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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2026 11:42 AM
v	No. 369123 Kalamazoo Circuit Court
ROBERT LEE SIMONS, Defendant-Appellant.	LC No. 2022-001034-FH

Before: BOONSTRA, P.J., and YOUNG and KOROBKIN, JJ.

PER CURIAM.

Defendant, Robert Lee Simons, appeals as of right his jury-trial convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b); and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b). On November 13, 2023, Simons was sentenced to 25 to 50 years for CSC-I and 5 to 15 years for CSC-II. On appeal, Simons makes four arguments. First, Simons argues that the prosecution's expert witness impermissibly vouched for the credibility of the complainant. Second, he argues that the trial court erred by permitting the prosecutor to question Simons about his juvenile conviction for CSC on the basis that trial counsel had opened the door to such questioning. Third, Simons argues that the trial court erred by asking a witness to comment on the credibility of another witness. Fourth, in a Standard 4 brief, Simons argues that the prosecutor committed misconduct by expressing the opinion that Simons was guilty, bolstering the complainant's credibility, attacking the credibility of a witness using false statements, and asking a witness whether complainant was an honest person. We agree that the prosecution's expert witness impermissibly vouched for the credibility of the complainant. We therefore vacate Simons' convictions and remand for a new trial.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

After a roughly ten-year-long courtship, Simons married AS, becoming stepfather to her two children from a previous marriage, IN and NN. Looking back as a seventeen-year-old testifying at trial, NN could not specifically recall when Simons first began molesting her. Her earliest specific memories were from when she was six or seven years old. According to her trial testimony, NN and Simons would play what he called "the bouncy game," which involved Simons

lying down—sometimes clothed, sometimes not—while NN, with her clothes still on, sat on Simons' crotch and "move[d] [her] body back and forth" as he touched her breasts and vagina. They would play this game "multiple times throughout the week." And although NN could not remember the first time Simons put his penis in her mouth, she did recall being six when Simons told her that he would give her Jello if she let him ejaculate in her mouth. "I never let him finish [in my mouth]," NN recalled. "[A]nd I never got my Jello." Ordinarily, Simons would ejaculate into a sock or the nearby toilet instead.

According to NN, Simons told her that she could not tell anyone about what happened or else "daddy [would] go away for a very long time." In exchange, Simons would buy NN "new shoes, new clothes," or "the newest phone that comes out." This arrangement went on until NN was about 14 years old. "[T]here was a time that I was very suicidal and I was not happy with my life because of the things that has happened to me," NN testified. "And I went to the hospital and when I came back he asked me, did you do it because of what I did to you[?]" NN did not answer Simons' question, but their sexual encounters stopped after that.

Although NN had told others about Simons on two occasions in the past, his behavior came to light only after NN told her mother's friend that Simons had been touching her. The friend gave NN an ultimatum: If NN did not go to the police within the next 24 hours, she would. The next morning, NN told her mother, AS, that Simons had been touching her, but NN did not elaborate any further. According to NN, her mother called the police "right away," and the police requested that the two of them come down to the station.

Simons was arrested and charged on August 11, 2022, with CSC-I and CSC-II. His jury trial began on October 10 of the following year and, over the next two days, jurors heard testimony from a number of the prosecution's witnesses, including the retired chief programming officer for Young Women's Christian Association (YWCA) of West Central Michigan, Thomas Cottrell.

Cottrell, who oversaw at YWCA programming on domestic violence, sexual assault, and child sexual abuse for roughly 20 years before his retirement earlier that year, testified that he had personally worked with between 300 to 350 child victims of sexual assault since being hired at YWCA in 1982. Once the parties finished questioning Cottrell, the trial court turned to questions submitted by the jury, one of which was, "In your experience with hundreds of cases you participated with from CPS, were any of them found to [be] made up or fiction?" Defense counsel appears not to have objected to the question; however, unlike some of the other juror question forms in the record, the form for this question does not affirmatively note that no objections were made. The question was then read for Cottrell, who answered as follows:

> *A*. A handful yes. But when we explore them, I can give some examples. One was a—because there are only a handful, it is easier to remember them.
>
> One was a teenager who's [sic] mother was a victim of domestic violence and the mother wouldn't protect herself, so the child alleged sexual assault in order to get law enforcement involved in the case. And she later disclosed that is exactly what she wanted to have happen. So, he would be removed from the household to protect her mother.

> I have a handful of cases where young siblings of abuse victims are also alleging that they were abused. Once they found out their sibling got to come to my office and play with the toys and draw pictures and—they wanted to be a piece of that too, so I had two very young children, probably three or four years old who also said they were abused, even though it was pretty clear they weren't.
>
> And another child who was older with a developmental disability who also wanted—alleged abuse even though we were pretty sure that didn't occur was well.
>
> Um, we had one child—
>
> *Q*. I am going to stop you for a second. I think that you answered the question and that is, in your experience with hundreds of cases that you participated with from CPS, were any of them found to be made up or fiction. And I think your answer is yes and you are describing some examples, right?
>
> *A*. Almost all of the examples, but yes.

Another juror wanted to know if Cottrell had "ever worked with a child who [he] thought was fabricating their abuse." Again, counsel appears not to have objected to the question: The handwritten notes on the juror question form indicate only that the question's second part—"If yes, please describe"—was "not asked/read." The annotations do not otherwise address the question and make only the general observation that "some [questions were] read as noted for Thomas Cottrell." Further still, the transcript of the bench conference during which any objection would have been made does not clearly identify when, if ever, the questions at issue were discussed.[1] The trial court ultimately permitted the question to be asked, and Cottrell answered, "Just the ones that I already mentioned. But the short answer is yes. Very small percentage but yes."

After hearing from Simons himself, the jury deliberated for nearly two full days and returned a guilty verdict on both counts. Simons was later sentenced to 25 to 50 years for CSC-I and 5 to 15 years for CSC-II. On June 10, 2024, Simons filed a motion for a new trial, arguing, among other things, that Cottrell had impermissibly vouched for NN by testifying that a "very small percentage" of the roughly 300 to 350 child sexual abuse victims he worked with over the course of his career had lied about their abuse. In response, the prosecution argued that Cottrell's testimony was permissible because he was not testifying about NN specifically, but rather about the behavioral characteristics of sexual assault victims more generally.

The trial court agreed with the prosecution. At the hearing on Simons' motion, the trial court concluded that Cottrell gave a generalized answer that was not specific to the case in which he was testifying as an expert witness. Consequently, the trial court reasoned, Cottrell had not

[1] However, we note that defendant does not argue on appeal that this issue was preserved because he objected to the question during the bench conference, but rather because he raised the issue in his motion for a new trial.

vouched for the credibility of NN "one way or the other." The trial court denied Simons' motion for a new trial, and this appeal followed.

II. THE TESTIMONY OF THOMAS COTTRELL

Simons argues that the trial court erred by allowing Cottrell to vouch for NN by testifying to the rates of false allegations among child sexual abuse victims. We agree.

A. ISSUE PRESERVATION AND STANDARDS OF REVIEW

Generally, a trial court's decision to allow jurors to question a witness is reviewed for an abuse of discretion. See *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1972) ("[T]he questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court."). However, "[a] defendant must raise an issue in the trial court to preserve it for our review." *People v Heft*, 299 Mich App 69, 78; 829 NW2d 266 (2012). "[A] party asserting evidentiary error who fails to object at a time that gives the trial court the opportunity to correct the error does not preserve that evidentiary error by raising it for the first time in a postjudgment motion for a new trial." *People v Butsinas*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 364778); slip op at 10.

An unpreserved issue in a criminal case is reviewed for plain error affecting the defendant's substantial rights. *People v Smith*, 351 Mich App 1, 32; 34 NW3d 593 (2024). Under the "plain error" standard, a defendant must establish that "(1) an error occurred, (2) the error was 'plain'—i.e. clear and obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected." *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015). If these elements are satisfied, relief is warranted only if we also determine that (4) "the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Id*. (quotation marks and citations removed).

At the same time, "[w]hen defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). Waiver is "the intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 783 n 7; 597 NW2d 130 (1999). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007).

The record does not reflect that Simons affirmatively waived the alleged errors altogether by clearly expressing satisfaction with the trial court's decision. The transcript of the bench conference during which the jury's questions for Cottrell were discussed by the parties is not illuminating: The parties almost exclusively refer to the questions under discussion using pronouns whose referents are clear only to those physically present, and defense counsel's speech is transcribed as "inaudible" a number of times throughout the discussion. And, as noted above, the trial court recorded when objections were and were not made. No such notation was made on the forms for the questions at issue here.

Simons did not object during the bench conference in which the questions submitted by jurors were being reviewed, raising the issue for the first time in his motion for a new trial. Simons did not, therefore, preserve the issue for appellate review.

B. THE TRIAL COURT PLAINLY ERRED BY PERMITTING THE JURY TO QUESTION COTTRELL ABOUT THE RATE AT WHICH CHILD SEXUAL ABUSE VICTIMS FABRICATE THEIR ABUSE

"Generally, a witness may not comment on or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury. The same is true for expert witnesses." *People v Sattler-VanWagoner*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 362433); slip op at 4 (quotation marks and citation omitted). Expert testimony about child sexual abuse victims is therefore limited to behaviors common among victims of abuse and such testimony may be introduced for two purposes only: To rebut an attack on the victim's credibility or to explain specific behavior of a complainant that might be misconstrued by the jury as inconsistent with the behavior of an abuse victim. *People v Peterson*, 450 Mich 349, 357; 537 NW2d 857 (1995). "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child" because such testimony "comes too close to testifying that the particular child is a victim of sexual abuse." *Id*. at 374.

In *People v Thorpe*, 504 Mich 230, 235; 934 NW2d 693 (2019), the Michigan Supreme Court held that "expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity." There, the prosecution's expert witness, Thomas Cottrell—the very same Thomas Cottrell whose testimony is at issue in this case—was asked on redirect what percentage of purported victims of child sexual abuse were in fact lying about their abuse. *Id*. at 239. Cottrell responded that, although the literature on fabricated disclosure was "extremely variable," "I can tell you within our population, we run into it probably two to four percent of the cases that we get." *Id*. at 240.

The Michigan Supreme Court observed in *Thorpe* that it had identified "nearly identical testimony" as impermissible vouching once before in *Peterson*. Of particular concern to the Court in both *Thorpe* and *Peterson* was the fact that the trials at issue involved credibility contests between the complainant and defendant. *Thorpe*, 504 Mich at 260; *Peterson*, 450 Mich at 376. " 'To a jury recognizing the awesome dilemma of whom to believe,' " the Court declared, " 'an expert will often represent the only seemingly objective source, offering [the jury] a much sought-after hook on which to hang its hat.' " *Thorpe*, 504 Mich at 263-264, quoting *People v Beckley*, 434 Mich 691, 722; 456 NW2d 391 (1990).

Although Cottrell did not, as he did in *Thorpe*, provide jurors with a specific percentage of child sexual abuse victims who lie about their abuse, his testimony nevertheless impermissibly quantified that information in a nearly identical manner. See *Sattler-VanWagoner*, ___ Mich App at ___; slip op at 5-6 ("Our Supreme Court's analysis in *Thorpe* was not limited to specific numeral values; it applied more broadly to the odds or likelihood that someone is telling the truth.") By testifying that, among the roughly 350 cases with which he was personally involved, "only a handful" of child sexual abuse victims were lying about their abuse, and that it was a "[v]ery small

percentage," Cottrell gave the jury the very same information, stopping short only of calculating the percentage for them in numerical terms. In doing so, he impermissibly vouched for the complainant. The fact that one may arrive at slightly different figures depending on how Cottrell's testimony is mathematically glossed is immaterial. An expert who opines on the veracity of child sexual abuse victims generally is inferentially vouching for the complainant specifically.[2] *Id.* at ___; slip op at 5 ("[The expert witness] . . . testified that false were reports were 'statistically very rare in these types of cases.' This was vouching.").[3]

The trial court erred by permitting Cottrell to vouch for NN, and because such testimony has been impermissible for over 30 years, see *Peterson*, 450 Mich 349, that error was plain. We now turn to whether the error affected the outcome of the lower court proceedings. We conclude that it did.

Like *Thorpe* before it, this trial was a "true credibility contest" in which "[t]here was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements." *Thorpe*, 504 Mich at 260. Here, too, the prosecution's case consisted of the complainant's allegations, testimony by her mother regarding the complainant's disclosure of the alleged abuse, and Cottrell's expert testimony. *Id*. And, like Thorpe himself, Simons testified in his own defense, denying the allegations. *Id*. "Because the trial turned on the jury's assessment

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[2] The prosecution relies on a number of this Court's unpublished opinions—each discussing the expert testimony of Cottrell—to argue for the permissibility of Cottrell's testimony here. *People v Ruiz*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 352431); *People v Wilson*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2023 (Docket No. 356825); *People v Denboer*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 2024 (Docket No. 364183). Our unpublished opinions, however, are not binding. *People v Brcic*, 342 Mich App 271, 282 n 2; 994 NW2d 812 (2022). *Sattler-VanWagoner*, which we rely on here, postdates these opinions and has been published. The opinion is therefore binding. *People v Moore*, ___ Mich App ___, ___ n 2; ___ NW3d ___ (2025) (Docket No. 371556); slip op at 4 n 2.

[3] Although we considered identical testimony by Cottrell to be vouching in *Sattler-VanWagoner*, we nonetheless concluded that the error was not outcome determinative because of "[t]he isolated nature of the statement and substantial other evidence of Sattler-VanWagoner's guilt. . . ." *Sattler-VanWagoner*, ___ Mich App at ___; slip op at 7. That substantial other evidence was principally the witness testimony of Sattler-VanWagoner's girlfriend at the time, who, having discovered Sattler-VanWagoner and the victim alone in a bedroom with the door locked, corroborated aspects of the victim's testimony with respect to a specific incident of sexual assault. *Id*. at ___; slip op at 3. We first note that the testimony at issue here was not similarly isolated; Cottrell went on at length about specific instances of false reporting. Further, Cottrell's testimony was elicited by the jury rather than, as was the case in *Sattler-VanWagoner*, on direct examination, which emphasizes the importance of the vouching testimony here to at least one of the jurors. Finally, we observe that, although NN's testimony was corroborated in certain respects by other witnesses, no witness testimony corroborating the details of a specific instance of sexual assault was available, making for a much closer credibility contest between the defendant and victim than was at issue in *Sattler-VanWagoner*.

of [complainant's] credibility, the improperly admitted testimony wherein Cottrell vouched for [complainant's] credibility likely affected the jury's ultimate decision." *Id*. We must next consider whether the error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Cain*, 498 Mich at 116.

Our Supreme Court held over 30 years ago in *Peterson* that an expert witness may not testify to the rates at which purported child sexual abuse victims fabricate their abuse because such testimony is vouching. The Supreme Court affirmed and clarified that holding just seven years ago in *Thorpe* with respect to "nearly identical" testimony as was at issue in *Peterson*, this time involving the very same expert witness whose testimony is at issue before us now. Finally, just two years ago, this Court held that expert testimony that false reports of child sexual abuse are "rare" constituted impermissible vouching. *Sattler-VanWagoner*, ___ Mich App at ___; slip op at 1.[4]

We conclude that the trial court erred by permitting the jury to—for all intents and purposes—ask Cottrell to vouch for NN in the context of what is essentially a pure credibility contest between a complainant and defendant. This error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Cain*, 498 Mich at 116.

III. CONCLUSION

The trial court plainly erred by permitting Cottrell to vouch for NN. Therefore, we vacate Simons' convictions and remand for a new trial.[5] We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Adrienne N. Young
/s/ Daniel S. Korobkin

[4] We acknowledge that the trial court could not benefit from the guidance of *Sattler-VanWagoner* when deciding Simons' motion for a new trial because that opinion would not be published for another six months. However, we are nonetheless bound to apply its holding because "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *People v Beesley*, 337 Mich App 50, 66 n 4; 972 NW2d 294 (2021).

[5] The relief granted obviates the need to address Simons' remaining arguments. We therefore decline to address them here.