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United States Court of Appeals
Tenth Circuit

June 26, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEFFERY ARCH JONES,

Defendant - Appellant.

No. 21-5079

**Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:21-CR-00023-GKF-1)**

Dean Sanderford, Assistant Federal Public Defender, (Virginia L. Grady, Federal Public Defender, also on the briefs), Office of the Federal Public Defender, Denver, Colorado, appearing for Defendant-Appellant.

Leena Alam, Assistant United States Attorney (Leah D. Paisner, Assistant United States Attorney, and Clinton J. Johnson, United States Attorney, on the brief), Northern District of Oklahoma, Tulsa, Oklahoma, appearing for Plaintiff-Appellee.

Before **MORITZ**, **SEYMOUR**, and **EBEL**, Circuit Judges.

EBEL, Circuit Judge.

Jeffrey Jones was convicted of sexually abusing his stepdaughters, K.B. and C.B., which resulted in three concurrent life sentences. On appeal, he challenges the

testimony of two witnesses. The first witness was Crystal Jones,[1] the mother of K.B. and C.B., who repeatedly testified as to her belief in the truthfulness of her daughters' accusations about Mr. Jones's actions, which she herself did not directly observe. The second government witness was an FBI forensic interviewer, Janetta Michaels, who testified that C.B. was "forthcoming" in her forensic interview and "appropriate with her knowledge."

Before this Court, Mr. Jones argues that the district court plainly erred by allowing both witnesses' testimony about the credibility of K.B. and C.B. Mr. Jones's central argument is that both witnesses impermissibly vouched for the credibility of K.B. and C.B. in violation of the Federal Rules of Evidence 608 and 702. Because Mr. Jones did not object for these reasons below, we review for plain error. We reject Mr. Jones's contention that the district court plainly erred by admitting Ms. Michaels's challenged testimony under Rule 702, but agree that the district court plainly erred in admitting Crystal's challenged testimony under Rule 608. Exercising jurisdiction under 28 U.S.C § 1291, we REVERSE and REMAND with instructions to VACATE Jeffrey Jones's conviction and sentence.

I. BACKGROUND

Mr. Jones and Crystal were married from 2014 to 2017, during which time they lived with K.B and C.B. in Broken Arrow, Oklahoma. When Mr. Jones married

[1] To avoid confusion between the names Mr. Jones and Ms. Jones, we will refer to Ms. Jones as "Crystal" and to Mr. Jones as either "the Defendant" or "Mr. Jones," as the parties did in their briefing.

Crystal, K.B. was six years old and C.B. was ten years old. In early 2017, when K.B. was eight, she disclosed to her teacher that Mr. Jones had been sexually abusing her. K.B.'s teacher immediately brought the matter to the school counselor. This led to a criminal investigation initiated by the Broken Arrow Police Department. As part of this investigation, forensic interviews were scheduled with both K.B. and C.B. During her interview, K.B. stated that Mr. Jones had, on multiple occasions, engaged in sexual conduct with her—including by trying to force her to touch his genitals and by attempting to force his genitals into her mouth. At C.B.'s interview, she said that Mr. Jones had repeatedly bear-hugged her and fondled her breasts above her clothes.

Mr. Jones was subsequently arrested and convicted of four counts of sexual abuse of a child under twelve by a state jury. These convictions were vacated in 2021 due to the Supreme Court's ruling in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), which deprived the state of jurisdiction over the matter. After these convictions were vacated, a federal grand jury indicted Mr. Jones on one count of aggravated sexual abuse (in violation of 18 U.S.C. § 2241(c)) and one count of abusive sexual contact (in violation of 18 U.S.C. § 2244(a)(5)).

Following this indictment, C.B. (sixteen years old at the time) was interviewed for a second time by a different FBI forensic interviewer (Ms. Michaels). In this interview, C.B. provided more details about the abuse than she had previously disclosed at her former interview, including that Mr. Jones had touched her breasts and genitals underneath her clothes. When asked why she did not reveal this at her

earlier interview, C.B. stated that she did not feel comfortable before, but later felt more comfortable talking about the abuse.

The case eventually proceeded to trial, at which the jury heard from nine witnesses: C.B., K.B., K.B.'s teacher, K.B.'s counselor, a Broken Arrow police officer, an expert pediatrician, Crystal, Ms. Michaels, and the defendant Mr. Jones.

Crystal was the first to testify, and she spoke to a range of topics. Her relevant testimony for the purposes of this appeal pertained to her belief that K.B. and C.B. were telling the truth about the allegations against Mr. Jones. There are five specific portions of this testimony that Mr. Jones challenges on appeal:

- After Crystal testified that she used to trust Mr. Jones, she was asked whether she still trusts him, to which she replied that she did not.
- Crystal testified that she was called to the school after K.B. told her teacher about Mr. Jones, which prompted the Government to ask—without defense objection—whether she believed her daughters. Crystal replied: "Yes. I believed them[.]"
- The Government later asked Crystal, without relevant defense objection, why she believed her daughters, to which she responded "I don't believe they would lie about anything like this. Why would a seven-year-old come to you and tell you someone is touching her[?]"
- Crystal further testified: "I believe they would tell the truth on something like this. They wouldn't lie."

- Finally, after Crystal testified that she used to think her daughters were "protected" when they lived with Mr. Jones, she was asked whether she still believed this, to which she replied that she did not.

R. vol. II, at 60–70.

After Crystal testified, K.B. and C.B. both provided testimony about the incidents they described in their forensic interviews. In addition, K.B.'s teacher and K.B.'s counselor both testified about their discussions with K.B. concerning the abuse and the subsequent investigation. The Broken Arrow officer provided more in-depth details about the investigation. The pediatrician provided information about K.B.'s medical examination. In rebuttal, Mr. Jones testified about his interactions with K.B. and C.B., denying that their accusations were true.

When Ms. Michaels testified, she spoke about C.B.'s second forensic interview. Her testimony began by explaining the purpose of forensic interviews and explained how such interviews are tailored to the age and development of each child. She also explained the various factors that go into a child's willingness to disclose information. For the purposes of this appeal, her relevant testimony came when she was asked about the interview with C.B., at which time she had agreed that C.B. appeared to be "forthcoming with information" and was "appropriate with her knowledge." Id. at 289.

The jury found Mr. Jones guilty on all counts and he was sentenced to three concurrent life sentences. This appeal followed, challenging the court's admission of

Crystal's testimony as to the truthfulness of her daughters and Ms. Michaels's testimony as to the forthcoming nature of C.B. during her forensic interview.

II. STANDARD OF REVIEW

Because Mr. Jones did not object to the testimony at issue here on the theory that it constituted improper credibility vouching, he concedes that this Court reviews the decision to permit this testimony for plain error. Under this standard, we will reverse the decision below "only when there is '(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" United States v. Archuleta, 865 F.3d 1280, 1290 (10th Cir. 2017) (quoting United States v. Wireman, 849 F.3d 956, 962 (10th Cir. 2017)).

III. DISCUSSION

A. Plain Error

The first issue we address is whether the district court plainly erred by permitting the testimony of Crystal and Ms. Michaels which, according to Mr. Jones, impermissibly vouched for the credibility of K.B. and C.B. Under Rule 608(a) of the Federal Rules of Evidence, a lay witness may only support another witness's credibility "by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character . . . after the witness's character for truthfulness has been attacked." FED. R. EVID. 608(a). In contrast, an expert witness can never "vouch for the credibility" of another witness because this would impermissibly "encroach[] upon the jury's vital

and exclusive function to make credibility determinations" and fail to "'assist the trier of fact' as required by Rule 702." United States v. Charley, 189 F.3d 1251, 1267 (10th Cir. 1999) (en banc).

Applying these rules, we agree that Crystal impermissibly vouched for K.B. and C.B., and that this error under Fed. R. Evid. 608(a) was plain. But we disagree with Mr. Jones's contention that Ms. Michaels's testimony violated Fed. R. Evid. 702.

1. Crystal's testimony

Crystal's testimony violated Rule 608(a) in two ways. First, because Rule 608(a) only permits testimony about a witness's character for truthfulness after that witness's character for truthfulness has been attacked, it is critical here that neither K.B.'s nor C.B.'s character for truthfulness had been attacked when Crystal testified. Indeed, Crystal was the very first witness, and her testimony about K.B.'s and C.B.'s truthfulness came in on direct examination, so no other witness even had a chance to attack the girls' character for truthfulness. Nor did defense counsel attack the girls' character for truthfulness during opening statements. Because the girls' character for truthfulness had never been attacked, the door had never been opened for testimony vouching for their truthfulness, and thus Crystal's testimony was improper. And since our caselaw has clearly established that this type of testimony is impermissible before a witness's character for truthfulness has been attacked, this error was plain. See United States v. Martinez, 923 F.3d 806, 819 (10th Cir. 2019) (concluding that testimony was

impermissible under Rule 608(a) because defendant's character for truthfulness had not been attacked).

Even if the door had been opened by an earlier challenge to the credibility of K.B. and C.B. (which we have ruled did not occur), Crystal's vouching testimony was impermissible under Rule 608(a) because she spoke directly to whether K.B. and C.B. were truthful on specific prior occasions, rather than to their character for truthfulness. In Charley, we noted that many courts have held that Rule 608(a) prohibits testimony about truthfulness on a specific occasion. 189 F.3d at 1267 n.21. This is because Rule 608 says that witnesses may only speak to another witness's "character for truthfulness or untruthfulness." FED. R. EVID. 608(a) (emphasis added). Because of this limitation, the testifying witness cannot speak to whether "another witness was truthful or not on a specific occasion." United States v. Schmitz, 634 F.3d 1247, 1268 (11th Cir. 2011) (emphasis added); see also 1 MCCORMICK ON EVID. § 43 (8th ed.) (" . . . the opinion must relate to the prior witness's character trait for untruthfulness, not the question of whether the witness's specific trial testimony was truthful.").

Crystal's testimony did just that. For example, Crystal testified that she "believed" K.B. and C.B when she was informed of their allegations at the school, thereby implying that the girls were truthful on this occasion. R. vol. II, at 61. She also testified that she believed their allegations because they wouldn't "lie about anything like this," further bolstering their truthfulness on that specific occasion. Id. at 69. This sort of testimony spoke to K.B. and C.B.'s truthfulness on "specific occasion[s]" specifically relating to Mr. Jones's charged conduct and therefore it violated Rule 608(a)'s

requirement that testimony only speak to a "general character" for truthfulness. See Schmitz, 634 F.3d at 1268.

This error was also plain. In general, an error is plain only when there is Supreme Court or controlling circuit authority resolving the issue. United States v. Marshall, 307 F.3d 1267, 1270 (10th Cir. 2002). This general principle, however, is most applicable "where the explicit language of a statute or rule does not specifically resolve an issue[.]" United States v. Edgar, 348 F.3d 867, 871 (10th Cir. 2003) (quoting United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003)). For this reason, we have found plain error when the Federal Rules of Criminal Procedure plainly rendered the decision below erroneous, even when there was no binding case on point. Id. Similarly, we have made clear that an error can be plain when statutory language is sufficiently clear, even when there is "no case exactly on point." United States v. Courtney, 816 F.3d 681, 686 (10th Cir. 2016). Thus, even without controlling caselaw, an error can be plain when the plain language of a rule or statute clearly settles the question.

In the case before us, although there is no binding caselaw which establishes that witnesses may not testify about another witness's truthfulness on a specific occasion, Rule 608(a) clearly speaks to the error below. As explained, Rule 608(a) plainly states that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." There is no dispute that K.B.'s and C.B.'s character for truthfulness had not yet been attacked by the defense when Crystal testified. And, as further explained above, Rule 608(a) says that

testimony may only vouch for a witness's "character for truthfulness," thereby plainly precluding the use of testimony to vouch for the truth of a witness on a "specific occasion." Schmitz, 634 F.3d at 1268. Crystal undoubtedly vouched for her daughters' truthfulness concerning a specific incident. Thus, for two separate reasons, Rule 608 plainly barred the erroneously admitted testimony below.[2]

In response, the Government argues that Crystal's testimony was permissibly based on her "personal knowledge or perceptions" as the girls' mother, relying on the Eighth Circuit's decision in In re Air Crash at Little Rock Ark., 291 F.3d 503, 515 (8th Cir. 2002). Aple. Br. 19. There, the Eighth Circuit concluded that Rule 701 did not bar a witness from testifying about one of the plaintiff's career prospects, given that the witness had personal knowledge of the plaintiff. In re Air Crash, 291 F.3d at 515–16. In re Air Crash thus concerns the requirement that lay witness testimony must be "rationally based on perception and helpful to a determination of a fact in issue" under Rule 701. Id. at 515. It does not pertain to Rule 608's bar on testimony about whether a witness was truthful in his or her testimony on a specific occasion. Even assuming Crystal's testimony was based on her personal knowledge and perceptions under In re Air Crash,

[2] Mr. Jones separately argues that Crystal's testimony also violated Rule 701. We disagree. We have previously held that expert testimony which bears on the truthfulness of another witness violates Rule 702, since testimony of this sort would not "assist the trier of fact." See Charley, 189 F.3d at 1267. We do not extend Charley to Rule 701(b), which requires that lay witness testimony be "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Unlike expert testimony under Rule 702, we do not believe that lay witness testimony which speaks to the truthfulness of a witness could never be "helpful" under Rule 701(b). We therefore hold only that this testimony runs afoul of Rule 608(a).

this would not cure the Rule 608 defect. That case is therefore unpersuasive on the issues before us.

The Government also cites United States v. Chiquito, 106 F.3d 311, 314 (10th Cir. 1997), to establish that the error here could not be plain. There, we considered whether it was improper for a lay witness to say "no" when asked whether she saw any indication that the victim was lying. Id. at 313. Critically, we did not actually determine whether this testimony was permissible, but instead held that if there was any error, it would have been harmless. Id. at 314. In other words, Chiquito does not speak to error; it speaks to harmlessness. And as we will discuss below, the error here was not harmless. Chiquito therefore does not bolster the Government's position.

2. Ms. Michaels's testimony

We next address Ms. Michaels's testimony, in which Ms. Michaels referred to C.B. as "forthcoming" during her forensic interview and said that C.B. was "appropriate with her knowledge" during the interview. R. vol. II, at 289. Unlike Crystal, Ms. Michaels testified as an expert witness, so her testimony was subject to the strictures of our decision in Charley, which prohibits experts from "vouch[ing] for the credibility" of a witness, as this "encroaches upon the jury's vital and exclusive function to make credibility determinations" and fails to "'assist the trier of fact' as required by Rule 702." 189 F.3d at 1267. Even so, it was not clearly erroneous for the district court to permit

Ms. Michaels's testimony at issue here because her testimony did not speak to C.B.'s truthfulness.

The most common definition of "forthcoming" concerns an individual's willingness to divulge information. See, e.g., Forthcoming, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993) ("readily available" and "affable, approachable, sociable"); Forthcoming, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) ("being about to appear or to be produced or made available" or "responsive, outgoing"); Forthcoming, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[R]eady to make or meet advances. Also, informative, responsive."). See also Heagney v. Wong, 915 F.3d 805, 814 (1st Cir. 2019) (applying the ordinary construction of "forthcoming" as "willing to divulge information").[3] To say that someone is "forthcoming" therefore means that he or she is willing to speak, not that he or she is being truthful. Indeed, if "forthcoming" meant "truthful," then to say that someone is "not forthcoming" would mean that they are not truthful. But it is perfectly sensible to refer to someone who refuses to speak as "not forthcoming," and this would not mean that the silent individual is a liar. To the contrary, it simply means that they are not willing to talk. Hence, when Ms. Michaels described C.B. as "forthcoming with information," it is highly likely that she meant that C.B. disclosed information with little

[3] Mr. Jones has identified a single definition of "forthcoming" which includes "candidness." Aplt. Br. 12–13 (citing Forthcoming, MERRIAM-WEBSTER'S DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/forthcoming). But a single reference to truth in just one of multiple definitions in a single dictionary is not enough to capture the ordinary usage of the word, let alone to establish plain error.

to no resistance—not that C.B. was being honest in everything she said. It was therefore not erroneous—and certainly not plainly erroneous—for the district court to permit this testimony.

As for Ms. Michaels's statement that C.B. was "appropriate with her knowledge of what happened to her," Mr. Jones concedes that it is "somewhat unclear" what Ms. Michaels meant by this phrase. Aplt. Br. 13. Nonetheless, Mr. Jones argues that, because the phrase came after the term "forthcoming," it was intended to vouch for C.B.'s truthfulness. Id. However, we believe that the phrase "appropriate with her knowledge" should be read in connection with the term "forthcoming," and thus should not be read to comment on C.B.'s truthfulness, but instead to refer to her willingness to divulge information. But, even if it were erroneous to allow this testimony, this error could not be plain because the meaning of the phrase is unclear (as Mr. Jones recognizes). See In Re Sealed Case No. 98-3116, 199 F.3d 488, 491 (D.C. Cir. 1999) ("To hold . . . that a record at worst ambiguous supports reversal is hardly consistent with plain error review.").

B. Substantial Rights

The next requirement of the plain error analysis is that the error must have affected the appellant's substantial rights. Archuleta, 865 F.3d at 1290. This requires a "'reasonable probability that, but for the error,' the outcome of the proceeding would have been different." United States v. Benford, 875 F.3d 1007, 1017 (10th Cir. 2017) (quoting Molina-Martinez v. United States, 578 U.S. 189, 194

(2016)). We conclude that Crystal's testimony affected Mr. Jones's substantial rights.

It is undisputed that K.B. and C.B. are the only witnesses to Mr. Jones's alleged crime. In this case there was no forensic evidence of the crimes charged nor any third-party witnesses. In such a case, where the outcome "boil[s] down to a believability contest" between the victims and the defendant, testimony vouching for the credibility of the victim is often prejudicial. United States v. Whitted, 11 F.3d 782, 787 (8th Cir. 1993). Indeed, the Government seemed to recognize as much at trial, since the prosecution told the jury: "[i]f you believe [K.B.] and [C.B.], the defendant is guilty." R. vol. II, at 321. Thus, given the importance of K.B.'s and C.B.'s credibility to a finding of guilt, amplified by the jury hearing the girls' mother vouch for them, there is a reasonable probability that Crystal's improper vouching testimony affected the outcome. Cf. United States v. Hill, 749 F.3d 1250, 1266 (10th Cir. 2014) (defendant's substantial rights were affected when expert impermissibly testified as to the defendant's credibility).

The Government's two arguments to the contrary are unavailing. First, the Government contends that the district court cured any issue by instructing the jury that they "are the sole judges of [] credibility." R. vol. I, at 193. This does not cure this issue because there was still no indication in these instructions that the jurors should disregard Crystal's vouching for her daughters' credibility. So, even if the jurors understood that they were the final arbiters of credibility, they also could have believed that they were permitted to rely on Crystal's testimony in evaluating

credibility. As such, this jury instruction does not eliminate the prejudice to Mr. Jones.

Second, the Government argues that there was "ample evidence" beyond Crystal's testimony that the jury could use to evaluate K.B.'s and C.B.'s credibility. Aple. Br. 22. But the only evidence that the Government cites here is the testimony of K.B. and C.B., and as we have discussed, this "case boil[s] down to a believability contest" between K.B., C.B., and Mr. Jones. See Whitted, 11 F.3d at 787.[4] In other words, the only other evidence cited by the Government here is testimony that Crystal vouched for, meaning that this evidence was also tainted by the erroneous vouching. And the Government ignores the testimony which arguably undermined the girls' credibility, which could have had more weight absent Crystal's impermissible testimony. See, e.g., R. vol. II, at 270, 272–73 (testimony establishing that Crystal had said that K.B. lies and that she had doubts whether Mr. Jones had assaulted K.B.). Although it is possible that the jury could have believed the girls even without Crystal's testimony, reversal does not require us to conclude with certainty that her testimony affected the outcome; there need only be a "reasonable probability" that it did. Benford, 875 F.3d at 1017. This standard has been met.

[4] In this way, the case is different from Charley, where we held that it was harmless error to admit the inadmissible testimony because there was overwhelming evidence implicating the defendant. 189 F.3d at 1271. Here, the case came down to the girls' word versus Mr. Jones's.

C. Fairness, Integrity, or Public Reputation of Judicial Proceedings

The final requirement of the plain error standard is that the error must have "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Archuleta, 865 F.3d at 1290. Mr. Jones has satisfied this requirement. Crystal's testimony—which vouched for the truthfulness of her daughters on specific occasions—is "intolerable under our system of jurisprudence, which has long recognized jurors' ability and sole responsibility to determine credibility." Hill, 749 F.3d at 1267. The admission of her testimony thus undercut Mr. Jones's ability to present his defense to the fullest. And, because there is a reasonable probability that Mr. Jones would not have been convicted absent the error here, "ignoring it would offend core notions of justice and seriously affect the fairness, integrity, and public reputation of judicial proceedings." Id. We thus conclude that Mr. Jones has met all four factors of the plain error standard and is entitled to relief.

IV. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND with instructions to VACATE Jeffrey Jones's conviction and sentence so that a new trial or other proceedings can occur expeditiously.