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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-86

No. COA20-806

Filed 1 February 2022

Johnston County, Nos. 18 CRS 54462-63, 54548-52

STATE OF NORTH CAROLINA

v.

HARDEN JUNIOR VIERS, Defendant.

Appeal by Defendant from judgments entered 30 October 2019 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

INMAN, Judge.

¶ 1

Harden Junior Viers (“Defendant”) appeals from ten child sex abuse convictions for the rape and molestation of his step-grandchildren. Defendant asserts that the trial court committed prejudicial error in admitting testimony from a medical expert in pediatric child abuse that he argues vouched for the victims’ credibility. After careful review, we hold Defendant has failed to demonstrate prejudicial error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below discloses the following:

1. Background and Initial Disclosure

¶ 3 In the summer of 2012, Defendant’s step-daughter and her two children, H.R. (“Henrietta”) and I.R. (“Irene”),¹ ages six and three, respectively, all moved in with Defendant and his then-wife. That fall, the girls and their mother moved to a neighboring house. Over a period of years, Defendant often looked after the two children, as their mother worked long hours five to six days a week and their father was either deployed overseas or stationed out of state while serving in the United States Armed Forces.

¶ 4 In July 2018, when she was 12, Henrietta informed her mother that she had had “sex” with Defendant and that he had touched her genitals with his tongue, hands, and penis. Henrietta told her mother that Irene had been similarly abused.² The girls’ mother confirmed Henrietta’s disclosure with Irene and immediately informed police.

2. Investigation and Arrest

¶ 5 Henrietta and Irene underwent numerous interviews during law

¹ We identify the minor children by pseudonym to protect their privacy and for ease of reading.

² Neither Henrietta nor Irene knew the other was being sexually abused by Defendant at the time of those alleged acts. However, Irene later confided to her sister that she was being molested.

enforcement's investigation into Defendant's abuse, including but not limited to: (1) an initial interview with the responding sheriff's deputy, Shawn Williams; (2) a forensic interview conducted by a professional trained in child interviews; and (3) an interview with a social worker. While some of these interviews contained more details than others, both children gave largely consistent accounts of the alleged abuse.

¶ 6 Defendant was arrested shortly after the girls' mother reported his alleged abuse. Police searched Defendant's home following his arrest, where they recovered pornographic videos and a blue massager from a dresser in his bedroom—items the girls' described in their initial interview with Deputy Williams.

¶ 7 Later, Henrietta and Irene each were examined by Dr. John Wright at a child advocacy center in Johnston County. Dr. Wright conducted the physical exam himself but relied on the earlier forensic interview for the girls' descriptions of the alleged abuse. His physical exam of the girls did not reveal any signs of trauma, but he did observe that Henrietta's medical history—specifically, a history of cyclical vomiting and attention deficit disorder—may have been symptomatic of sexual abuse. As for Irene, Dr. Wright noted that she had shown signs of developmental regression, which could also indicate abuse. Dr. Wright referred the girls to therapy based on these findings.

¶ 8 Both Henrietta and Irene underwent therapy for at least one year following Dr. Wright's recommendations. Their accounts of abuse remained generally consistent over this time period. Henrietta's vomiting subsided eight months into treatment. Irene, who had suffered from hives when therapy commenced, appeared to suffer from fewer outbreaks over that same span.

3. Indictment and Trial

¶ 9 Defendant was indicted on two counts of statutory sex offense with a child, three counts of rape of a child, and five counts of taking indecent liberties with a child. At trial, the jury heard testimony from Henrietta and Irene, as well as from the girls' mother and several interviewers.

¶ 10 Henrietta testified that Defendant began touching her inappropriately when she was in third grade. The abuse continued until Henrietta was in sixth grade, and included repeated acts of genital fondling, fellatio, and Defendant penetrating Henrietta's vagina with his fingers and penis. On occasion, Defendant would touch Henrietta's genitals with a blue massager he kept in his bedroom, and he sometimes forced Henrietta to watch pornographic videos with him.

¶ 11 Irene testified that Defendant began sexually abusing her when she was in second grade. Defendant repeated this abuse multiple times over the course of that school year before halting the following summer. The abuse included genital

fondling, cunnilingus, and the use of the blue massager on Irene's vagina.³

¶ 12 The girls' grandmother also testified and read for the jury a letter Defendant had sent to her from jail during pre-trial detention while divorce proceedings, prompted by the sexual abuse allegations, were ongoing. That letter included the following statements:

I am sorry for everything that has happened. I think something went haywire when I had the PTSD flare-up and the different meds the mental health doctors put me on years back. But no excuses. I pray to God and my family to try and forgive me and help me overcome this. Thanks for putting up with me for so long

¶ 13 Dr. Wright also qualified and testified for the State as an expert witness. The State sought to introduce into evidence his conclusions and recommendations from his written reports about Henrietta and Irene. Defendant's counsel made several objections to these attempts. But, Defendant's attorney failed to object when Dr. Wright read the recommendations from his report on Henrietta into the record. And although Defendant also objected to the publishing and admission into evidence of the report concerning Irene, Defendant's counsel did not object to Dr. Wright's reading that report to the jury.

³ Both girls' testimonies were largely consistent with the content of their prior disclosures. There were a few contradictions, however; for example, the evidence showed that Irene told Deputy Williams and the forensic investigator that she pushed Defendant away when he attempted to engage in cunnilingus, but Irene testified before the jury that he completed the act.

¶ 14 Following the presentation of evidence, closing statements, and jury instruction, the jury returned guilty verdicts on all ten counts. The trial court sentenced Defendant to five consecutive terms of 300 months to 400 months imprisonment for the three rape and two statutory sex offense convictions, and the five indecent liberties convictions were consolidated into a single consecutive sentence of 16 months to 29 months imprisonment. Defendant gave notice of appeal in open court.

II. ANALYSIS

¶ 15 On appeal, Defendant contends that the trial court erred in admitting into evidence Dr. Wright's written reports and recommendations about Henrietta and Irene, arguing they impermissibly bolstered and vouched for the girls' credibility. Specifically, Defendant challenges Dr. Wright's: (1) statements that each girl's "history supports a diagnosis of sexual abuse[;]" and (2) recommendations that both girls receive therapy for "emotional issues related to sexual abuse." We conclude that several of these challenges are unpreserved, waived, and Defendant has failed to demonstrate prejudicial error.

1. Standard of Review

¶ 16 A preserved challenge to expert witness testimony on the ground that it impermissibly vouched for the credibility of a victim is reviewed for prejudicial error. *State v. Martinez*, 212 N.C. App. 661, 666, 711 S.E.2d 787, 790 (2011). To show

prejudicial error, a defendant must demonstrate that “there is a reasonable possibility that had [the challenged testimony] not been admitted, the jury would have reached a different verdict.” *Id.* (citation omitted).

¶ 17 Unpreserved challenges, by contrast, are reviewed for plain error, and only “when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4) (2021). Such a specific and distinct contention must be made in a defendant’s principal brief in order to preserve the issue for plain error review. *State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 (2014).

2. Preservation

¶ 18 The State asserts that Defendant failed to preserve his challenges to the admission of all of Dr. Wright’s conclusions and recommendations except for a single statement in Henrietta’s report that her “history supports a diagnosis of sexual abuse.” We agree.

¶ 19 Defendant raised several objections to Dr. Wright’s reports, but he failed to object when Henrietta’s therapy recommendation and the challenged portions of Irene’s report were read for the jury. Defendant has thus waived review of this evidence, as “[i]t is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.” *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)

(citations omitted). And, because Defendant did not allege plain error review in his principal brief as required by Rule 10(4) of the North Carolina Rules of Appellate Procedure, any unpreserved challenges to this evidence are not before this Court. *Dinan*, 233 N.C. App. at 698-99, 757 S.E.2d at 485.

¶ 20 Defendant did, however, consistently object to Dr. Wright’s statement that Henrietta’s “history supports a diagnosis of sexual abuse.” We therefore consider only whether that statement impermissibly vouched for Henrietta’s credibility and, if so, whether it prejudiced Defendant.

3. Defendant Has Not Demonstrated Error

¶ 21 Dr. Wright’s opinion that Henrietta’s “history supports a diagnosis of sexual abuse” does not amount to an impermissible vouching for her credibility under our caselaw. An expert may not testify “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. Delsanto*, 172 N.C. App. 42, 45, 615 S.E.2d 870, 872 (citation and quotation marks omitted) (emphasis in original); *see also State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (per curiam) (holding testimony from a doctor that the victim “was *in fact* sexually assaulted” absent physical evidence of abuse was an impermissible vouching for the victim’s credibility (emphasis in original)).

¶ 22 In other words, “[f]or expert testimony to amount to vouching for a witness’s

credibility, that expert testimony must *present a definitive diagnosis of sexual abuse* in the absence of supporting evidence of the abuse.” *State v. Perdomo*, 276 N.C. App. 136, 2021-NCCOA-45, ¶ 13 (citation and quotation marks omitted) (emphasis added). An expert may testify, however, “to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.” *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. Any determination resolving impermissible vouching depends on the particular facts of each case. *State v. Chandler*, 364 N.C. 313, 318-19, 697 S.E.2d 327, 331 (2010).

¶ 23 Here, Dr. Wright confirmed for the jury that he was “not allowed as an expert to testify that sexual abuse actually happened; that would be the province of the jury.” Rather than make such a factual determination, Dr. Wright instead testified that Henrietta’s “history of cyclic vomiting and her—the methods that she used to let her mother know that this had been going on are very consistent with behaviors and processes that we’ve seen in other children that were known to have been sexually abused.” Thus, considered in context, Dr. Wright’s testimony and written observation that her “history supports a diagnosis of sexual abuse” do not vouch for Henrietta’s credibility, as he neither opined that she had in fact been abused nor offered a definitive diagnosis to that effect. *Perdomo*, ¶ 13.

¶ 24 His testimony otherwise falls within permissible limits, as “our courts have repeatedly held that a properly qualified expert may ‘testify concerning the symptoms

and characteristics of sexually abused children and state the expert’s opinion that the symptoms exhibited by the victim were consistent with sexual or physical abuse.’ ” *Id.* ¶ 18 (cleaned up) (quoting *State v. Kennedy*, 320 N.C. 23, 31-32, 357 S.E.2d 359, 366 (1987)) (additional citations omitted). Defendant has failed to demonstrate error.

¶ 25 Our holding is supported by factually similar precedent. For example, in *State v. Spinks*, the State introduced into evidence a medical expert’s report containing the phrases “Chief Concern: Possible child sex abuse” and “Assessment and Recommendations: Child sex abuse by the [victim’s] disclosure.” 256 N.C. App. 596, 605, 808 S.E.2d 350, 356 (2017). The defendant contended on appeal that these statements impermissibly vouched for the minor victim’s credibility, and this Court rejected that argument. *Id.* at 605, 808 S.E.2d at 357. We did so because, when viewed in context with the expert’s testimony, these statements in the report were “not conclusory and left the ultimate issue to the jury to determine whether the facts and circumstances of the case were explainable by the possibility presented by [the expert doctor].” *Id.* The same is true here; Dr. Wright confirmed for the jury that he was not offering any opinion that Henrietta had in fact been abused, and the statement in his report that Henrietta’s “history supports a diagnosis of sexual abuse” does not, on its face, arise to a definitive factual determination that the alleged abuse actually occurred.

¶ 26 In contrast to *Spinks*, the key decisions on which Defendant relies—*State v.*

Couser, 163 N.C. App. 727, 594 S.E.2d 420 (2004), and *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914 (2005)—are distinguishable from the facts before us. In *Couser*, a medical expert testified to an affirmative diagnosis of “*probable* sex abuse.” 163 N.C. App. at 729, 594 S.E.2d at 422 (emphasis added). Similarly, in *Ewell*, the jury heard expert testimony that “it was ‘*probable*’ that [the minor] was a victim of sexual abuse in the absence of any physical evidence.” 168 N.C. App. at 100, 606 S.E.2d at 917 (emphasis added). Unlike in those cases, Dr. Wright offered neither an affirmative diagnosis of sexual abuse nor an expert conclusion that the alleged abuse was “probable.”

¶ 27 In sum, because Dr. Wright only testified that characteristics of Henrietta’s reported history were consistent with sexual abuse, *see Stancil*, 355 N.C. at 267, 559 S.E.2d at 789, did not factually assert that sexual abuse had occurred, *see Spinks*, 256 N.C. App. at 605, 808 S.E.2d at 357, and did not affirmatively diagnose Henrietta as having endured sexual abuse in concluding her “history supports a diagnosis of sexual abuse,” *see Perdomo*, ¶ 13, Defendant has failed to demonstrate error.

4. Presuming Error, Defendant Cannot Show Prejudice

¶ 28 Even if we were to presume the trial court committed error in admitting portions of Dr. Wright’s testimony and reports, Defendant has not shown prejudice. *See Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (holding a defendant was not entitled

to a new trial based on erroneous admission of medical expert testimony absent a showing of sufficient prejudice).

¶ 29 The jury had ample opportunity to appraise the credibility of both Henrietta and Irene, as both children testified at trial. The jury also viewed the same videotaped forensic interviews of Henrietta and Irene that Dr. Wright relied on in evaluating the children, giving the jury another chance to observe their demeanor and consider their truthfulness as it related both to Dr. Wright’s expert opinion and the prosecution of Defendant.

¶ 30 Further, physical evidence corroborated Henrietta and Irene’s testimony: police found (1) pornography recovered in Defendant’s bedroom consistent with Henrietta’s reports and (2) a blue, four-pronged massager in Defendant’s dresser that matched descriptions given by both children. And Defendant’s wife read for the jury the letter in which Defendant expressed remorse “for everything that has happened[,]” blamed his actions on “something [that] went haywire when I had the PTSD flare-up and the different meds the mental health doctors put me on years back[,]” admitted there were “no excuses” for his past conduct, and asked his family and God for forgiveness. In light of the above, Defendant has not shown “a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.” N.C. Gen. Stat. § 15A-1443(a). *Cf. State v. Godfrey*, 263 N.C. App. 264, 822 S.E.2d 894 (2018) (holding there was no prejudice in

admission of challenged evidence when other evidence, including the victim's testimony and the defendant's admissions, was so overwhelming as to preclude a showing of prejudice).

III. CONCLUSION

¶ 31 For the foregoing reasons, we hold Defendant has failed to demonstrate prejudicial error warranting a new trial.

NO PREJUDICIAL ERROR.

Chief Judge STROUD concurs.

Judge TYSON concurs.

Report per Rule 30(e).