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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1156

Filed: 15 December 2020

Pitt County, No. 16CRS50571

STATE OF NORTH CAROLINA

v.

JONATHAN MATTHEW HARRIS, Defendant.

Appeal by defendant from judgment entered on or about 28 November 2018 by Judge Leonard L. Wiggins in Superior Court, Pitt County. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Julianne L. Bradshaw, for the State.

Mark Montgomery, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment convicting him of first degree sexual offense. Defendant contends there were two forms of impermissible vouching for a witness and the trial court should have *sua sponte* granted a mistrial due to a misstatement before the jury was empaneled; as to each of these issues, we conclude there was no error.

I. Background

In 2011, seven-year-old Jane¹ was living with defendant, her father. The State's evidence tended to show defendant blindfolded her, put his penis in her mouth, and moved her head in an up-and-down motion. Jane told her paternal aunt and her paternal grandmother about the incident; neither woman did anything. Jane then told her mother in December of 2011, and her mother contacted DSS that same month. DSS instructed Jane's mother to inform the sheriff's department and take Jane to TEDI BEAR, a child advocacy center. The first week of January of 2012, Jane went to TEDI BEAR, but she did not disclose that anything improper had happened with defendant. Eventually, in December of 2015, due to behavioral issues, Jane was referred to a licensed clinical social worker, Ms. Dianna Aideuis, who she informed "about the bad things that had happened to her[.]"

Defendant was indicted for first degree sexual offense. Jane testified at the trial and was then 14 years old. The jury convicted defendant of the one charge against him, first degree sexual offense. Defendant appeals.

II. Defendant's Appeal

The only issues on appeal are whether an expert witness and an exhibit were used to improperly bolster Jane's testimony. We turn to defendant's arguments on appeal.

¹ A pseudonym is used.

A. Expert Witness Vouching

During defendant's trial, Ms. Dianna Aideuis, a licensed clinical social worker who treated Jane, was qualified as an expert in "child trauma and the effects of child trauma." The trial court clarified that Ms. Aideuis would not be allowed "to give an opinion as to when the sexual abused actually occurred[,] but she could speak about "the nature and scope of her conversation" with Jane and "what she actually disclosed to her." Throughout Ms. Aideuis's testimony, defendant objected to questions and the trial court sustained some objections and overruled others. In response to one objection and motion to strike, the trial court allowed the motion to strike and instructed the jury that they were "not to consider any testimony at this point in time that came from the witness to the effect that it was discovered that the alleged or purported child victim had been sexually abused. That is a question of ultimate determination for you, the jury."

Defendant now contends that the trial court committed plain error in admitting Ms. Aideius's expert testimony that impermissibly vouched for Jane's testimony, or, in the alternative, he was denied effective assistance of counsel because his attorney did not object to the testimony which vouched for Jane's testimony. "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.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted).

Defendant argues that although “Ms. Aideuis did not say, in so many words, ‘I believe Joan’, she nonetheless made [her beliefs] clear to the jury . . . [by] ‘stealth vouching.’” Defendant directs us to the following testimony,

A. So treatment plan was based on the interview with [Jane] and her mother. When [Jane] had started talking about the **bad things that happened to her . . .**

Q. How soon after she came to you did she start talking about those things?

A. It was minimal the first appointment, but after that she did talk about that something **bad had happened to her** and –

Q. Is that how she expressed it?

A. Uh-huh, **a bad thing had happened to her.**

. . .

Q. Can you describe the procedures involved in that therapy?

A. What’s involved with that therapy is – the context of it is to gently walk into **that trauma** with the child to give them a coherent narrative. So that –

Q. When you say a coherent narrative what is that?

A. It's to make sense out of **what happened** so that they don't have shame or blame based on **the event**.

...

Q. What's – I don't mean to interrupt, but what's the goal of feelings identification?

A. The goal of feelings identification is so that the child will have words for how it made them feel for **what happened**.

....

So the coping skills are specifically directed for the purpose of helping the child cope with what **happened to her**. The psycho-education also is directed towards that so the child does not feel blamed for **the event** or to feel shame for **the event**[.]

(Emphasis by defendant.)

“Our case law has long held that a witness may not vouch for the credibility of a victim.” *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010).

Testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence. In 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. Examples of impermissible vouching for a child victim's credibility include a clinical psychologist's testimony that a child victim was believable, and an expert witness's statement, based on an interview with the child, that she was a sexually abused child. 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.

State v. Crabtree, 249 N.C. App. 395, 401–02, 790 S.E.2d 709, 714–15 (2016) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 370 N.C. 156, 804 S.E.2d 183 (2017).

When we consider Ms. Aideuis’s testimony in context, we cannot conclude that she improperly vouched for Jane’s credibility. In the testimony defendant challenges, Ms. Aideuis did not state she believed Jane or state any opinion on whether Jane was telling the truth. Essentially, defendant contends that any testimony by an expert witness reporting what a child told the witness about “what happened” to them” is “stealth vouching,” but if this were true, there would be no way for an expert witness to testify about an interview with a child who may have been sexually abused. Ms. Aideuis explained the process she would go through as a social worker when Jane said “what happened” to her. In other words, Ms. Aideuis recounted the steps a professional takes to evaluate and assist a child alleging sexual abuse. Whether or not Ms. Aideuis believed what the child reported in full or not at all, her testimony describes the process she uses and then what Jane reported to her. This is the therapeutic process she engages in when a child alleges “bad things that happened to her[.]” Ms. Aideuis’s challenged testimony is also generally about abused children within the process of therapy and not specifically about Jane. Accordingly, we

conclude the challenged testimony did not amount to impermissible vouching and therefore defendant's counsel was not ineffective in failing to object to such testimony. *See generally Quick*, 152 N.C. App. at 222, 566 S.E.2d at 737. Further, without an error in the admissibility of the statements, there can be no plain error. *State v. Larkin*, 237 N.C. App. 335, 339, 764 S.E.2d 681, 685 (2014) (“[O]n plain error review, the defendant must first demonstrate that the trial court committed error[.]” (citation omitted)). This argument is overruled.

B. Use of the Word “Disclosure”

Defendant next contends the trial court erred in allowing evidence of a statement in the TEDI BEAR report which referred to Jane's allegations as a “disclosure.” Defendant argues labeling the report as a “disclosure” amounts to further impermissible vouching for Jane. Defendant objected to the report before the trial court, but the basis of defendant's objection before the trial court was that the report contained hearsay and conclusory statements. Defendant did not object to the statements within the report using the word “disclosure” as impermissible vouching. Since defendant failed to raise an objection to the word “disclosure” before the trial court and failed to argue plain error, we will not address this argument on appeal. *See State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013) (“According to well-established North Carolina law, where a theory argued on an appeal was not raised before the trial court, the argument is deemed waived on

appeal.” (citation, quotation marks, and brackets omitted)); *see State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (“He also waived appellate review of those arguments by failing specifically and distinctly to argue plain error.”).

C. Mistrial

Last, defendant contends the trial court abused its discretion in not *sua sponte* declaring a mistrial, or, in the alternative, his attorney provided ineffective counsel by not moving for a mistrial. Defendant makes two arguments as to his basis for a mistrial.

1. Curative Instructions

Defendant’s first basis for mistrial is additional testimony from Ms. Aideius he contends impermissibly vouched for Jane. But according to defendant, he objected to this testimony at trial, and his objections were sustained; in addition, the trial court gave curative instructions. Still, defendant now contends the trial court’s curative instructions were not sufficient, although he did not request any additional instruction, mistrial, or any other action at trial.

“[M]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.” *See State v. Burgess*, ___ N.C. App. ___, ___, 843 S.E.2d 706, 709 (2020) (citation, quotation marks, and brackets omitted). The trial court did not abuse its discretion in not *sua sponte* declaring mistrial based upon a few statements which defendant objected to, and his

objections were sustained, with curative instructions as an additional measure. *Id.* at ___, 843 S.E.2d at 709 (“Our standard of review when examining a trial court’s denial of a motion for mistrial is abuse of discretion.”). Further, because defendant’s counsel did successfully object to the testimony, defendant has not demonstrated any basis for his alternative theory, ineffective assistance of counsel.

2. Jury Instructions

Finally, *before the jury was empaneled* the trial court stated, “[t]he Defendant is charged with the offenses of first degree sexual offense, two separate counts. To all of those offenses he says that he is not guilty.” Jury selection then proceeded. The next morning, the State began by noting that it was “only proceeding on one of the charges against Mr. Harris. That would be the 16 CRS 50571 charge.”² The trial court then clarified,

I indicated that the Defendant was pleading not guilty to two counts of first degree sexual offense and I need to clarify that with everyone in the room. The Defendant is actually pleading not guilty to only one count of first-degree sexual offense. So the State will only be proceeding on one count and not two so I wanted everyone to be clear and aware of that so that we could rectify the record.

Defendant made no objections to the clarifying instructions and jury selection continued.

² Our record only contains the indictment for 16-CRS-50571, one count of first degree sexual offense.

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Opinion of the Court

Defendant now contends that the trial court should have granted a mistrial or his attorney should have moved for a mistrial because the trial court erroneously stated there were two counts of first degree sexual offense instead of one. Defendant contends the clarifying instructions suggested defendant “had either pled guilty or been found guilty of one count of sexual offense.” We disagree.

Defendant cites several cases concluding there was reversible error where the jury heard evidence a defendant had committed or possibly committed other crimes, but that did not occur here. At the very beginning of the trial, before the jury was even empaneled, the trial court said “two” and then corrected the misstatement. Considering the trial court’s statements in context, we do not find any implication that defendant had pled guilty to another charge or that there was another charge pending against defendant. Throughout the entire trial, after this sole misstatement, the one charge against defendant was correctly and clearly identified. We see no indication that the jury may have believed defendant was subject to other charges based upon the trial court’s statements. Again, we do not conclude the trial court abused its discretion in failing to *sua sponte* declare a mistrial as the mistake did not “make it impossible to attain a fair and impartial verdict.” *Id.* Further, we do not conclude that defendant’s counsel was ineffective in failing to move for a mistrial based on the clarifying instruction provided before trial had even begun. This argument is overruled.

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III. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Chief Judge MCGEE concurs.

Judge ARROWOOD concurs in the result only.

Report per Rule 30(e).