

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-136

APRIL TERM, 2009

APR 15 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
	}	
Bubba Lake	}	DOCKET NO. 491-4-04 BnCr

Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction on two counts of sexually assaulting his then-six-year-old niece, J.C. We affirm.

In April 2004, the State charged defendant with two counts of sexual assault, alleging that he compelled J.C. to have penis-to-vulva contact on two occasions during the time period from August 2001 through August 2002. The State also charged defendant with two counts of cruelty to a child, but those charges were dropped before the matter was submitted to the jury at trial. The prosecution called seven witnesses at the two-day trial in May 2005. J.C. testified of the sexual contact that occurred on two occasions. J.C.'s aunt testified about J.C. reporting the contact to her. J.C.'s mother testified that defendant resided with her and her children during the spring and summer of 2002 and would periodically babysit the children. The State then presented the testimony of a Department for Children and Families (DCF) investigator, the examining physician, the investigating detective, and finally J.C.'s younger sister, who offered only limited testimony before she was unable to continue. Following the close of evidence, the jury returned a verdict of guilty on both counts. Defendant filed the instant appeal after the court denied his separate motions for judgment of acquittal and for a new trial.

Defendant first argues on appeal that the DCF caseworker impermissibly vouched for J.C.'s credibility, thereby prejudicing the jury and depriving him of a fair trial. We conclude that reversal of the convictions is not warranted, given the entirety of the circumstances, including the scope and nature of the challenged testimony and the court's curative instructions. This Court has a long line of precedents on the parameters of expert testimony in child sexual assault cases. See *State v. Weeks*, 160 Vt. 393, 399-400 (1993) (citing cases). "It is well-settled in Vermont that experts in child sexual abuse cases are not permitted to comment directly on their personal perceptions or beliefs regarding the credibility of the child victim." *State v. Leggett*, 164 Vt. 599, 599 (1995) (mem.). While experts are permitted to help jurors understand the typical behavior of child sexual assault victims so that the jurors themselves may better assess the credibility of the complainant, they may not usurp the role of the jury by providing testimony

that effectively vouches for the credibility of the complainant in a particular case. Id. Here, defendant argues that the DCF investigator directly commented on J.C.'s veracity and credibility on three occasions, thereby prejudicing the jury and depriving him of a fair trial in a case in which J.C.'s credibility was the central issue.

After the prosecutor elicited testimony from the DCF investigator on her background as an experienced investigator of child assault allegations and on her methodology for investigating such allegations, the following colloquy occurred:

Q: Okay, all right. And during the course of your investigation, were you able to determine whether [J.C.] had made, in the past, any allegations of sexual abuse by any other individual?

A: [J.C.] had not. Everybody we talked to reported that [J.C.] is a very honest child.

Q: And—

The State: Your Honor, can we approach briefly?

The Court: Yes.

(Bench conference held as follows:)

The State: Well, that wasn't really the answer that I was expecting.

The Court: Yeah. Do you want me to strike that, Mr. Montgomery [defense counsel]?

The State: The State would ask that the court strike that because it's not appropriate for a witness to vouch for a victim's credibility, and I think that's just a safe course.

The Defense: Yeah.

The Court: Yeah, I'll strike it, at this time.

(End of bench conference)

The Court: Ladies and Gentlemen, I'm striking the last comment. A witness cannot vouch for another witness. The question was simply had she heard any other evidence that [J.C.] had made any other complaints, and I believe the answer to that is no.

A: No.

The Court: You're cautioned that you should ignore any comment about [J.C.'s] credibility, that is for you to decide, so that portion of the answer is struck.

The State: Thank you, Your Honor.

Q: And then during the course of your investigation, is it part of your training to look for motivations as to why a child might be fabricating an allegation of sexual abuse?

A: Yes.

Q: Okay. And were you able to determine in this case whether [J.C.]—were you able to discover whether [J.C.] had any motivation for fabricating an allegation against Bubba Lake?

A: We found nothing to indicate that she was fabricating the story.

Q: Okay.

The Defense: Actually, I'm going to object as to the substance of that answer. I'm not sure. That goes into whether or not she's believing whether [J.C.]'s telling the truth or not, it's along the same lines here.

The Court: Well, I think there was—I'm going to overrule. I think the answer was that she did not find fabrication, it's still up to the jury to decide, you know, any other issues of credibility, but I think that's different than the earlier comment.

During the following cross-examination, defense counsel questioned the DCF investigator extensively regarding J.C.'s behavior at the interview, including not making eye contact and initially denying the sexual contact. On redirect, the following exchange occurred:

Q: Okay. Based upon your experience in those 200 interviews [of alleged child sexual assault victims], was how [J.C.] presented to you unusual?

A: Yeah, I mean she presented as an extremely credible child—

The Defense: Excuse me, I'm going to object. Again, this is—

The Court: Strike that. That's struck, Ladies and Gentlemen. Again, I caution the witness cannot talk about the credibility. Ms. Cummings [the DCF investigator], you've got to listen to the question. I think he's asking was her presentation unusual compared to other interviews you've done.

Q: Have you done—in your experience, was it unusual for a child to look down and begin talking softly when they started discussing specific acts of sexual conduct?

A: No, no.

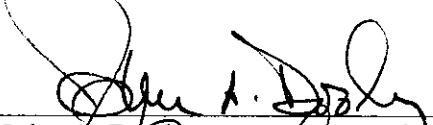
We conclude that the brief exchanges cited above, which were a small part of the eighty pages of the DCF investigator's transcript testimony, did not deprive defendant of a fair trial and do not require reversal of defendant's convictions. First, the court gave a prompt and strongly worded curative instruction on the two occasions that the DCF investigator came closest to vouching for J.C.'s credibility. When the DCF investigator unexpectedly stated that J.C. presented as an extremely credible child, in response to the prosecutor's question whether J.C. presented differently than other alleged sexual assault victims she had interviewed, the court immediately interrupted her, asked her to listen carefully to the question, and cautioned the jury that the witness could not talk about credibility. Similarly, when the DCF investigator unexpectedly responded to an earlier question by stating that everyone she had spoken to reported J.C. as being a very honest child, the State itself objected, and the court issued a strongly worded cautionary instruction emphasizing that the jury alone determined the credibility of witnesses. Although on that occasion the DCF investigator was reporting what others had said to her, the court properly struck the testimony and reminded the jurors that it was their duty to determine credibility. Regarding the DCF investigator's response that she had found nothing during her interview to suggest fabrication, we note that the prosecutor's question was whether the investigator had learned of any particular motivation for fabrication. The court could have struck this response as well, but it did remind the jurors again, and in its final jury instructions, that the jurors ultimately decided issues of credibility. In short, the challenged comments were, for the most part, unexpected, isolated, and quickly followed by curative instructions emphasizing the jury's exclusive role in determining credibility. See State v. Shaw, 149 Vt. 275, 279 (1987) (absent any indication otherwise, "we presume the jury followed the trial court's instructions"); cf. State v. Normandy, 143 Vt. 383, 386 (1983) ("[A] strongly worded and prompt admonition is preferred, and in appropriate cases, will cure the need for a mistrial.").

Second, the testimony of the DCF investigator, while significant, was not the primary focus of the State's case. Cf. Weeks, 160 Vt. at 401 (describing how the psychologist's testimony took up more than one-third of the entire trial testimony and was "a richly detailed roadmap of how he elicited and came to believe the child's allegations of abuse"). As evidenced by the prosecutor's closing argument, the State built its case primarily on what J.C. initially reported to family members and later to investigators. Cf. id. (noting that the psychologist was the first person to whom the child reported the abuse and the most important witness at trial, and that the State emphasized in its closing argument the credibility of the abuse report because it originated outside the family). Here, besides countering the defense claim that J.C. had been pressured during her interview to verify the fabricated claim of abuse, the State's closing argument emphasized the child's initial disclosures to family members, and did not refer to the DCF investigator's opinion on J.C.'s credibility. Defendant has failed to demonstrate that the family court erred in handling the DCF investigator's unexpected and inappropriate responses, or that he was denied a fair trial.


Defendant also argues that he was denied a fair trial when the court erroneously charged the jury that testimony regarding an inconsistency in what J.C. and her sister had reported should not be considered for the truth of the matter asserted. Because defendant did not object at trial to the challenged instruction, he must demonstrate plain error. See State v. Day, 150 Vt. 119, 124 (1988). He does not attempt to do so in his appellate brief, and in any case, we find no plain error, if any error at all. On cross-examination, the DCF investigator acknowledged that J.C.'s sister told her she had not been present when defendant allegedly abused J.C., which was inconsistent with J.C.'s statement that her sister had been present. The hearsay testimony was elicited based on the presumption that J.C.'s sister would testify. When it became apparent that the sister would be unable to testify, the court instructed the jury that any testimony regarding alleged prior statements by the sister could not be used as proof of the matter asserted. The jurors, however, were certainly aware of the inconsistency in the sisters' respective versions of what took place. Indeed, both the DCF investigator and the investigating officer testified as to that inconsistency. Any error in limiting use of that testimony is not so serious that it strikes at the heart of defendant's constitutional rights or results in an obvious miscarriage of justice. See State v. Pelican, 160 Vt. 536, 538 (1993).

Affirmed.

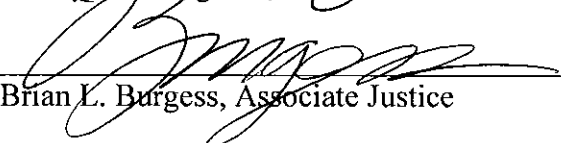
BY THE COURT:



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice