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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-522

NOVEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
	}	
Kevin Williams	}	DOCKET NO. 1584-11-04 WmCr
		Trial Judge: John P. Wesley, Katherine A. Hayes

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of lewd and lascivious conduct with a minor. He contends the trial court improperly (1) allowed the victim's school counselor to testify as both an expert and a fact witness and (2) permitted the introduction of hearsay testimony to rehabilitate the victim's credibility. We affirm.

Defendant was charged with sexual assault and lewd and lascivious conduct with a minor based on numerous alleged acts of sexual misconduct against his daughter, K.W., beginning when she was five years old and continuing until she was thirteen, when K.W. first made the allegations to a guardian ad litem (GAL) in the course of a custody dispute between her parents. Over the course of a two-day trial, K.W. described acts perpetrated by defendant, including both the fondling of her private parts and vaginal penetration, the areas of her home where the acts generally occurred, and the whereabouts of her other family members at the time. She testified that defendant told her not to tell anyone about the incidents, and recalled that he often bought her candy and ice cream afterwards.

On cross-examination, K.W. acknowledged that she was the subject of a contentious custody dispute between defendant and K.W.'s mother; that she hated living with defendant and his family, where she was subjected to filthy conditions and neglect, denied the opportunity to socialize with friends, and forced to wear shabby and ill-fitting clothing which resulted in ridicule from her peers; and that she felt anger toward defendant. K.W. further acknowledged that she wanted to live with her mother, who allowed her wear nicer clothes, jewelry and makeup. Cross-examination of K.W. about the allegations of sexual misconduct also revealed numerous memory lapses and a number of inconsistencies as to where, when, and how the acts occurred.

K.W.'s court-appointed GAL in the custody dispute also testified. She recalled visiting K.W. at her school and inquiring whether she felt safe at home. Over objection, the GAL testified that K.W. then began to cry and reported that defendant had been raping her. The GAL promptly notified the Department for Children and Families (DCF), who sent an investigator and police officer to the school to meet with K.W. Again over objection, the investigator testified that K.W. told her that defendant had been touching her private parts since she was young, and that K.W. described in some detail the nature of the sexual misconduct. The investigator recalled that when defendant arrived to pick her up from school, K.W. cried hysterically and hid under a table. Shortly after the initial report of abuse, K.W. was examined at Dartmouth Hitchcock Medical Center by a doctor with expertise in sexual assault injuries. The doctor testified that K.W. had suffered a deep split and scarring to the hymen, which was almost certain to be the result of penetrating injury to the vagina.

K.W.'s school counselor also testified. Identified by the State as both an expert and a fact witness, the counselor was the subject of a vigorous pre-trial motion contest. The court ruled that it would allow the witness to appear in both roles but cautioned the State to keep the two areas of testimony separate. The counselor testified initially as an expert about rape trauma syndrome, describing in general terms the behaviors of children who suffer sexual abuse, including disassociation, depression, and delayed reporting. The prosecutor then explained that he wished to inquire into a separate area concerning the counselor's personal experience with the victim, and was not seeking her opinion as an expert. The court cautioned the witness not to "connect in any way in the testimony you're about to give [with] what you've just talked about and whether [K.W.] fits." In addition, the court instructed the jury that the counselor would thereafter be testifying as a fact witness, and that her testimony should be treated as any other fact witness. The witness then testified that she had been K.W.'s counselor at school where they met regularly, that K.W. had often appeared agitated and easily angered, and that the counselor had learned of an upsetting disclosure that K.W. made to her GAL in the Fall of 2004. The school counselor did not describe the nature of those disclosures, and expressed no opinion on whether she believed K.W. was truthful or had been abused.

Following a two-day trial, the jury returned a verdict of not guilty on the charges of sexual assault and aggravated sexual assault, and guilty on the charge of lewd and lascivious conduct with a minor. The court denied a subsequent motion for judgment of acquittal or new trial. This appeal followed.

Defendant contends the court erred in allowing K.W.'s school counselor to testify as an expert and fact witness, claiming that the conjoint testimony had the improper effect of lending an "aura of special reliability and trustworthiness" to her testimony. State v. Bubar, 146 Vt. 398, 401 (1985) (quotation and citation omitted). As we have frequently explained, expert testimony on rape trauma syndrome and the associated psychological profile of children who suffer sexual abuse is admissible to assist the trier of fact to understand often confusing behaviors, such as delayed reporting, but the expert may not comment directly on the victim's credibility or express an opinion as to whether the victim has, in fact, been abused. State v. Wigg, 2005 VT 91, ¶¶ 16-23, 179 Vt. 65; State v. Catsam, 148 Vt. 366, 369-70 (1987). As we have also held, the expert may not only describe the behaviors generally associated with rape trauma syndrome but may also point out that the alleged victim "exhibits symptoms typical of sexually abused children." State v. Gokey, 154 Vt. 129, 134 (1990). As we recently explained in Wigg, the expert may

"testify that the complainant's conduct was consistent with the profile, excluding only the testimony that suggest[s] that the expert believed the statements of the complainant." 2005 VT 91, at ¶ 22.

Although the school counselor here did not comment directly on K.W.'s credibility or express any views on whether she believed the minor's claims of abuse, defendant asserts that this was nevertheless the indirect effect of the court's decision to allow the witness to testify about her observations as K.W.'s school counselor. Defendant relies principally on State v. Weatherbee, where an expert who testified on the effects of rape trauma syndrome had also examined the victim and provided detailed testimony about her disclosures of abuse, essentially "preview[ing]" the victim's own subsequent testimony "almost word for word." 156 Vt. 425, 432 (1991). In these circumstances, we held, there was a greater likelihood that the expert would be seen as "vouch[ing]" for the victim. Id. at 433. Citing Weatherbee, we have since observed in several cases that the danger of improper vouching is reduced where the expert neither interviews the victim nor refers directly to the victims in the case. State v. Kinney, 171 Vt. 239, 251 (2000); State v. Gomes, 162 Vt. 319, 330 (1994).

Contrary to defendant's implicit assertion, however, we have never held that an expert on rape trauma syndrome who has also interviewed the victim must necessarily be seen as vouching for the victim. The danger in Weatherbee resulted from the close clinical relationship between the expert and the victim, a relationship made quite explicit in the expert's testimony which, as noted, literally "previewed" the victim's allegations of sexual abuse "almost word for word." 156 Vt. at 432. The nature of the relationship between the school counselor and K.W. here did not have this quality, and the counselor gave virtually no testimony about K.W.'s specific allegations of abuse. In addition, the court carefully instructed the jury to regard the counselor's testimony as a fact witness as it would any other witness. In these circumstances, we find no likelihood that the witness acquired an improper aura of special reliability or trustworthiness. Accordingly, we find no error.

Defendant also contends the court erred in admitting hearsay testimony by the minor's GAL and the DCF investigator as prior consistent statements to rehabilitate K.W.'s earlier testimony. We recently clarified the standards governing the admission of such testimony in State v. Hazelton, 2006 VT 121, 915 A.2d 224. There we explained that, while our earlier holding in State v. Church, 167 Vt. 604 (1998) (mem.), might have suggested "a broad application of the rehabilitative use of prior consistent statements, the predicate remains that the prior statement must have some rebutting force other than that the witness merely said something earlier that was the same as part of her trial testimony that was not impeached." Hazelton, 2006 Vt 121, ¶13 (quotation and citation omitted). Defendant asserts that, while cross-examination of K.W. disclosed a motive to fabricate the allegations against defendant (based on the underlying custody dispute and K.W.'s strong desire to live with her mother) it did not uncover any inconsistencies in her testimony. The record does not, however, support the claim. Under vigorous cross-examination, K.W. acknowledged numerous memory lapses as to where, when, and how often the alleged acts had occurred and whether they occurred over or under her clothing, as well as denying having seen defendant's penis. Such events had, however, been previously described by K.W. to the GAL and DCF investigator. The court thus found, as it later explained, that the brief and limited testimony of the GAL and the DCF investigator recalling K.W.'s specific descriptions of how defendant had fondled her were admissible to rehabilitate

her testimony on these points, observing also that K.W. appeared to supply greater detail "in a context where she knew the person to whom she was speaking." Accordingly, we conclude that the Hazelton standard for the admission of prior consistent statements was satisfied, and we find no error or basis to disturb the judgment.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice