

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1142

Filed 17 December 2024

Bertie County, Nos. 20 CRS 50132, 20 CRS 50202

STATE OF NORTH CAROLINA

v.

KWAME TIRRELL HAYES, Defendant.

Appeal by Defendant from judgment entered 14 April 2023 by Judge Cy A. Grant Sr. in Bertie County Superior Court. Heard in the Court of Appeals 27 August 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Amanda J. Reeder, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant-Appellant.*

CARPENTER, Judge.

Kwame Tirrell Hayes (“Defendant”) appeals from judgment after a jury found him guilty of one count of first-degree rape of a child and one count of rape of a person under age fifteen. On appeal, Defendant argues that the trial court plainly erred by: (1) allowing expert testimony from Nurse Ann Parsons and Dr. John Wright

diagnosing sexual abuse in the absence of physical evidence; and (2) instructing the jury to continue deliberating without reciting the full substance of the *Allen* charge. Alternatively, Defendant raises two ineffective assistance of counsel claims. After careful review, we agree that the trial court plainly erred by admitting the expert testimony. Accordingly, we vacate the trial court's judgment and remand for new trial. Because Defendant's first issue is dispositive, we do not reach his remaining arguments.

### **I. Factual & Procedural Background**

On 27 July 2020, a Bertie County grand jury indicted Defendant for: five counts of first-degree rape of a child; one count of first-degree sex offense; one count of statutory rape of a person under age fifteen; six counts of first-degree kidnapping; and one count of incest with a child under thirteen. On 31 March 2023, the State moved to join the offenses for trial. The trial court granted the State's motion and Defendant's case proceeded to trial on 11 April 2023. The evidence at trial tended to show the following.

In March 2020, Zena<sup>1</sup> was fourteen years old. Defendant is Zena's uncle, married to Zena's maternal aunt, Rhonda Hayes. On 3 March 2020, Zena "was in [her] first block class, and [became] really upset." She went to the front office where "the counselors pulled [her] into their office [to] ask[] what's going on." Zena called

---

<sup>1</sup> Pseudonyms are used to protect the identities of the minor children and for ease of reading. See N.C. R. App. P. 42(b).

her mother and when her mother arrived at school, Zena advised her that Defendant “had been touching on [her] and messing with [her].” At school, Zena gave a written statement detailing several allegations of sexual abuse by Defendant.

In the statement, Zena alleged that when she stayed the night at her Aunt Rhonda’s in the summer of 2017, Defendant would “touch her” and had on several occasions, “insert[ed] his penis into [her] vagina.” Zena stated that Defendant “did it repeatedly [on] nights [she] was there.” Zena also stated that on one occasion, when her cousin Kira was present, Defendant told both of them to go into Aunt Rhonda’s room and to “take [their] clothes off and get on the bed.” Zena said after they went into the room, Defendant “inserted his penis into [Kira] first, and then [he] did it to [her].” Zena said after she got off the bed, Defendant told her: “Don’t tell nobody, don’t say nothing.” In the statement, Zena also described several other instances of sexual abuse that occurred on different occasions.

In the afternoon of 3 March 2020, Zena went to the Bertie County’s Sheriff’s Office and prepared a written statement, restating the same allegations. The Sheriff’s Office referred Zena to the Tender Evaluation, Diagnosis and Intervention for a Better Abuse Response (“TEDI Bear”) Children’s Advocacy Center in Greenville, North Carolina, for evaluation.

Also on 3 March 2020, after Zena’s disclosure, Danica, another member of the family, made similar allegations against Defendant. Danica told her mother and her grandmother that Defendant had also “messed with [her]” when she was “[thirteen]

or something like that.” Danica also prepared a written statement at the Bertie County Sheriff’s Office. In the statement, Danica stated that while she was sleeping at her Aunt Rhonda’s, she felt “something touch[ing] [her]” and that she “ended up in Aunt Rhonda’s bed . . . [and] once she realized [Defendant’s] penis was inside of [her] she pushed him off of [her].” According to Danica, “that was the very first time somebody did something like that to [her].” The Sheriff’s Office also referred Danica to TEDI Bear for evaluation.

Generally, a TEDI Bear evaluation consists of gathering information from law enforcement and from the family member who accompanies the child, conducting an interview with the child, performing a physical exam, and meeting with a team to prepare a report with recommendations. Two TEDI Bear staff members involved in Zena’s and Danica’s evaluations testified at Defendant’s trial: Nurse Ann Parsons, a pediatric nurse practitioner, and Dr. John Wright, a pediatrician.

Nurse Parsons performed Danica’s physical exam, “observed portions of [Danica’s] interview in real time, and [] viewed the interview in its entirety” the morning of trial. While testifying about the interview, Nurse Parsons stated “[it] did not surprise [her]” that Danica was not able to remember specific details of the events. Additionally, when asked if not remembering and not immediately disclosing were “common symptoms” of victims of child abuse, Nurse Parsons agreed. Nurse Parsons also testified that Danica’s “physical exam was normal from head to toe” and that a

DNA sample was not obtained from her. Nurse Parsons went on to testify that in regards to Danica, “she made the diagnosis of sexual abuse.”

Dr. Wright was a part of the team that evaluated Zena at TEDI Bear. Dr. Wright watched Zena’s interview with the forensic interviewer as it was happening. Dr. Wright performed Zena’s physical exam, and Nurse Parsons performed Zena’s genital exam. Nurse Parsons relayed her findings to Dr. Wright, and Dr. Wright determined that Zena’s physical exam was “normal.” Dr. Wright went on to testify that his diagnosis for Zena was “sexual assault by her history.”

Defendant took the stand and denied all allegations. On 13 April 2023, the jury began deliberations. The following morning, the trial court gave the jury the complete *Allen* charge. That afternoon, following continued deliberation and several exchanges with the trial court, the jury found Defendant guilty of one count of first-degree rape of a child and one count of rape of a person under age fifteen. The trial court sentenced Defendant in the mitigated range to two consecutive terms of 144 to 233 months. Defendant gave oral notice of appeal in open court.

## **II. Jurisdiction**

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

## **III. Issues**

The issues are whether the trial court plainly erred by: (1) admitting expert testimony diagnosing sexual abuse in the absence of physical evidence; and (2) instructing the jury to continue deliberating without reciting the full substance of the

*Allen* charge. Alternatively, Defendant raises two ineffective assistance of counsel claims.

#### **IV. Analysis**

In his first argument, Defendant asserts, and the State concedes, that the trial court plainly erred by allowing expert testimony from Nurse Parsons and Dr. Wright diagnosing sexual abuse in the absence of physical evidence. Specifically, Defendant argues the testimony was improper because the diagnoses were based solely on the experts' opinions of the complainants' credibility. We agree.

Under our Rules of Appellate Procedure, “to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). We will, however, “apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases,” *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018), if the Defendant “specifically and distinctly” argues the error amounted to plain error, *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995); N.C. R. App. P. 10(a)(4).

Here, Defendant concedes this argument is not preserved for our review and contends the admission of the experts' testimony constituted plain error. Accordingly, because Defendant “specifically and distinctly” argues plain error, we review for plain error. N.C. R. App. P. 10(a)(4).

To establish plain error, a defendant must pass a three-part test:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (citations and quotation marks omitted).

The second prong of the plain-error test requires a defendant to show that, because of the trial court's error, a different verdict "is significantly more likely than not." *Id.* at 159, 900 S.E.2d at 787. In other words, the defendant must show that a different result would have been "almost certain[]" without the error. *Id.* at 159, 900 S.E.2d at 787 (citing New Oxford American Dictionary (3d ed. 2010) and Merriam-Webster's Collegiate Dictionary (11<sup>th</sup> ed. 2007)).

Here, under plain-error review, our first task is to determine whether the admission of Nurse Parsons' and Dr. Wright's testimony constituted error. *Id.* at 158, 900 S.E.2d at 786.

Rule 702 permits expert witnesses to testify in the form of an opinion when they have "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." N.C. Gen. Stat. §8C-1, Rule 702 (2023). Our courts have consistently held that "[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). Where a proper foundation is laid, however, an expert witness may, in the absence of physical evidence of sexual abuse, 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 788.

In this case, both Nurse Parsons and Dr. Wright testified they made a diagnosis of sexual abuse. Stated differently, both experts testified that sexual abuse had in fact occurred in the absence of any physical evidence.

In regards to Danica, Nurse Parsons testified, in pertinent part, as follows:

**The State:** And after the interview and the physical exam were performed, was a report prepared by TEDI B[E]AR.

**Nurse Parsons:** Yes.

**The State:** And did it have a conclusion?

**Nurse Parsons:** Yes.

**The State:** And what was that conclusion with regard to [Danica]?

. . .

**Nurse Parsons:** The conclusion was that she was 15 years and some months old, referred to us for evaluation of possible sexual abuse, that she had given consistent disclosure, she had said very similar things about what happened to her family, to law enforcement and at TEDI B[E]AR with [the forensic interviewer] . . . . She was just normal on the day that I saw her, and *I made the diagnosis of sexual abuse.* (emphasis added).



In regards to Zena, Dr. Wright testified, in pertinent part, as follows:

**The State:** And after [Zena] was seen, did your team come up with a conclusion, actions, and recommendations in this case?

**Dr. Wright:** Yes.

**The State:** And could you share with the jury what those were?

**Dr. Wright:** We just - - we recommended that she get therapy - - for - - for her - - for the stress associated with the sexual assault[.]

**The State:** And after [Zena's] visit to TEDI B[E]AR, did you have a diagnosis as it relates to [Zena]?

**Dr. Wright:** Yes.

**The State:** And what was your diagnosis?

**Dr. Wright:** Well, there are two, basically. *Sexual assault by her history*, and also, she had witnessed some violence and witnessed some assault, so those things that are not - - are things she was dealing with. (emphasis added).

Both Zena's and Danica's physical exams were "normal" and there was no physical evidence that sexual abuse had in fact occurred. Thus, Nurse Parson's and Dr. Wright's testimony constituted "impermissible opinion[s] regarding the victim[s] credibility." *See Stancil*, 355 N.C. at 266–67, 559 S.E.2d at 788. Accordingly, the trial court erred by admitting the testimony.

Next, we determine whether, absent the error, a different verdict was "significantly more likely than not." *See Reber*, 386 N.C. at 158, 900 S.E.2d at 786.

The North Carolina Supreme Court in *State v. Clark* determined that in circumstances "where . . . the sole direct evidence of sexual abuse is testimony from the victim, the case necessarily 'turn[s] on the credibility of the victim.'" 380 N.C. 204, 213, 868 S.E.2d 56, 63 (2022) (quoting *State v. Towe*, 366 N.C. 56, 63, 732 S.E.2d

564, 568 (2012)). In such cases, “expert opinion to the effect that the victim was sexually abused based on a combination of the victim’s testimony and behaviors of the victim in the absence of ‘definitive’ physical evidence is likely to weigh heavily on the jury’s assessment of the victim’s credibility.” *Id.* at 213, 868 S.E.2d at 63.

The facts in *Clark* are strikingly similar to those in the instant case. *Clark* involved a six-year-old child who disclosed to her step-mother that her aunt’s boyfriend had sexually abused her. *See id.* at 205–06, 732 S.E.2d at 58. The child disclosed the abuse to her step-mother a year after the incident occurred and the step-mother reported the incident to law enforcement. *See id.* at 206, 732 S.E.2d at 58–59. The Pitt County Sheriff’s Office referred the child to TEDI Bear, the same organization that evaluated Zena and Danica. *See id.* at 206, 732 S.E.2d at 58. Nurse Parsons, the expert witness who performed Zena’s genital examination and Danica’s genital and physical examination, was the same practitioner who performed the child’s examination in *Clark*. *See id.* at 206, 732 S.E.2d at 59.

Additionally, and most significantly, Nurse Parsons testified as an expert witness in *Clark*. *See id.* at 206, 732 S.E.2d at 59. Indeed, as in this case, Nurse Parsons testified that the child “was healthy . . . looked normal for [her] age from head to toe” and that she “determined [the child] had been sexually abused.” *See id.* at 206–07, 732 S.E.2d at 59. She went on to testify that her diagnosis was based “predominantly [on] the history of [the child’s] disclosures to family, law enforcement, and [the forensic interviewer] at TEDI Bear, and her behavioral change.” *Id.* at 207,

732 S.E.2d at 59. Lastly, the defense counsel in *Clark*, like here, did not object to the admission of the expert testimony. *See id.* at 207, 732 S.E.2d at 59.

When this Court analyzed *Clark* in the first instance, we concluded the admission of the testimony was improper, but discerned no plain error. *See State v. Clark*, No. COA 19-632, 2020 WL 1274899, at \*2–5 (N.C. Ct. App. Mar. 17, 2020) (unpublished). Relying on *State v. Betts*, 267 N.C. App. 272, 833 S.E.2d 41 (2010), we determined the admission of the testimony did not amount to plain error because “the State presented substantial evidence from which the jury could find Defendant guilty and the jury had ample opportunity to assess for themselves the credibility of the child victim.” *Id.* at \*4. In doing so, this Court highlighted the following evidence, which supported the conclusion that the improper testimony did not have a probable impact on the outcome:

(1) [the victim]’s testimony at trial; (2) a video-recorded interview with [the victim] at the CAC; (3) evidence of [the victim]’s lasting behavioral problems after the incident—including bed-wetting, nightmares, and social withdrawal; and (4) the consistency of [the victim]’s accounts of the incident to her family, law enforcement, and medical personnel at the CAC.

*Id.* at \*4.

On appeal, however, the North Carolina Supreme Court reversed this Court’s decision, holding, in part, that the admission of the testimony constituted plain error. *See Clark*, 380 N.C. at 213, 732 S.E.2d at 63. In doing so, the North Carolina Supreme Court explained that “[Nurse Parson’s] improper testimony . . . had a probable impact

on the jury's finding that defendant was guilty of taking indecent liberties with a child, and . . . the error had the 'prejudicial effect necessary to establish that the error was a fundamental error.'" *Id.* at 213, 732 S.E.2d at 63 (quoting *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012)).

Although our plain-error test has evolved in recent years, *see Reber*, 386 N.C. at 158, 900 S.E.2d at 786, we are bound by *Clark*, *see Clark*, 380 N.C. at 213, 732 S.E.2d at 63; *see also In re O.D.S.*, 247 N.C. App. 711, 721–22, 786 S.E.2d 410, 417 (explaining that one panel of the North Carolina Court of Appeals "cannot overrule . . . our Supreme Court" or the holding of a prior panel of the North Carolina Court of Appeals) (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

Here, as in *Clark*, there was no physical evidence that Zena and Danica had been sexually abused. *See Clark*, 380 N.C. at 212–13, 732 S.E.2d at 62–63. Indeed, Zena's and Danica's physical and genital exams were "normal." Additionally, as in *Clark*, trial evidence included Zena's and Danica's statements and testimony, the testimony of the girls' family members, testimony from law enforcement, and the expert witness testimony. Considering this case "necessarily turne[d] on the credibility of the victim[s]," Nurse Parson's and Dr. Wright's testimony diagnosing sexual abuse "likely weigh[ed] heavily on the jury's assessment of [Zena's] and [Danica's] credibility." *See id.* at 213, 868 S.E.2d at 63.

In sum, the admission of Nurse Parson's testimony that Danica was in fact sexually abused based on Danica's "consistent disclosure[s]" and behavior, and Dr.

Wright’s testimony that Zena was sexually abused based on Zena’s “consisten[cy]” and behavior, in the absence of any physical evidence supporting a diagnosis of sexual abuse, had a probable impact on the jury’s finding that Defendant was guilty of first-degree rape of a child and rape of a person under age fifteen. *See Clark*, 380 N.C. at 213, 868 S.E.2d at 63; *see also Towe*, 366 N.C. at 64, 732 S.E.2d at 569 (holding the expert’s testimony that the victim had been sexually abused in the absence of physical evidence of abuse, “stilled any doubts the jury might have had about the victim’s credibility or defendant’s culpability, and thus had a probable impact on the jury’s finding that defendant [was] guilty”).

Thus, the admission of the expert testimony “had the ‘prejudicial effect necessary to establish the error was a fundamental error,’” *see Clark*, 380 N.C. at 213, 732 S.E.2d at 63 (quoting *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335), and “absent the error, the jury probably would have returned a different verdict,” *see Reber*, 386 N.C. at 159, 900 S.E.2d at 787. Finally, we are satisfied, since this case turned on the victims’ credibility, that the error “seriously affect[ed] ‘the fairness, integrity or public reputation of [the] judicial proceeding[.]’” *See id.* at 158, 900 S.E.2d at 786 (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 326). Accordingly, we conclude the admission of the experts’ testimony constituted plain error.

We commend our concurring colleague on his principled and compelling separate opinion, which succinctly traces our evolving caselaw on this issue from *Stancil* to *Clark*. We simply note that in our limited role as an “error-correcting

court,” our inquiry ceased upon the realization that we were bound by *Clark*. See *State v. Wilkins*, 287 N.C. App. 343, 344–45, 882 S.E.2d 454, 455 (2022); see also *In re O.D.S.*, 247 N.C. App. 711, 721–22, 786 S.E.2d 410, 417 (explaining that one panel of the North Carolina Court of Appeals “cannot overrule . . . our Supreme Court” or the holding of a prior panel of the North Carolina Court of Appeals) (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). As our concurring colleague clearly agrees, any revisions in this area must come from the General Assembly or a higher court.

Because Defendant prevails on this issue, we do not reach his remaining arguments.

## **V. Conclusion**

In sum, we conclude that the trial court plainly erred by admitting the expert testimony. Accordingly, we vacate and remand for new trial.

VACATED AND REMANDED.

Judge HAMPSON concurs.

Judge GRIFFIN concurs in the result by separate opinion.

Report per Rule 30(e).

GRIFFIN, Judge, concurring in result.

Defendant Kwame Tirrell Hayes appeals from the trial court’s judgment entered upon a jury verdict finding him guilty of one count of first-degree rape of a child and one count of rape of a person under age fifteen. I agree with the majority that the Supreme Court’s holding in *State v. Clark*, 380 N.C. 204, 213, 868 S.E.2d 56, 63 (2022), requires us to conclude the trial court committed plain error. However, I write separately because I would hold there was substantial evidence supporting the victims’ credibility other than Nurse Parson’s and Dr. Wright’s improper testimony.

Plain error should be found in only the most extraordinary cases where the error “has ‘resulted in a miscarriage of justice’ or the denial of a ‘fair trial.’” *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (quoting *State v. Lawrence*, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012)). In these extraordinary cases, a defendant must satisfy a three-prong test:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a “probable impact” on the outcome, meaning that “absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an “exceptional case” that warrants plain error review, typically by showing that the error seriously affects “the fairness, integrity or public reputation of judicial proceedings.

*Id.* at 158, 900 S.E.2d at 786 (citations omitted). This Court has struggled with

threshing out whether an error had a *probable impact* on the jury's findings for purposes of the second prong. *See id.* at 158–59, 900 S.E.2d at 786–87. The probable impact standard of the prejudice prong focuses not on whether that error *could* have caused the jury to reach an alternative result. *Id.* at 159–60, 900 S.E.2d at 787. Rather, a defendant must show the jury “almost certainly” would have returned a different verdict absent the error. *Id.* at 159, 900 S.E.2d at 787 (citation omitted). Again, this is an extremely high, exacting, and rare standard to meet.

Our Supreme Court held 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) (citations omitted). This is so because frequently the only witnesses to a sexual assault are the child and perpetrator. Exacerbating this issue, child victims often wait to disclose sexual assaults, thus severely limiting the time physical evidence of the assault is available. Resultingly, often the child-victim is the only person capable of providing direct evidence against the perpetrator and thus cases such as these may “turn[] on the credibility of the victim.” *Clark*, 380 N.C. at 212, 868 S.E.2d at 36 (citation and internal marks omitted). *See also State v. Towe*, 366 N.C. 56, 63, 732 S.E.2d 564, 568 (2012) (“[T]his case turned on the credibility of the victim, who provided the only direct evidence against [the] defendant.”).

Fundamentally, the issue captured here boils down to whether an improper



statement made by a medical professional, who renders treatment to minor sexual-assault victims, when testifying is so powerfully persuasive and influential on the jury that it fundamentally renders a jury's verdict erroneous despite a potential plethora of other evidence. I would not hold it does.

Our law on this issue has evolved in recent years and an examination of applicable precedent is helpful for understanding the legal context as it stands today. *State v. Stancil* provides the foundational rule for the dispositive issue: "In 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." 355 N.C. at 266–67, 559 S.E.2d at 789 (citations omitted). There, despite concluding the State failed to lay a proper foundation for expert testimony "that the victim was 'sexually assaulted and [that there was] also maltreatment, emotionally, physically, and sexually[.]" the Court nonetheless held "[t]he overwhelming evidence against [the] defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached." *Id.* at 267, 559 S.E.2d at 789. While the Supreme Court did not identify the other evidence, it referred to the Court of Appeals decision summary:

In the instant case, the jury had before it: (1) the testimony of the child; (2) evidence of her intense and immediate emotional trauma after the incident; (3) the consistency of her accounts; (4) her demeanor and physical manifestations during the interviews and first physical

exam; (5) evidence of her symptoms and exam by [Dr.] Prakash five days later; and (6) the conclusions of two experts that her actions and statements were consistent with child maltreatment or abuse.

*State v. Stancil*, 146 N.C. App. 234, 240–41, 552 S.E.2d 212, 216 (2001).

Relying on *Stancil*, our Supreme Court held analogous expert testimony to be improper in *State v. Towe*, 366 N.C. at 62, 732 S.E.2d at 568. Following this conclusion, the Court surveyed other evidence presented at trial—specifically discounting the testimony of the victim’s mother and another of the defendant’s victims because they were offered under Rule 404(b) of the North Carolina Rules of Evidence. *Towe*, 366 N.C. at 62–63, 732 S.E.2d at 568. As there were discrepancies in the nine-year-old victim’s account about the way the defendant had touched her, the Court held the trial “turned on the credibility of the victim, who provided the only direct evidence against [the] defendant.” *Id.* at 63, 732 S.E.2d at 568. Thus, because of the expert’s extensive experience discussed during her certification as an expert at trial, the Supreme Court was “satisfied that Dr. Everett’s testimony stilled any doubts the jury might have had about the victim’s credibility or [the] defendant’s culpability, and thus had a probable impact on the jury’s finding that [the] defendant is guilty.” *Id.* at 63–64, 732 S.E.2d at 569–69. The inapposite holdings of *Stancil* and *Towe* seem to have turned on the other evidence presented at trial—such as that cited in the *Stancil* Court of Appeals opinion.

Following *Towe*, our Supreme Court once again addressed this issue in *State*

*v. Clark*. There, as the majority notes, the same nurse testified she diagnosed a child as having been sexually abused despite any physical evidence to support the diagnosis. *Clark*, 380 N.C. at 210, 868 S.E.2d at 61. Analogizing to *Towe*, the Supreme Court concluded the case once again turned on the credibility of the victim as “the only direct evidence of sexual abuse was the statements of the victim from her testimony at trial and her video-recorded interview, as well as corroborative evidence through testimony regarding her accounts to family, law enforcement, and medical personnel.” *Id.* at 212, 868 S.E.2d at 62. Assigning no weight to the fact the victim had been consistent in her disclosures, a fact material to the analysis in *Towe*, 366 N.C. at 63, 732 S.E.2d at 568, the Court also held other circumstantial evidence, such as bedwetting and nightmares, was essentially irrelevant as it could be assigned to other causes. The Court ultimately held “in the absence of definitive physical evidence, irrespective of testimony concerning the victim’s behavioral changes, [expert testimony stating they diagnosed the child as a sexual-assault victim] constituted plain error.” *Id.* at 213, 868 S.E.2d at 63.

This expansive holding is unmoored from the rule’s origin in *Stancil* where the Court sensibly looked at the other evidence presented to the jury before holding the error harmless. *Stancil*, 146 N.C. App. at 240–41, 552 S.E.2d at 216. To this point, the Supreme Court entirely discounted the other evidence presented at trial, specifically:

- (1) [the victim]’s testimony at trial; (2) a video-recorded

interview with [the victim] at the CAC; (3) evidence of [the victim]’s lasting behavioral problems after the incident—including bed-wetting, nightmares, and social withdrawal; and (4) the consistency of [the victim]’s accounts of the incident to her family, law enforcement, and medical personnel at the CAC.

*State v. Clark*, 270 N.C. App. 639, 838 S.E.2d 694, 2020 WL 1274899 at \*4 (17 Mar. 2020).

Simply put, we have seemingly turned the holdings of *Stancil*, *Towe*, and *Clark* into a rule requiring automatic reversal if an expert testifies they diagnosed a child as a sexual-assault survivor without physical evidence. This line of cases and the rule they bear out result in a troubling scenario: a defendant convicted by a jury of their peers for sexually abusing a minor child will be awarded a new trial because, ostensibly, a single medical expert states they diagnosed a child as the victim of sexual assault without physical evidence. Effectively, we have “placed an untenable burden on our trial courts in child sexual abuse cases to unilaterally discern and correct, without the benefit of an objection, possible misstatements made during trial.” *Towe*, 366 N.C. at 65, 732 S.E.2d at 569–70 (*Newby, C.J. dissenting*).

With this history in mind, I would hold Defendant failed to show Nurse Parson’s and Dr. Wright’s improper statements prejudiced Defendant to the high degree necessary for a new trial. Rather, after reviewing the entire record as mandated to do when conducting plain error analysis, *Reber*, 386 N.C. at 158–59, 900 S.E.2d at 786–87, the State presented substantial other evidence which supported

the victims' credibility to the extent that the case no longer turned on it.

Specifically, both Zena and her cousin Danica testified to Defendant assaulting them. *See Stancil*, 146 N.C. App. at 240–41, 552 S.E.2d at 216 (considering “the testimony of the child” as other evidence mitigating prejudice). Zena’s statements regarding the sexual assault remained consistent throughout her initial disclosure, her interviews with law enforcement, and with the child advocates at TEDI BEAR. *See id.* (considering “the consistency of [the victim]’s accounts” as other evidence mitigating prejudice). Moreover, both Zena and Danica’s mothers testified corroborating the sequence of events, their daughters’ disclosures, and at least one of their daughters exhibiting behavioral changes in the aftermath of the assault while the other daughter exhibited “pink discharge” from her private areas following the assault. *See id.* (considering the victim’s “intense and immediate emotional trauma after the incident” as other evidence mitigating prejudice). Finally, the jury watched the TEDI BEAR interviews of both Zena and Danica and heard testimony from Dr. Wright that Zena cried during the interview because it was upsetting for her. *See id.* (considering the victim’s “demeanor and physical manifestations during the interviews” as other evidence mitigating prejudice).

These pieces of evidence bolster the victim’s credibility and ultimately were for the jury to weigh. It did so and returned a verdict finding Defendant guilty of multiple sex offenses committed against children.

Were it not for the Supreme Court’s holding in *Clark*, I would affirm the trial

STATE V. HAYES

*GRIFFIN, J., concurring*

court's ruling and hold the State presented substantial other evidence corroborating the victim's account of the sexual assault to the extent that the improper expert testimony does not constitute plain error.