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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION December 19, 2024 2:05 PM
v	No. 362433 Shiawassee Circuit Court
TYLOR ROBERT SATTLER-VANWAGONER, Defendant-Appellant.	LC No. 2021-005573-FC

Before: O'BRIEN, P.J., and BORRELLO and N. P. HOOD, JJ.

N. P. HOOD, J.

Defendant, Tylor Robert Sattler-VanWagoner, appeals by right his jury trial conviction of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (2)(b) (sexual penetration of victim under 13 years of age; defendant 17 years of age or older). The trial court sentenced Sattler-VanWagoner to serve 25 to 75 years' imprisonment. On appeal, he argues that expert testimony that false reports of child sex abuse are "rare" amounted to impermissible vouching under *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019). We agree that this testimony amounted to vouching. This error was plain. But this plain error does not warrant reversal because Sattler-VanWagoner cannot establish prejudice. We therefore affirm.

I. BACKGROUND

This appeal arises out of Sattler-VanWagoner's sexual assault of his biological daughter, LD, when she was 9 years old, and he was 28 years old. Around the time of the assault in 2019, LD would sporadically visit Sattler-VanWagoner at his house, where he lived with his then-girlfriend, Anna Mickle, her three children, and his son. In September 2019, LD was at Sattler-VanWagoner's house for a weeklong visit. LD testified that, during that visit, Sattler-VanWagoner told the other children to go upstairs to bed, but told the her to stay behind. He then took LD into his room, and he closed the door and locked it. Sattler-VanWagoner removed her underwear and pants and licked the inside of her vagina. LD could not recall how long this lasted, but she testified that Sattler-VanWagoner stopped once his Mickle arrived at home. Mickle knocked on the bedroom door, and Sattler-VanWagoner told LD to put her clothes on. After she was dressed, he unlocked the door, and Mickle came into the bedroom.

During the prosecutor's case-in-chief, Holly Rosen testified as an expert in sexual assault, child abuse or child assault, perpetrator tactics, victim responses, and the neurobiology of trauma. At trial, defense counsel objected to her qualification as an expert in the field of neurobiology. After a brief voir dire, the trial court qualified her as an expert over the defense's objection.[1] Rosen discussed what she described as "non-intuitive victim responses." She explained that a common pattern in adult and child victims of sexual abuse is a delay in reporting or never reporting because the victim blames himself or herself or feels responsible for the sexual assault. Rosen explained that many victims of sexual assault have inconsistent memories or gaps in their memories, and she noted that children often do not report a sexual assault because they are afraid of getting into trouble or they have received a threat from the person who abused them.

The prosecutor asked Rosen whether a delay in reporting "necessarily mean[s] that an assault never occurred," and Rosen explained that "a lot of law enforcement confuse false reports with delays in reporting or insufficient evidence which means there's no maybe DNA proof or witnesses that saw it or inconsistent memories." The prosecution asked Rosen whether recanting and false reporting are different. Rosen explained that they are different and testified about the differences. During her explanation, she testified that false reporting is "statistically very rare in these types of cases." The prosecutor then asked whether Rosen knew the statistics of false reports. Before Rosen could respond, defense counsel objected on the basis that Rosen's response may vouch for the victim's credibility. The court sustained defense counsel's objection, and Rosen continued to explain why a victim may blame himself or herself for the sexual assault, and why a victim's recollection of the sexual assault may change over time because of trauma.

In addition to Rosen, the prosecution called LD's mother, SE. She testified that she received a text message about the sexual assault from a woman who was then pregnant with Sattler-VanWagoner's child. According to SE, Mickle told the woman about Sattler-VanWagoner sexually assaulting LD at a party and that Sattler-VanWagoner had child pornography on his phone. SE and her husband, LD's stepfather, then spoke with LD, who stated that the assault did not happen at a party but that Sattler-VanWagoner had "touched her down there."

During its case, the prosecution also proffered the preliminary examination testimony and a transcript of LD's forensic interview, along with the testimony of several law enforcement witnesses.

Sattler-VanWagoner testified at trial. He denied taking the LD into the locked bedroom, removing her pants and underwear, and performing oral sex on her. But he acknowledged that he was in the bedroom alone with LD including when Mickle came home. Sattler-VanWagoner testified that LD had spilled something on herself and that all the laundry was in his bedroom. He stated that he told her to stand between the bed and the wall so the other children in the living room

[1] We observe that the prosecution did not disclose Rosen as an expert witness until shortly before trial. Defense counsel briefly mentioned his inability to file a motion under *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), challenging her testimony because of the timing of the prosecution identifying her as a witness. On appeal, Sattler-VanWagoner does not challenge Rosen's qualifications and expert and does not challenge his trial counsel's decision not to file a *Daubert* motion.

could not see her change. Sattler-VanWagoner sat at the foot of the bed and was going through the laundry, looking for clean clothes for LD, when Mickle came home. He knew that Mickle was upset, so he shut the bedroom door until she knocked. Sattler-VanWagoner held onto the doorknob for less than a minute, until he realized that LD was still in the room, so he opened the door to let her out. LD walked out of the bedroom and went upstairs, and Sattler-VanWagoner and Mickle argued.

The defense also called Mickle, Sattler-VanWagoner's ex-girlfriend, who arrived home during the assault. Mickle testified that she dated Sattler-VanWagoner from 2014 through 2020, but was not dating him when the sexual assault allegations "came to light" in October 2020. Mickle acknowledged that Sattler-VanWagoner and LD were in the bedroom with the door shut "sometime in 2017" but Mickle denied telling anybody that Sattler-VanWagoner molested or sexually assaulted LD.

According to Mickle, she came home and saw Sattler-VanWagoner at the foot of the bed and LD on the side of the bed. She testified that Sattler-VanWagoner shut the door to the bedroom because he knew she was mad at him for other reasons. Mickle "pounded" on the bedroom door and told Sattler-VanWagoner to let her in or she would "call the cops." Mickle noted that she threatened to call the police because she was mad, and Mickle denied threatening to call the police because she thought Sattler-VanWagoner was doing something to LD. She testified that the door was shut for "about a minute." When Sattler-VanWagoner opened the door, LD and Mickle's dog came out of the bedroom. Mickle asked LD what was going on, and LD stated that her pants were wet and that they had to be changed, so Mickle "sent her on her way." When LD left the bedroom, Mickle saw her pants on the floor beside the bed, and Mickle checked the pants to see if they were wet.

During Mickle's testimony, the defense asked if she ever saw pornography on Sattler-VanWagoner's phone. She stated that Sattler-VanWagoner had sent her a picture of a girl in a t-shirt and underwear and that the girl was clearly under 18 years old. The defense also offered the testimony of several other family members including Sattler-VanWagoner's mother and other children.

The jury found Sattler-VanWagoner guilty as charged of one count of CSC-I. This included a finding that LD was under 13 years old at the time of the offense and that Sattler-VanWagoner was 17 years of age or older, thus triggering the 25-year mandatory minimum sentence under MCL 750.520b(2)(b).

The trial court sentenced Sattler-VanWagoner to 25 to 75 years' imprisonment for his CSC-I conviction. Prior to sentencing, defense counsel acknowledge that there was little that he could argue to affect the mandatory minimum sentence. This appeal followed.

II. VOUCHING

Sattler-VanWagoner first argues that Rosen's expert testimony impermissibly vouched for the victim's credibility. We agree and conclude that Rosen's statements that false reports are "statistically very rare," though lacking a numeric value, was essentially the statistical vouching described in *Thorpe*, 504 Mich at 252. See *People v Bonner*, unpublished per curiam opinion of

the Court of Appeals, issued April 16, 2020 (Docket No. 346460) (holding that expert's testimony that children fabricating reports of sexual abuse are "extremely rare" crossed the line drawn in *Thorpe* and amounted to impermissible vouching).[2] Despite finding that an error occurred, we nonetheless affirm Sattler-VanWagoner's conviction because he has not established outcome-determinative prejudice.

The parties agree that Sattler-VanWagoner's claim of evidentiary error is unpreserved because he did not specifically object to Rosen's statement that false reports are "statistically very rare."[3] We review unpreserved evidentiary errors for plain error affective substantial rights. See *People v Burkett*, 337 Mich App 631, 543-544; 976 NW2d 864 (2021), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To obtain relief under the plain-error rule, a defendant must prove that (1) an error occurred, (2) the error was plain, and (3) that the plain error affected substantial rights—in other words, the error affected the outcome of the proceedings. *People v Anderson*, 341 Mich App 272, 280; 989 NW2d 832 (2022). If a defendant satisfies these three requirements, we must determine whether the plain error warrants reversal, in other words, whether it seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 763-764. Sometimes identified as a fourth prong of plain-error analysis, this last step conceptually overlaps with the third prong. *People v Davis*, 509 Mich 52, 75-76; 983 NW2d 325 (2022).

Regarding the first two prongs, we conclude that an error occurred and its was obvious. Even without attaching a number or percentage, Rosen's testimony about the statistical likelihood of a child complainant lying about sexual assault (i.e., that it was "statistically very rare") clearly violated *Thorpe*'s prohibition on such testimony.

Generally, a witness may not "comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich

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[2] Though unpublished cases are nonbinding on this Court, they may be persuasive or instructive. See *People v Darga*, ___ Mich App ___, ___ n 2; ___ NW3d ___ (2023) (Docket No. 362683); slip op at 5 n 2.

[3] Both parties agree that Sattler-VanWagoner's claim of evidentiary error is unpreserved. Relying on that consensus, we address this issue through the lens of plain-error analysis. We acknowledge that defense counsel did not object immediately after the expert witness testified that false reporting was statistically very rare. We observe however that defense counsel did object to the expert's testimony concerning numerical statistics on false reporting in sexual assault cases on the basis that the testimony would impermissibly vouch for the victim's credibility. If we were to view the error as preserved, it would be subject to harmless-error review. See *Thorpe*, 504 Mich at 252. "Preserved nonconstitutional errors are subject to harmless-error review under MCL 769.26 . . . ." *Thorpe*, 504 Mich at 252. Under this standard, a defendant must establish that it was more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); *Thorpe*, 504 Mich at 252 (a defendant bears the burden of establishing a miscarriage of justice under "a 'more probable than not' standard" to establish error requiring reversal under MCL 769.26). Sattler-VanWagoner would not be able to establish prejudice even under the more permissive harmless-error standard of review.

App 58, 71; 732 NW2d 546 (2007). The same is true for expert witnesses. *Id*. (holding an expert witness "may not vouch for the veracity of a victim."). But our Supreme Court has held that when a defendant attacks the credibility of the victim, a qualified expert may offer testimony to explain the typical behavior of victims of child sex abuse. See *People v Peterson*, 450 Mich 349, 352, 373; 537 NW2d 857 (1995). In child sex abuse cases, an expert may also testify regarding the typical symptoms of child sexual abuse in order to explain a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut a credibility attack. *Thorpe*, 504 Mich at 258. Still, an expert may not vouch for the credibility of the victim. *Peterson*, 450 Mich at 373. Commenting on the numerical odds or a statistical assessment of a witness telling the truth or lying about sexual assault allegations amounts to vouching. See *id.*; *Thorpe*, 504 Mich at 258-259.

In *Thorpe*, the Supreme Court held that the expert's testimony amounted to vouching for the victim's credibility. *Thorpe*, 504 Mich at 258-259. There, when asked by the prosecutor, the expert on child sex abuse asserted "that only 2% to 4% of children lie about sexual abuse." *Id.* at 239-240, 250. He also identified two scenarios in which children "might lie," but neither scenario existed in that case. *Id*. at 259. Our Supreme Court concluded, "[A]lthough he did not actually say it, one might reasonably conclude on the basis of [the expert's] testimony that there was a 0% chance [the victim] had lied about sexual abuse." *Id.* The Court reasoned that this effectively amounted to vouching for the victim's credibility and reversed and remanded. *Id.*

The decision in *Thorpe* followed an earlier decision in *Peterson*, where the Court determined that an expert who testified that "children lie about sexual abuse at a rate of about two percent," and one who testified that "there is about an eighty-five percent rate of veracity among child abuse victims," improperly vouched for the complainant's truthfulness. *Peterson*, 450 Mich at 375-376. The Court reasoned that, even though the testimony may have been accurate, and neither witness explicitly stated that the child victim was telling the truth, the risk was that the jury, in a credibility contest, would be "looking 'to hang its hat' on the testimony of witnesses it views as impartial." *Id*. at 376. However, the Court determined that this was harmless error because the evidence of the defendant's guilt was overwhelming. *Id*. at 353.

Here, unlike *Thorpe* and *Peterson*, Rosen did not testify about the exact percentage or odds that child complainants falsely (or truthfully) report sex abuse. The prosecution may have begun to ask about such percentages, but defense counsel objected and successfully excluded such impermissible vouching. But Rosen had already testified that false reports were "statistically very rare in these types of cases." This was vouching. See *Bonner*, unpub op at 3-5 (holding that expert's testimony that fabricated reports of sexual assault are "extremely rare" was precisely the sort of vouching *Thorpe* sought to exclude).[4] Our Supreme Court's analysis in *Thorpe* was not

[4] We acknowledge that this Court has reached differing conclusions on similar facts in a handful of unpublished cases addressing this issue. Compare *Bonner*, unpub op at 3-5, with *People v Yats*, unpublished per curiam opinion of the Court of Appeals, issued August 4, 2022 (Docket No. 354180), pp 3-6 (interpreting *Thorpe* as only prohibiting testimony about specific statistical percentages as opposed to less precise statements regarding "rarity"; holding that expert testimony that false disclosures of sexual assault "rarely" happen, but do occur, did not amount to improper

limited to specific numerical values; it applied more broadly to the odds or likelihood that someone is telling the truth. See *Thorpe*, 504 Mich at 240. See also *Bonner*, unpub op at 4-5. This is a vitally important issue on cases that can be decided entirely on credibility. M Crim JI 20.25 (to prove a charge of criminal sexual conduct it is not necessary that there be evidence other than the testimony of the complainant, if that testimony proves guilt beyond a reasonable doubt). See also *People v Smith*, 149 Mich App 189, 195, 385 NW2d 654 (1986) (same).[5]

We reached the same conclusion in *Bonner*. There, the same expert that was the subject our Supreme Court's decision in *Thorpe* testified. *Bonner*, unpub op at 3. In response to the prosecutor's question of whether the expert had encountered "children who fabricate," the expert responded, "It's extremely rare, but, yes, I have." *Id.* The trial court overruled defense counsel's objection. *Id.* Comparing the case to *Thorpe*, we observed that the expert's comment that fabrication was "extremely rare" "crossed the line drawn in *Thorpe*." Specifically, we held, "There is no meaningful difference between a falsehood estimate of 'two to four percent,' [the expert]'s testimony in *Thorpe*, and his unsolicited 'extremely rare' response here." *Id*. at 4-5. We further noted that in *Thorpe* the expert used "precisely the same phraseology, opining that lying about sexual abuse among children is 'extremely rare.' " *Id.* at 5 n 1.

Finding our prior reasoning persuasive, we conclude that Rosen impermissibly vouched for LD's credibility by testifying that false reports were "statistically very rare in cases like this" for two reasons. First, although Rosen did not provide a specific percentage value, her comment on the statistical rarity of a false report was sufficiently similar to bring her testimony within the scope of *Thorpe*'s prohibitions. This is exactly what we concluded in *Bonner*. See *Bonner*, unpub at 4-5. And the reasoning is sound. Put simply, what is the meaningful difference between saying that the likelihood a complainant will lie is 2% to 4% and saying that it is "statistically very rare"? There is none. Second, the addition of the phrase "in cases like this" comes dangerously close to commenting directly on LD's truthfulness or veracity in this case. That phrase directly linked the statistical likelihood of a false report to the testimony in this case. Relying on *Thorpe* and the reasoning in *Bonner*, we conclude that an error occurred and the error was plain.

Despite this conclusion, Sattler-VanWagoner has not established outcome-determinative prejudice. His issue relates to a single comment in Rosen's testimony. Looking at the body of evidence without this comment, we are not convinced that the result would have been different.

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vouching). We have applied a narrower reading of *Thorpe* in at least one case involving Rosen, where her testimony was similar to her testimony here, and we concluded that her statements did not implicate *Thorpe*. See *Yats*, unpub op at 6 (holding that Rosen's expert testimony during cross-examination that "[f]alse reports are very rare" was not plain error because it "lack[ed] the statistical precision that troubled the Supreme Court in *Thorpe*."). These cases are not binding. See MCR 7.215(C)(1). To the extent that they may have persuasive value, we are persuaded that the analysis in *Bonner* is correct as it closely adheres to the principles outlined in *Thorpe*.

[5] Although opinions issued before November 1, 1990, are not strictly binding pursuant to MCR 7.215(J)(1), as a published opinion, *Smith* nevertheless "has precedential effect under the rule of stare decisis" pursuant to MCR 7.215(C)(2). See *Darga*, ___ Mich App at ___ n 6; slip op at 8-9 n 6.

The isolated nature of the statement and substantial other evidence of Sattler-VanWagoner's guilt indicates that this error did not affect the outcome. We conclude, therefore, Sattler-VanWagoner established that a plain error occurred, but not one warranting reversal. We therefore affirm the conviction.

III. MANDATORY MINIMUM SENTENCE

Next, Sattler-VanWagoner argues that the 25-year mandatory minimum sentence imposed under MCL 750.520b(2)(b) violates state and federal constitutional prohibitions against cruel or unusual punishment. Sattler-VanWagoner, however, acknowledges this Court's decision in *People v Benton*, 294 Mich App 191, 203-207; 817 NW2d 599 (2011), where we upheld the constitutionality of the mandatory 25-year sentence for CSC-I convictions where the victim is under 13 years of age and the defendant is 17 years old or older. Even if we were to disagree with the conclusion in *Benton*, we are strictly bound to follow *Benton*. See MCR 7.215(J)(1). Under *Benton*, the 25-year mandatory minimum sentence is constitutionally sound.

For the reasons stated, we affirm the conviction and sentence.

/s/ Noah P. Hood
/s/ Stephen L. Borrello