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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-385

Filed 5 March 2025

Lincoln County, Nos. 21CRS50492-93

STATE OF NORTH CAROLINA

v.

CALVIN ALEXANDER FAIR, Defendant.

Appeal by Defendant from judgments entered 13 October 2023 by Judge W. Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 14 January 2025.

*Attorney General Jeff Jackson, by Special Deputy Attorney General John F. Oates, Jr., for the State.*

*Mark Montgomery for Defendant.*

GRIFFIN, Judge.

Defendant Calvin Alexander Fair appeals from the trial court's judgments entered after a jury found him guilty of statutory rape and statutory sex offense with a child under fifteen in violation of sections 14-27.25(b) and 14-27.30(b) of the North Carolina General Statutes. Defendant contends the trial court plainly erred by

allowing the State to characterize Brandy<sup>1</sup> as a “victim” and refer to her accusation as a “disclosure.” We hold the trial court did not err.

### **I. Factual and Procedural Background**

On 3 March 2021, Defendant was arrested and charged with statutory rape and statutory sex offense with a child under fifteen. Defendant was indicted for the same offenses on 12 April 2021 by a Lincoln County grand jury. Defendant’s case came on for trial in Lincoln County Superior Court before the Honorable W. Todd Pomeroy on 9 October 2023.

At trial, the State elicited testimony from Brandy, in addition to her uncle, father, mother, and grandmother. Victoria Gilmore testified for the State as an expert in forensic interviewing and child sexual abuse. Alicia Beckley testified as an expert trained in examining sexual assault victims. The investigative officer assigned to Brandy’s case, Deputy Jerry Talbot, also testified.

Prior to the underlying conduct in this case, Defendant was involved in a shooting at his mother’s house in Gastonia. After receiving medical treatment for his injuries, Defendant thought it would be safer for him to reside in another location temporarily while he recovered. Defendant decided to stay with his cousin, Brittany Powell, who lived in Lincolnton with her two children, one being Brandy. Defendant

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<sup>1</sup> We use a pseudonym for ease of reading and to protect the identity of the juvenile. *See* N.C. R. App. P. 42(b).

slept on the couch in the living room until 12 August 2020, when he was arrested for unrelated charges in Davie County.

After Defendant moved out of the house following his arrest, Brandy came forward with sexual assault allegations against Defendant. Brandy testified that sometime around early August 2020, Defendant came into her bedroom on two separate occasions and forced her to have sex with him. On the first occasion, Brandy testified Defendant came into her room at night, got in the bed with her, pulled down her underwear, flipped her over on her back and forced his penis inside her vagina. On the second occasion, Brandy testified Defendant came into her room again at night, pulled down her underwear and, while she was lying on her side, forced his penis inside her anus. Brandy identified Defendant as the one who sexually assaulted her because she recognized his dreadlocks and smell.

Brandy first confided in her uncle about the assaults after her family noticed a change in Brandy's behavior and a decline in her academic performance at school. Brandy was failing all of her classes, and she began acting out and being disrespectful towards family members.

Brandy's uncle, Raymond Fair, Jr., testified about Brandy confiding in him and he encouraged her to tell her mother and suggested law enforcement needed to be involved. Brandy also told her father, Brandon Ussery, about the assaults. Mr. Ussery testified, recalling what Brandy told him about the events, and stated he could tell it was difficult for Brandy to discuss.

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Mr. Ussery informed Brandy's mother, Brittany Powell, that Brandy had something she needed to tell her and that it involved Defendant. Ms. Powell testified she initiated a discussion with Brandy and Brandy's godmother, and that is when Brandy confided in them about the assaults. Ms. Powell stated Brandy told them Defendant came into her room, touched her, and had sex with her twice. After learning this information, Ms. Powell called the police and arranged for an interview and hospital visit for Brandy. Ms. Powell informed Brandy's grandmother, Janice Chalk, about the incidents and Ms. Chalk had a conversation with Brandy. Ms. Chalk testified, recalling the information Brandy told her about the assaults, and stated she was the one who drove Brandy to the hospital to be medically examined.

Alicia Beckley testified as an expert in forensic nursing and child sexual abuse. Ms. Beckley examined Brandy at the hospital and spoke with her about the assaults. While Ms. Beckley did not find any physical evidence of a sexual assault, she testified she did not expect to find any evidence given the length of time that had passed. Ms. Beckley stated it had been five months since the assaults occurred and that the "average suggested time" for collecting physical evidence is "five days." Ms. Beckley also explained 96% of sexual assault medical exams are found to be "normal," and that the anus is even less likely to have an injury. In her expert opinion, she testified that the normal medical exam is consistent with sexual abuse just as it would be consistent with no sexual abuse.

Victoria Gilmore testified as an expert in forensic interviewing and child sexual abuse. Ms. Gilmore met with Brandy on 3 February 2021 while employed at the Child Advocacy Center in Lincolnton. Brandy confided in Ms. Gilmore about the assaults, and Ms. Gilmore testified Brandy “detailed two separate interactions.” The first incident involved Defendant putting his penis in her “coochie” and the second involved Defendant sticking his finger “on her coochie” and his penis “in her butt hole.” Brandy’s interview with Ms. Gilmore was recorded and admitted into evidence. Ms. Gilmore also commented that victims of sexual abuse usually exhibit symptoms that are “out of their normal.” Symptoms could be a change in behavior, a decline in academics, or withdrawing from family.

Deputy Talbot was the detective assigned to Brandy’s case in January 2021. Deputy Talbot learned of the incidents after the report was filed at the hospital. He arranged Brandy’s interview at the Child Advocacy Center and interviewed Brandy’s family members to collect information about the assaults.

Defendant testified and denied raping or ever having sex with Brandy.

The jury found Defendant guilty of statutory rape and statutory sex offense with a child under 15. The court entered judgments on 13 October 2023. Defendant timely appeals.

## **II. Analysis**

Defendant alleges the trial court plainly erred by allowing the State to

characterize Brandy as a “victim” and refer to her accusation as a “disclosure.” Specifically, Defendant argues using the characterizations “victim” and “disclose” constitute improper expert vouching. Defendant contends that, by using these words, witnesses conveyed their opinion to the jury that the victim was in fact sexually assaulted. Because Defendant failed to object to the challenged testimony at trial, we review for plain error.

This Court reviews unpreserved evidentiary challenges for plain error. N.C. R. App. P. 10(a)(4); *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). Our Supreme Court recently clarified the plain error standard in *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024). In *Reber*, the Court emphasized the standard set forth in *Lawrence*, for plain error review. *Id.* For this Court to hold a trial court plainly erred, the defendant must satisfy a three-factor test. *Id.* First, the defendant must demonstrate a “fundamental error occurred at trial.” *Id.* (citing *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). Second, “that the error had a ‘probable impact’ on the outcome, meaning that ‘absent the error, the jury probably would have returned a different verdict.’” *Id.* (quoting *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334). Third, “that the error is an ‘exceptional case’ that warrants plain error review . . . showing that the error seriously affects ‘the fairness, integrity or public reputation of judicial proceedings.’” *Id.* (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

#### **A. Victim characterization**

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Defendant contends Deputy Talbot’s testimony that Brandy was a “victim,” rather than an “accuser” was an expression of an opinion and constitutes improper expert vouching.

This Court has previously recognized using the word “victim” does not conclusively mean a witness is vouching for the credibility of a complainant. *See State v. Womble*, 272 N.C. App. 392, 400, 846 S.E.2d 548, 554 (2020) (“This Court has rejected the premise that the use of the term ‘victim’ by prosecution witnesses represents a ‘reinforcing [of] the complainant’s credibility at the expense of defendant.’”) (quoting *State v. Jackson*, 202 N.C. App. 564, 568–69, 688 S.E.2d 766, 769 (2010)). However, despite this Court’s statement in *Womble*, most cases, including *Womble*, have not addressed whether a witness calling a complainant a “victim” is error by itself. Instead, they analyzed the issue under plain error, considering the strength of the State’s evidence against the defendant absent the word “victim” being used by prosecution witnesses. *Id. See also Jackson*, 202 N.C. App. at 568–69, 688 S.E.2d at 769 (holding no plain error in light of the substantial evidence presented despite the prosecutor, the State’s witnesses, and the trial court referring to the complainant as the “victim”).

Our Supreme Court has held it is not error for a trial court to refer to a complainant as a “victim.” *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014). In *Walston*, our Supreme Court considered whether a trial court’s use of the term “victim” in jury instructions was error and held that it was not. *Id. Walston*

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cites cases where the same issue was considered with a similar result. *See State v. Hill*, 331 N.C. 387, 411, 417 S.E.2d 765, 777 (1992) (holding no error and stating, “[t]he use of the word ‘victim’ in the jury charge was not improper . . . . By using the term ‘victim,’ the trial court was not intimating that the defendant committed the crime”) (citing *State v. Allen*, 92 N.C. App. 168, 171, 374 S.E.2d 119, 121 (1988)); *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413 (1997) (holding no error and rejecting the argument that a trial court using the word “victim” in jury instructions is an improper expression of an opinion) (citing *Hill*, 331 N.C. at 411, 417 S.E.2d at 777); *State v. McCarroll*, 336 N.C. 559, 565–66, 445 S.E.2d 18, 22 (1994) (holding no plain error and stating “the judge properly placed the burden of proof on the State” in its charge to the jury).

The *Walston* Court did caution that “when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase ‘alleged victim’ or ‘prosecuting witness’ instead of ‘victim.’” *Walston*, 367 N.C. at 732, 766 S.E.2d at 319. The Court stopped short of calling this characterization error. *Id.*

Because our Supreme Court has repeatedly held a trial court giving a jury instruction using the term “victim” is not error, and considering instructions from a trial court are one of the most “critical parts in a criminal trial,” *State v. Vaughn*, 293



N.C. App. 770, 774, 901 S.E.2d 260, 264 (2024), we hold that a witness using the term “victim” to reference the accuser is not by itself error.

Further, even assuming *arguendo* that a witness using the term “victim” is error, we hold it does not amount to plain error in this case. Defendant has not shown that “absent the [alleged] error, the jury probably would have returned a different verdict.” *Reber*, 386 N.C. at 158, 900 S.E.2d at 786 (quoting *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 326). There was substantial evidence presented at trial to support a finding of guilt absent prosecution witnesses referring to the complainant as a “victim.” *See Jackson*, 202 N.C. App. at 568–69, 688 S.E.2d at 768–69 (holding no plain error based on the strength of the State’s evidence against the defendant which included testimony from the victim, results of paternity testing, and the defendant’s own testimony that he does not deny being the father of the victim’s child); *See Womble*, 272 N.C. App. at 400, 846 S.E.2d at 554 (“Officers’ real-time communication with and pursuit of [the] defendant and [the victim], injuries to [the victim] consistent with her account of her abduction, immediate seizure of incriminating evidence from multiple locations, and contemporaneous statements from [the victim], [a witness], and [the] defendant outweighed any potential subliminal effect of the witnesses’ occasional references to [the victim] as the victim.”).

Here, like in *Jackson* and *Womble*, there was substantial evidence presented to support the verdict, absent Deputy Talbot’s use of the term “victim.” Before Deputy

Talbot testified using the term “victim,” the jury heard Brandy’s direct testimony and corroborating testimony from Brandy’s uncle, father, mother, grandmother, Alicia Beckley, and Victoria Gilmore. The jury also watched a video recording of Ms. Gilmore’s interview with Brandy where she described the assaults by Defendant. Thus, even if we assume error, we hold the strength of the State’s evidence “outweighed any potential subliminal effect” of Deputy Talbot’s occasional references to Brandy as a “victim.” *See Womble*, 272 N.C. App. at 400, 846 S.E.2d at 554.

**B. Disclosure characterization**

Defendant next argues the term “disclose” was misused by Ms. Gilmore, Ms. Beckley, and Deputy Talbot. Specifically, Defendant argues referring to a complainant’s accusation as a “disclosure” is vouching. We disagree.

Defendant challenges the following statements made at trial:

Expert Witness Gilmore:

Throughout the interview I am asking open questions. I’m there to find out more about an allegation of abuse. I’m there to provide a safe space for them to be able to share their experience or whenever they’re disclosing.

Expert Witness Beckley:

Q: And how do you—who sends them there? I mean, how does someone get funneled to the ER?

A: In varying ways. They can come honestly anyway that a patient comes to the ER. They can be brought in by a medic if they call out from a scene, which does happen very rarely. Law enforcement can see them first and send them in. They can disclose to someone who gets DSS or law

enforcement involved, they send them in.

Deputy Talbot:

A: So after the interview concluded, then I start talking to people that may have first-hand knowledge whether the victim disclosed.

A: [Brandy] informed me that she learned of the incident that she -- she wasn't sure how to approach it so she kind of wanted another family member to be with her when this topic of conversation came up. And she called a family friend to come in, and they did [Brandy's] nails and just talked to her while this was going on. And during that time [Brandy] disclosed the events that occurred.

Our Supreme Court has held “[a]n expert witness’s use of the word ‘disclose,’ standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made.” *State v. Betts*, 377 N.C. 519, 525, 858 S.E.2d 601, 605–06 (2021).

In *Betts*, our Supreme Court considered whether “use of the word ‘disclose’ throughout the State’s expert and lay witnesses’ testimony constituted impermissible vouching as to [the victim’s] credibility.” *Id.* at 524, 858 S.E.2d at 605. In holding the trial court did not err in admitting the testimony because the prosecution’s use of the term “disclose” merely showed that a statement was made, the Court went a step further and stated “[e]ven if it were error for the trial court to admit testimony of the State’s witnesses who used the term ‘disclose,’ [the] defendant has not shown plain error.” *Id.* at 525, 858 S.E.2d at 606. There, the victim testified in detail about “three

incidents of [the] defendant inappropriately touching her” and although her testimony may have had inconsistencies, our Supreme Court held the jury had an opportunity to “make an independent determination as to her credibility.” *Id.* In addition to the victim’s own testimony, our Supreme Court held “substantial evidence was presented to the jury to find that [the] defendant had inappropriately touched [the victim].” *Id.* A report and video of the forensic interview was admitted into evidence, and the State presented testimony of licensed clinical social workers involved in the case. *Id.* Thus, the Court held the defendant “has not shown that the use of the word ‘disclose’ had a probable impact on the jury’s finding that he was guilty.” *Id.* (citing *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

Here, like in *Betts*, the prosecution’s use of the word “disclose” was merely used to show that a statement was made and therefore it was not error. However, even if it were error, as the Court addressed in *Betts*, there was substantial evidence presented to support Defendant’s guilty verdict absent any error from use of the word “disclose.” Here, also like in *Betts*, Brandy testified in detail about the assaults she experienced by Defendant, a video recording of Ms. Gilmore’s interview with Brandy where she described the assaults was admitted into evidence, and additional witnesses’ testimony supported Brandy’s allegations. Thus, we hold even if it were error for the trial court to admit testimony of the prosecution witnesses who used the term “disclose,” Defendant has not shown plain error.

### **C. Ineffective Assistance of Counsel**

In the alternative, Defendant argues he received ineffective assistance of counsel because his trial counsel failed to object to the challenged testimony. We disagree.

To challenge a conviction based on ineffective assistance of counsel, a defendant must establish that his counsel's conduct "fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). To meet this burden, the defendant must satisfy a two-part test. *Id.* at 562, 324 S.E.2d at 248. First, the defendant must prove that his counsel's performance was deficient, such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the defendant must prove his counsel's performance was prejudicial, such that "counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*" *Id.* As held above, the challenged testimony was not error. Thus, Defendant cannot meet the first prong of the ineffective assistance of counsel test and Defendant's argument fails.

### **III. Conclusion**

For the foregoing reasons, we hold Defendant failed to meet his burden of demonstrating the trial court committed error, much less plain error.

NO ERROR

Judges STROUD and CARPENTER concur.

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Report per Rule 30(e).