IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-768

No. COA22-233

Filed 15 November 2022

Brunswick County, Nos. 20 CRS 700, 51257

STATE OF NORTH CAROLINA

v.

DELBERT ALMONZO KURTZ, Defendant.

Appeal by Defendant from judgments entered 27 August 2021 by Judge Richard Kent Harrell in Brunswick County Superior Court. Heard in the Court of Appeals 5 October 2022.

*Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.*

*Mark Montgomery for the Defendant.*

JACKSON, Judge.

¶ 1 Delbert Almonzo Kurtz ("Defendant") appeals from judgments entered after a jury found him guilty of sexual activity by a substitute parent, rape of a child, taking indecent liberties with a child, and sexual offense with a child. Upon careful review, we find no error.

## I. Background

¶ 2 In July 2009, the victim, Anna,[1] and her mother ("Mother") were in a car accident leaving Mother severely injured and requiring her to use a wheelchair. Mother met Defendant, who lived in Oregon, through a dating website for people involved in traumatic accidents or who sustained traumatic injuries. Mother and Defendant began dating in or around 2014 when Anna was in fifth grade. Over the course of Mother and Defendant's relationship, which lasted until around 2016, Defendant flew to North Carolina between four and six times to visit with Anna and Mother, staying with them for weeks at a time. Anna endured instances of sexual abuse by Defendant at least two or three times during each of his visits. Anna told Mother she felt uncomfortable around Defendant but never divulged any occurrences of abuse.

¶ 3 Then, on or about March 2020, Brunswick County Department of Social Services ("DSS") received a report that Anna was taken by law enforcement to Brunswick Novant Medical Center Emergency Center after an attempted suicide. J. Marshall, a DSS social worker with the Child Protective Service ("CPS") unit, was assigned to Anna's case. Marshall went to the hospital and met with Anna to investigate and assess the case. While at the hospital, Anna told Marshall only of her continued conflicts with Mother and her mental health issues. Anna was

[1] We use pseudonyms for the juvenile mentioned in this opinion to protect her privacy and for ease of reading. *See* N.C. R. App. P. 42(b).

discharged from the hospital and Marshall followed Anna and Mother home. Upon arriving at the home, Marshall was again able to speak with Anna. It was at this time that Anna told Marshall she had been sexually abused, several years prior, by Mother's boyfriend at the time, Defendant.

¶ 4 Per DSS policy, Marshall informed the Shallotte Police Department of the alleged abuse and scheduled a forensic interview with the Carousel Center, the local Child Advocacy Center. Upon contacting the Shallotte Police Department to report Anna's abuse, Marshall was put in contact with Detective C. McLamb, who began gathering information on the case. Marshall took Anna to her appointment at the Carousel Center where Anna met with licensed clinical mental health counselor, G. Warren. Warren conducted a recorded forensic interview. Detective McLamb assessed the information he previously gathered along with the recorded interview.

¶ 5 On 1 June 2020, Defendant was indicted on two counts of sexual activity by a substitute parent, rape of a child, taking indecent liberties with a child, and sexual offense with a child. Defendant's case came on for trial on 23 August 2021 in Brunswick County Superior Court before the Honorable Kent Harrell. Defendant was convicted by the jury on all counts. The trial court ordered Defendant's convictions of rape of a child, taking indecent liberties with a child, and sexual offense with a child be consolidated for judgment. Further, the trial court considered Defendant's prior record points and determined Defendant was a prior Record Level

I before sentencing him to a minimum of 300 to a maximum of 420 months' imprisonment. The court then, in a separate judgment, consolidated Defendant's other two convictions of sexual activity by a substitute parent and, after making the same findings as to Defendant's prior record level, sentenced Defendant to a minimum of 25 to a maximum of 42 months' imprisonment, running this judgment consecutively with the first judgment. Upon release, the trial court ordered Defendant to register as a sex offender and to refrain from having any contact with Anna during the remainder of his natural life.

¶ 6 Defendant gave notice of appeal in open court.

## II. Standard of Review

¶ 7 This Court may review an issue, in a criminal case, which was not otherwise preserved for appeal, where the "judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). Plain error arises "only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something 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) (internal marks, emphasis, and citations omitted). Moreover, under the plain error standard, the 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).

## III. Analysis

¶ 8 Defendant argues the trial court committed plain error by admitting testimony from the State's witnesses which amounted to vouching on behalf of Anna, and in admitting testimony by Detective McLamb in which he refers to Defendant's "full criminal background." Further, assuming arguendo the trial court did not commit plain error in allowing this testimony, Defendant asserts he received ineffective assistance of counsel in that his counsel neglected to object to said testimony, thereby prejudicing Defendant's defense. We disagree and address these arguments in turn.

### A. No Plain Error as the Testimony Admitted Did Not Amount to Vouching

¶ 9 Defendant specifically argues the trial court committed plain error in allowing three of the State's witnesses—Marshall, Detective McLamb, and Warren—to refer to Anna's accusations using the term "disclosure," and other variations thereof, in that their testimony amounted to impermissible vouching and rendered the trial fundamentally unfair.

¶ 10 Our long-standing precedent holds "a witness may not vouch for the credibility of a victim" because a question as to whether a witness is telling the truth is a matter for the jury alone. *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009). *See also State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995). This prohibition against vouching applies to both lay and expert witnesses alike.

*State v. Coble*, 63 N.C. App. 537, 541, 306 S.E.2d 120, 121 (1983).

¶ 11 Further, still, this Court has and will continue to review witness testimony on a fact-specific basis when considering whether testimony given at trial amounted to vouching. *State v. Robinson*, 275 N.C. App. 876, 878, 854 S.E.2d 407, 409 (2020). The term "disclose" is defined as "[t]o make (something) known or public" or "to reveal." *Black's Law Dictionary* 583 (11th ed. 2019). Specifically, we have held that, standing alone, use of the term "disclose" conveys neither believability nor credibility. *State v. Betts*, 267 N.C. App. 272, 281, 833 S.E.2d 41, 47 (2019). *See also State v. Frady*, 228 N.C. App. 682, 685, 747 S.E.2d 164, 167 (2013) (holding that the term "disclosure" merely refers to the victim's description of abuse).

¶ 12 In support of his contention here, Defendant cites this Court's decision in *State v. Jamison*, 262 N.C. App. 708, 821 S.E.2d 665, 2018 WL 6318321 (2018) (unpublished), the reasoning of which our Court rejected in a published opinion in *Betts*. 267 N.C. App. 272, 833 S.E.2d 41. In *Betts*, the defendant alleged the trial court committed plain error when it allowed the State's expert and lay witnesses to testify using the term "disclose," or variations thereof, when summarizing the statements made to them by the juvenile. *Id.* at 279, 833 S.E.2d at 46. The defendant, relying on our Court's unpublished opinion in *Jamison*, asserted the word "disclose" amounted to vouching for the juvenile's credibility. *Id.* at 280, 833 S.E.2d at 46. *See also Jamison*, 262 N.C. App. 708, 821 S.E.2d 665, 2018 WL 6318321 (holding, while

relying on *State v. Frady*, 228 N.C. App. 682, 747 S.E.2d 164 (2013), that the repeated use of the term "disclosure" and "disclose" suggested not only that there was something factual being divulged by the testifying victim but that the frequent use also lent credibility to the victim's testimony). However, we disagreed, reasoning the *Jamison* panel had misinterpreted *Frady*. *Betts*, 267 N.C. App. 272, 280-81, 833 S.E.2d 41, 46-47. In holding the term merely meant the content of the victim's description of the abuse, our Court in *Betts* stated, "*Jamison* should not be viewed as persuasive on this point and this Court is unaware of any opinion prior to *Jamison* that held that use of the word 'disclose' amounted to error because that term was tantamount to testimony that a victim was 'believable, had no record of lying, and had never been untruthful.'" *Id.* at 281, 833 S.E.2d at 47 (citations omitted).

¶ 13 In the instant case, the term "disclose," and variations thereof, were used frequently by several of the State's witnesses including both Marshall and Detective McLamb. Upon examination of Marshall, the term came up several times:

> Q. Okay. And during that conversation, at that point did [Anna] *disclose* anything else to you?
>
> A. She did. She *disclosed* to me that she had previously and in the past—prior to my involvement, that she had been sexually abused, but she had never told her mother before and was not ready for her mother to know at that point that day.
>
> . . .

> Q. Okay. And at that—during that conversation when [Anna] tells you she had been molested, did she give you any other details at that point?
>
> A. So I intentionally—because the kind of protocol, anytime a child, teenager, whoever, *discloses* any type of sexual abuse, per kind of DSS terminology, we intentionally do not dig for details or information[.]
>
> . . .
>
> A. When I had reported that—when I did my report to law enforcement, after [Anna's] initial *disclosure* to me, I ended up getting in contact with Cory[.] He called me to let me know he was the one assigned to it. And then we kind of sat down and went over everything that had happened and then what was to come with scheduling the Carousel interview.

(Emphasis added.) This testimony clearly indicates that in using the term "disclose," Marshall simply meant, as the dictionary defines, to reveal or to tell. Notably, on direct examination, after Marshall stated "[she] disclosed to me[,]" the State responded saying "during that conversation when [Anna] tells you she had been molested[.]" Here, the testimony in itself shows not only that Marshall viewed the use of the word "disclose" synonymously with the word "told" but also that in this instance, no credibility was given to Anna's telling of the molestation and therefore Marshall was in no way vouching for Anna's credibility.

¶ 14 Further, Defendant also takes issue with Detective McLamb's use the term "disclose" in his testimony:

> A. I received a call from a DSS employee by the name of "Jessica Marshall." Said that an incident was *disclosed* to them where [Anna] had *disclosed* that [Defendant] had sexually assaulted her several years—four or five years ago.
>
> . . .
>
> Q. Did you review that audio/video recording as part of your investigation?
>
> A. Yes, I did.
>
> Q. And why did you review that?
>
> A. To see the full *disclosure* that [Anna] had said during that interview of what happened four or five years ago.

(Emphasis added.) Again, the direct examination testimony reveals that Detective McLamb only intended the word "disclose" to be synonymous with a retelling of an alleged incident between Anna and Defendant. This is indicated distinctly where Detective McLamb says "[t]o see the full disclosure that [Anna] had said . . . of what happened[.]" Here, Detective McLamb uses "disclosure" and "said" synonymously and gives no indication at all that Anna's allegations were in anyway true. This testimony therefore cannot be viewed as Detective McLamb vouching for Anna.

¶ 15 Additionally, Defendant argues the State's expert, Warren, went to great lengths to assure the jury that Anna's "disclosure" was the truth. Regarding experts, our Supreme Court has held, "[i]n a sexual offense prosecution involving a child

victim, the trial court 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) (citations omitted). An expert may, however, testify "as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 508.

¶ 16 Upon direct examination, Warren stated:

> A. [A]nd so at the Carousel Center, we follow the RADAR protocol, which stands for Recognizing Abuse *Disclosure* Types and Responding. It was developed here in North Carolina. It is an evidenced-based best practices protocol. It is structured and designed to elicit accurate information from children when they're reporting different stuff happened.
>
> . . .
>
> A. So the preinterview, kind of preparation and planning phase, is a part of the RADAR protocol[.] You're also gathering kind of the referral information. So the type of disclosure that the child had, if there was any previous *disclosures* of abuse, any other statements or concerns that the child has made. And that allows us to have information to go into the interview with to help guide the conversation, if needed. It also allows us to have alternate hypotheses when going into the interview.
>
> . . .

Q. How would you describe—well, strike that . . . What is a *disclosure*?

A. So a *disclosure* is when any person—but in this case, a child—makes a report of something that has happened—

. . .

—to them. Or to somebody else.

Q. Are there different types of *disclosures*?

A. Yes, ma'am. There's purposeful, there's accidental, and there's prompted or kind of like requested. And in [Anna's] case, her *disclosure* was purposeful.

Q. And so what is a purposeful *disclosure*?

A. So that is when somebody makes a report that is with intent. So she intentionally told a peer about the abuse.

Q. And when you use the phrase "makes a report," do you mean like a formal report is done?

A. No, ma'am. When I say—when I say that, she was just talking to a friend.

. . .

Q. When a child *discloses*, do they always tell everything all at one time?

A. No, ma'am.

Q. And so explain that—that concept for the jury.

> A. So oftentimes when children are reporting or *disclosing* something that has happened to them, they're looking for a reaction[.]
>
> . . .
>
> Q. And so I want to turn now to this concept of a delayed *disclosure*. What is a delayed *disclosure*?
>
> A. So a delayed *disclosure* is when somebody does not *disclose* something that has happened to them for some period of time. And that can be a little bit of time or a long time. It just depends on the delay.
>
> Q. Is delayed *disclosure* something common with instances of child sexual abuse?
>
> A. It is. And most victims of child sexual abuse do not disclose until adulthood. And in times where a childhood *disclosure* is made, it is very common for it to be a delayed *disclosure*.

(Emphasis added.) Here, Warren never testifies specifically as to Anna's credibility. Instead, Warren defines the word "disclosure" generally as an instance where a child "makes a report." Warren then uses the words "disclose" and "disclosure" synonymously with "report" throughout the remainder of her testimony, even going as far as to then describe the report as "talking to a friend." This testimony in no way lent credibility to the victim. Further, in most instances, Warren testified only about the overall practices of examining potentially abused children and the characteristics consistent with disclosures made by sexually abused children.

¶ 17 Because the State's witnesses used the term "disclose" synonymously with

terms such as "said," "report," and "talking to a friend," the testimony did not lend credibility to Anna and therefore cannot be said to amount to vouching. Because the State's witnesses were in no way vouching for Anna, the trial court did not err, much less plainly err, in admitting the testimony.

**B. No Plain Error in Admitting Testimony Referencing Defendant's "Full Criminal History"**

¶ 18 Defendant next argues the trial court committed plain error in allowing Detective McLamb to testify he reviewed Defendant's "full criminal history" because it impermissibly created an illusion that Defendant was a career criminal and had likely also committed the crimes against Anna.

¶ 19 Under Rule 404(b) of the North Carolina Rules of Evidence, "[e]vidence of other crimes . . . is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). *See also State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5*, rev'd for the reasons stated in the dissent*, 356 N.C. 418, 571 S.E.2d 583 (2002) (holding "the State may not introduce prior crimes evidence under Rule 404(b) by introducing the bare fact that the defendant was previously convicted of a crime, even if the defendant's previous conviction was for the same crime for which he or she is currently charged.").

¶ 20 In the instant case, Detective McLamb testified as to his investigation of Defendant:

> Q. And so at some point did you work to try to kind of figure out who this [Defendant] was?
>
> A. Yes. The day after—it was either the day after or the day of that I received a call from [J] Marshall. I met her at the police department, and we started doing a little investigating, and found out that DSS was involved with the family four or five years ago[.] And we were able to get his full name and his date of birth—
>
> Q. Okay.
>
> A. —from, if I recall, Oregon, where [Defendant] was originally from and where he lived at, and was able to get his driver's license number and a full criminal history from Oregon.

Although Detective McLamb does refer to the fact that, in his investigation, he was able to find Defendant's full criminal history from Oregon, there was no violation of Rule 404(b). Not only did Detective McLamb omit reference to any specific crime, but he also made no reference to a previous conviction. In fact, Detective McLamb only referenced Defendant's "full criminal history" in explaining how he was able to identify Defendant as Mother's boyfriend—the alleged perpetrator in Anna's disclosure.

¶ 21 Because there was no implication of any prior conviction nor a reference that Defendant had be previously convicted of a crime at all, the trial court did not err, much less plainly err, in allowing the testimony.

**C. Defendant Was Not Denied Effective Assistance of Counsel**

¶ 22 Defendant, assuming arguendo the trial court did not err in the admission of the State's witnesses' testimony, asserts his counsel was ineffective in that Defendant's counsel did not object to the State's witnesses' testimony using the term "disclosure" nor to Detective McLamb's testimony referencing Defendant's "full criminal history."

¶ 23 Criminal defendants have a constitutional right to effective assistance of counsel in all felony cases. U.S. Const. amend. XIV; U.S. Const. amend. XI. Where a defendant claims he was denied this right, he must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). The defendant may only satisfy this burden by meeting a two-part test. *Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286. Defendant must first show his counsel's performance was deficient; then, that the deficiency caused his defense to suffer prejudice. *Id.*

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Id.* In all, this Court will only find Defendant's counsel was ineffective when the representation was "so lacking that the trial [became] a farce and mockery of justice." *State v. Pennell*, 54 N.C. App. 252, 261, 283 S.E.2d 397, 403 (1981).

¶ 24 In the instant case, for the reasons stated in Parts A and B, the trial court did not err in the admission of the State's witnesses' testimony. Notably, there being no error in the admission of this testimony further cements the fact that Defendant's counsel's performance cannot have been deficient when refraining from objecting to said testimony. Even if this testimony had not been admitted, there is no reasonable probability that the jury, in considering other testimony from the State's witnesses along with Anna's testimony and recorded forensic interview, would have reached a different conclusion. Therefore, Defendant was not prejudiced and, in turn, did not receive ineffective assistance of counsel.

## IV. Conclusion

¶ 25 We therefore hold not only that the trial court did not err in admitting the State's witnesses' testimony, but also that Defendant was not denied effective assistance of counsel.

NO ERROR.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).