th grade.” Sylvia testified she would have intercourse with Defendant “two to three times a week maybe.” She stated the intercourse occurred in several locations including the family home, a graveyard, various work sites, and “a house [Defendant] was cleaning up . . . for our landlord.” Sylvia also testified to the locations and descriptions of the graveyard—where she stated Defendant had intercourse with her “multiple times”—and gave a detailed description of the red house’s interior and the intercourse she stated Defendant had with her in the red house.

Sylvia testified she went to the red house with Defendant to see if the landlord “had any work” for Sylvia and Defendant to do. She then stated she went with Defendant upstairs to a room with windows and a fireplace. Sylvia recalled seeing a condom still in its wrapper on the floor in the room; she stated Defendant then put the condom on his penis. Sylvia testified she then had sex with Defendant on the floor—which Sylvia recalled was covered in blue carpet—in front of the fireplace. At some point prior to or during the encounter, Sylvia said Defendant removed the condom and placed it on the mantle. She further testified Defendant “ejaculated on the floor.”

Sylvia then stated she left her mother's home about a week after the alleged encounter in the red house to go to her "best friend Tanya's" house. Sylvia "told [Tanya] about it." Sylvia then stated she called her mother to let her know she was fine, and Sylvia's mother "said that her and [Defendant] were on their way[.]" Sylvia testified she then dialed 9-1-1 and told the dispatcher "my step-dad was molesting me, and that—that they were on their way to come get me, and I didn't want to go back with them." Sylvia testified three officers arrived at Tanya's house and then Tanya took Sylvia to "Coastal Carolina East Medical" where they were met by law enforcement. Sylvia recounted speaking to someone named "Leyla" and the State Bureau of Investigation into the midnight hours on that evening. Sylvia did not return home after the hospital; she was initially placed in foster care. Sylvia then testified to speaking with a "Ms. Beth" (Pogloszewski) from the Child Advocacy Center. The trial court then allowed the State to play a video recording of this interview for the jury.

Upon cross-examination, Defendant's counsel asked many questions seeking to clarify or resolve purported discrepancies in Sylvia's testimony. Some of these issues included: whether Defendant was serving a prison sentence while Sylvia was in the seventh grade; whether Sylvia spoke to male and female law enforcement officers alone or in the presence of others; the number and types of interviews Sylvia had with law enforcement or social workers; whether Sylvia had been to the red house

prior to the incident she alleged occurred with Defendant; whether law enforcement investigated certain locations—other than the red house—where Sylvia stated Defendant molested her and certain claims about Defendant’s physical characteristics. Counsel then asked if Sylvia had “prepared” for her testimony by reviewing her previous “questions and answers.” Then defense counsel conducted a detailed inquiry as to Sylvia’s interviews with and statements made to law enforcement.

The State then called Beth Pogloszewski to testify. Pogloszewski worked as a child forensic interviewer at the Child Advocacy Center in Jacksonville, North Carolina, and conducted the video interview the jury watched during Sylvia’s testimony. The trial court qualified Pogloszewski as an expert witness “in the techniques of forensic interviewing of a child.” Pogloszewski recounted her interview with Sylvia and, of note and relevant to this appeal, stated:

I remember [Sylvia] *disclosing* that the last time that something had happened with [Defendant] she said they had gone to a red house. She described it being downtown, and it was near Mr. Neal’s house, and she gave a description of it, and she gave a description of *what had happened* and basically she during the interview she described it as rape. But she said explicitly *what had happened* and she gave description of the house and, you know, *how it happened* inside.

The State’s case continued with counsel calling several law enforcement officers to testify as to their investigations and interviews with Sylvia. These witnesses referred to Sylvia as “the victim” numerous times throughout their

testimony. The State also presented evidence law enforcement officers took DNA samples from Sylvia and Defendant and Sylvia showed officers where the alleged incident at the red house took place. Special Agent Timothy D. Saunders (Special Agent Saunders) of the State Bureau of Investigation testified he took photos of the red house and collected evidence from the scene. Special Agent Saunders stated he found a condom laying on top of a package of shingles outside a window in the upstairs room of the red house. Special Agent Saunders further testified he found a condom wrapper on the fireplace mantle in the room and took carpet samples from the area Sylvia said Defendant had intercourse with her.

Shane Wilcox, a forensic scientist with the North Carolina State Crime Lab, testified he examined two pieces of the blue carpet seized from the red house and detected the presence of semen on one of the pieces. Samantha Chitkin, also a forensic scientist with the North Carolina State Crime Lab, testified she analyzed the DNA profiles taken from Sylvia, Defendant, and the samples taken from the blue carpet. Chitkin testified she was able to separate the sperm-cell DNA from the non-sperm DNA, and the non-sperm DNA contained two contributors—the minor contributor matched Sylvia’s DNA profile, and the major contributor matched Defendant’s DNA profile. Chitkin then testified the DNA profile obtained from the sperm on the blue carpet matched Defendant’s DNA profile.

After the close of all evidence, the jury found Defendant guilty of three counts of Taking Indecent Liberties with a Child, two counts of Statutory Rape of a Person Fifteen Years or Younger, two counts of Sex Act by a Substitute Parent/Guardian, and one count of Sex Act by a Person in a Parental Role in connection with the charges in 16 CRS 50395-97. On 27 September 2019, the trial court entered Judgment and Commitment on these convictions. Defendant gave oral Notice of Appeal in open court, and the trial court appointed the Office of the Appellate Defender as appellate counsel.

Issues

The dispositive issues on appeal are whether: (I) the trial court plainly erred when it allowed the State's witnesses to refer to Sylvia's allegations as "disclosure" and "what happened," and to refer to Sylvia as "the victim;" and (II) Defendant's trial counsel's failure to object to these admissions constituted ineffective assistance of counsel.

Analysis

I. Impermissible Vouching

Defendant argues the trial court allowed improper expert vouching when the State's witnesses referred to Sylvia's allegations as "disclosures" and "what happened" and to Sylvia as "the Victim." Defendant acknowledges he did not object to these statements at trial. "In criminal cases, unpreserved issues '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.’ ” *State v. Worley*, ___ N.C. App. ___, ___, 836 S.E.2d 278, 282 (N.C. Ct. App. 2019), *disc. rev. denied*, 375 N.C. 287, 846 S.E.2d 285 (2020) (quoting N.C.R. App. P. 10(a)(4) (2019)). Because Defendant failed to object to these statements at trial, he is only entitled to plain error review. *Id.*

Plain error is error which is “ ‘so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]’ ” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

A. “Disclosing” and “What had Happened”

Defendant claims Beth Pogloszewski’s testimony constituted “improper expert vouching for Sylvia’s truthfulness.” Specifically, Defendant takes issue with Pogloszewski stating: “I remember [Sylvia] disclosing . . . the last time that something had happened with [Defendant] . . . she gave me a description of what had happened . . . she said explicitly what had happened and . . . how it happened[.]” We disagree.

“[T]estimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.” *State v. Bailey*, 89 N.C. App.

212, 219, 365 S.E.2d 651, 655 (1988). Specifically, “[i]n child sexual abuse cases, where there is *no physical evidence* of the abuse, an expert witness's affirmation of sexual abuse amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony.” *State v. Crabtree*, 249 N.C. App. 395, 401, 790 S.E.2d 709, 714 (2016), *aff’d*, 370 N.C. 156, 804 S.E.2d 183 (2017) (emphasis added).

However, in this case there was significant physical evidence corroborating Sylvia’s allegations against Defendant. First, although not physical evidence, the State showed the video of Pogloszewski’s interview with Sylvia allowing jurors to determine the weight and credibility of Sylvia’s statements absent any characterization by Pogloszewski. Moreover, the State presented evidence of the condom and wrapper at the red house and DNA matching Sylvia’s and Defendant’s DNA profiles—including sperm cells matching Defendant’s DNA profile. Therefore, unlike in *Crabtree*, there was significant physical evidence and the witness’s statements were not the only evidence presented at trial.

Defendant cites this Court’s opinion in *State v. Jamison* to support his argument Pogloszewski’s use of “disclosing” and “what had happened” was impermissible expert vouching. 262 N.C. App. 708, 821 S.E.2d 665 (2018) (unpublished), *disc. rev. denied*, 372 N.C. 289 (2019). In *Jamison*, a child forensic interview expert testified it was “rather impressive that [the alleged victim] disclosed in spite of . . . barriers” and the alleged victim gave “age appropriate” and “really

specific” responses during the forensic interview. *Id.* (slip op. at 10). The *Jamison* Court held these statements and characterizations of the alleged victim’s interview were impermissible expert vouching and were admitted in error. *Id.* (slip op. at 11-12). However, because there was other evidence supporting the State’s case, the court held this error did not have a probable effect on the on the jury’s verdict. *Id.*

We find *Jamison* to be inapposite for several reasons. *Jamison*—an unpublished opinion—is not persuasive because the testimony in *Jamison* is distinguishable from Pogloszewski’s testimony in this case. Unlike the expert testimony in *Jamison*, Pogloszewski’s statements were not overt characterizations of Sylvia’s interview statements. If anything, these phrases merely pointed to Sylvia’s recounting of the alleged incidents, and Pogloszewski was not intentionally characterizing Sylvia’s statements as credible. Moreover, this Court expressly declined to follow *Jamison* in subsequent published opinions. In *State v. Betts*, we held *Jamison* “is not controlling, not persuasive, and . . . did not properly analyze [precedent].” ___ N.C. App. ___, ___, 833 S.E.2d 41, 47 (2019). In *State v. Worley*, we held, “repeated use of the word ‘disclose’ or its variants does not constitute impermissible vouching for a declarant’s credibility.” ___ N.C. App. ___, ___, 836 S.E.2d 278, 284 (2019). Therefore, Pogloszewski’s use of “disclosing” and “what had happened” did not constitute impermissible vouching for the credibility of an alleged victim by an expert. Accordingly, the trial court did not err in allowing this testimony.

B. “Victim”

Similarly, Defendant argues the trial court allowed impermissible expert vouching—constituting plain error—when it allowed the State’s witnesses to refer to Sylvia as the “victim.” Again, for similar reasons, we disagree.

First, Defendant concedes the State’s witnesses who referred to Sylvia as the “victim” may not have intentionally done so to offer an opinion on the credibility of Sylvia’s claims; rather, this phrase was “jargon” denoting Sylvia as the alleged victim, the trial court implicitly qualified these witnesses as experts, and the witnesses’ references to Sylvia as the “victim” carried great weight with the jury. Although law enforcement officers may act as both lay and expert witnesses, the witnesses here were not offering opinions of Sylvia’s credibility. They were simply recounting events and explaining the evidence they found for the State. *See State v. Womble*, ___ N.C. App. ___, ___, 846 S.E.2d 548, 554-55 (2020) (holding even expert witnesses referring to a person as “victim” were not vouching for the alleged victim’s credibility when recounting “evidence-collection” processes). Accordingly, the trial court did not err in allowing witnesses to refer to Sylvia as the “victim.”

Even if these references to Sylvia as “victim” were opinions, use of the word “victim” does not necessarily prejudice a defendant. Our appellate courts have held time and again referring to an alleged victim as “victim” is not prejudicial when there is evidence corroborating the alleged victim’s claims. *See, e.g., State v. McCarroll*,

336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994); *State v. Jackson*, 202 N.C. App. 564, 568-69, 688 S.E.2d 766, 769 (2010). Again, in this case the State presented substantial physical evidence—including DNA evidence—corroborating Sylvia’s testimony. Therefore, even if the trial court had not allowed witnesses to refer to Sylvia as “victim,” the jury would have probably still convicted Defendant based on this evidence. Accordingly, the trial court did not err, much less plainly err, in allowing the State’s witnesses to refer to Sylvia as the “victim.”

II. Ineffective Assistance of Counsel

Finally, Defendant argues, in the alternative, his trial counsel’s failure to object to Pogloszewski’s use of “disclosing” and “what had happened” and other witnesses referring to Sylvia as the “victim” constituted ineffective assistance of counsel. For the following reasons, we disagree.

“To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

Defendant asserts, “[t]here could have been no strategic reason for counsel’s failure to object to the improper testimony.” However, because we hold the trial court did not err by allowing the witness testimony Defendant now challenges, trial counsel’s failure to object did not fall below any objective standard of reasonableness. *See State v. Lee*, 348 N.C. 474, 492, 501 S.E.2d 334, 345 (1998) (“The first part of the [ineffective assistance of counsel] test is not satisfied where defendant cannot even establish that an error occurred.”). Even if the court committed error to which trial counsel should have objected, as explained above, Defendant cannot show he was prejudiced by these statements—considering the State’s substantial, corroborating evidence. *See Jackson*, 202 N.C. App. at 569, 688 S.E.2d at 769. Accordingly, Defendant’s trial counsel’s failure to object to this testimony did not constitute ineffective assistance of counsel.

Conclusion

For the foregoing reasons, we conclude there was no error in Defendant’s trial.

NO ERROR.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).