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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 43108
 Plaintiff-Respondent,)
) Canyon Co. Case No.
 v.) CR-2013-25890
)
 DAVID GEORGE HEROD,)
)
 Defendant-Appellant.)
)
)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE	4
ARGUMENT	5
Herod Has Failed To Show An Abuse Of Discretion Because The Challenged Testimony Was Admissible Evidence Relevant To Credibility And Not An Inadmissible Opinion That A Witness Was Telling The Truth	5
A. Introduction.....	5
B. Standard Of Review	6
C. Nurse Ortega Did Not Provide An Inadmissible Opinion On The Truth Of T.W.'s And A.M.'s Statements	6
D. Any Error Is Necessarily Harmless	9
CONCLUSION	12
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991)	9
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	9
<u>Deck v. Missouri</u> , 544 U.S. 622 (2005)	9
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673 (1986)	9
<u>Kuhn v. Coldwell Banker Landmark, Inc.</u> , 150 Idaho 240, 245 P.3d 992 (2010)	6
<u>Neder v. United States</u> , 527 U.S. 1 (1999)	10
<u>Premo v. Moore</u> , 562 U.S. 115 (2011)	9, 10
<u>State v. Allen</u> , 123 Idaho 880, 85 P.2d 625 (Ct. App. 1993)	6
<u>State v. Almaraz</u> , 154 Idaho 584, 301 P.3d 242 (2011)	7
<u>State v. Arrasmith</u> , 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998)	6
<u>State v. Blackstead</u> , 126 Idaho 14, 878 P.2d 188 (Ct. App. 1994)	8, 9, 11
<u>State v. Critchfield</u> , 153 Idaho 680, 290 P.3d 1272 (Ct. App. 2012)	7
<u>State v. Dutt</u> , 139 Idaho 99, 73 P.3d 112 (Ct. App. 2003)	8
<u>State v. Hester</u> , 114 Idaho 688, 760 P.2d 27 (1988)	6
<u>State v. Joslin</u> , 145 Idaho 75, 175 P.3d 764 (2007)	6
<u>State v. Konechny</u> , 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000)	6
<u>State v. Lindsey</u> , 115 Idaho 184, 765 P.2d 695 (Ct. App. 1988)	10
<u>State v. Parton</u> , 154 Idaho 558, 300 P.3d 1046 (2013)	6
<u>State v. Perry</u> , 139 Idaho 520, 81 P.3d 1230 (2003)	6
<u>State v. Phillips</u> , 123 Idaho 178, 845 P.2d 1211 (1992)	10

RULES

I.R.E. 702.....6

STATEMENT OF THE CASE

Nature Of The Case

David George Herod appeals from his conviction for two counts of lewd conduct with a child.

Statement Of The Facts And Course Of The Proceedings

A grand jury indicted Herod on two counts of lewd conduct with a child involving two victims. (R., pp. 23-24.) The matter proceeded to jury trial. (R., 148-65.)

At the trial eleven-year-old T.W. testified that the second time she slept over at her best friend [REDACTED] house [REDACTED] father, the Defendant Herod, “touched [her] on the upper private part ... of the body.” (Trial Tr., p. 38, Ls. 3-11; see also p. 20, Ls. 19-24; p. 27, L. 1 – p. 43, L. 7.) The next time she slept over Herod touched her under her panties. (Trial Tr., p. 44, L. 1 – p. 51, L. 19.) On a third occasion Herod “pull[ed] [her] over” and “[made her] touch him” on his “private part.” (Trial Tr., p. 54, Ls. 18-20; p. 55, Ls. 4-11; see also p. 51, L. 20 – p. 56, L. 13.)

Eleven-year-old A.M. also testified at the trial. (Trial Tr., p. 305, Ls. 11-19.) She slept over at her friend Katelynn’s house several times. (Trial Tr., p. 313, L. 2 – p. 314, L. 7.) On one of those sleepovers A.M. woke up to discover Katelynn’s father, the Defendant Herod, “touching [her] in [her] private part.” (Tr., p. 323, L. 17 – p. 324, L. 14.) He then tried to get her to touch him. (Trial Tr., p. 325, Ls. 13-25.) Another time sleeping over, this time in a tent in the back yard,

Herod tried to touch A.M. with a “massager” that she could not see in the dark, but heard it make a “buzzing” sound. (Trial Tr., p. 327, L. 5 – p. 333, L. 4.)

At the trial the state also called Alisa Ortega, a pediatric nurse practitioner, as a witness. (Trial Tr., p. 132, Ls. 10-24.) She explained how interviews of possible [REDACTED] victims of sexual abuse are generally conducted. (Trial Tr., p. 136, L. 11 – p. 140, L. 20.) Based on her expertise, she testified that factors deemed important in assessing a child’s statements about sexual abuse include development and knowledge (Trial Tr., p. 141, L. 6 – p. 143, L. 17); embarrassment (Trial Tr., p. 143, L. 18 – p. 144, L. 13); and understanding of ramifications (Trial Tr., p. 144, L. 14 – p. 145, L. 9). She explained delayed disclosure—where a victim of sexual abuse may not immediately report it or may withhold events or details due to some of the factors already discussed. (Trial Tr., p. 145, L. 10 – p. 148, L. 13.) Other considerations in evaluating the child’s statements include body language (Trial Tr., p. 148, L. 14 – p. 149, L. 4); a physical examination for signs of abuse and the significance of finding no such signs (Trial Tr., p. 149, L. 5 – p. 153, L. 2); how much detail the [REDACTED] is able to use in describing the abuse (Trial Tr., p. 153, Ls. 9-24); the amount of repetition in descriptions of the abuse (Trial Tr., p. 154, L. 18 – p. 155, L. 5); and appropriateness of the descriptions based on the child’s development and knowledge (Trial Tr., p. 155, Ls. 6-23).

Relevant to this appeal, Herod objected to Ortega’s testimony that the amount of detail an interviewee can provide about the incident would go to assessing whether the claim of sexual abuse was genuine or fabricated, because

the testimony went to credibility. (Trial Tr., p. 153, L. 25 – p. 154, L. 4.) The district court overruled the objection. (Trial Tr., p. 154, L. 9.)

Following trial, the jury found Herod guilty on both counts. (R., pp. 204-05.) The district court entered judgment (R., pp. 245-47) and Herod timely filed a notice of appeal (R., pp. 263-67).

ISSUE

Herod states the issue on appeal as:

Did the district court abuse its discretion when it allowed Ms. Ortega to testify on how she determined whether an allegation is false, because her testimony passed upon the credibility of the complaining witnesses and thereby usurped the jury's function?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Pediatric nurse practitioner Ortega testified that one factor for evaluating a child's statement about having been sexually abused is the child's ability to recall details. On appeal Herod claims that this testimony was an inadmissible comment on the credibility of witnesses. Does Herod's argument fail because the challenged testimony was evidence relevant to credibility but was not an opinion on credibility?

ARGUMENT

Herod Has Failed To Show An Abuse Of Discretion Because The Challenged Testimony Was Admissible Evidence Relevant To Credibility And Not An Inadmissible Opinion That A Witness Was Telling The Truth

A. Introduction

Alisa Ortega, a pediatric nurse practitioner specializing in assessing [REDACTED] sexual abuse, testified about a variety of factors used by her professionally to determine whether to diagnose [REDACTED] sexual abuse. Relevant here, one of those factors includes how much detail the [REDACTED] is able to use in describing the abuse, because a lack of detail may indicate fabrication. (Trial Tr., p. 153, Ls. 9-24.) Herod objected, claiming this testimony amounted to an improper opinion that the victims were telling the truth. (Trial Tr., p. 153, L. 25 – p. 154, L. 4.) The prosecutor responded by pointing out that Nurse Ortega “was not giving an opinion” as to whether the victims’ statements were true. (Trial Tr., p. 154, Ls. 5-8.) The district court overruled the objection. (Trial Tr., p. 154, L. 9.)

On appeal Herod argues that Ortega’s testimony “on how she determined [sic] whether an allegation was false” was inadmissible because it “passed upon the credibility of witnesses and thereby usurped the jury’s function.” (Appellant’s brief, p. 8.) Herod’s argument fails because Nurse Ortega did not offer an inadmissible opinion on credibility, but instead offered testimony to assist the jury in making its own credibility determination. Herod’s appellate argument that an expert may offer no testimony relevant to the jury’s credibility determinations is without legal merit.

B. Standard Of Review

“The determination of whether expert testimony will assist the trier of fact lies within the broad discretion of the trial court.” State v. Parton, 154 Idaho 558, 563, 300 P.3d 1046, 1051 (2013) (quoting Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 252, 245 P.3d 992, 1004 (2010)).

C. Nurse Ortega Did Not Provide An Inadmissible Opinion On The Truth Of T.W.’s And A.M.’s Statements

“To be admissible, the expert’s testimony must assist the trier of fact to understand the evidence or to determine a fact in issue.” State v. Joslin, 145 Idaho 75, 81, 175 P.3d 764, 770 (2007) (quotations omitted); see also I.R.E. 702. “The function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror.” State v. Arrasmith, 132 Idaho 33, 42, 966 P.2d 33, 42 (Ct. App. 1998) (citations omitted). Only where the normal experience of the jurors permits them to draw proper conclusions from the facts and circumstances are expert conclusions or opinions inadmissible. Id.

An expert’s testimony is “admissible up to the point where an expression of opinion would require the expert to pass upon the credibility of witnesses or the weight of disputed evidence.” State v. Perry, 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003) (citing State v. Hester, 114 Idaho 688, 696, 760 P.2d 27, 35 (1988); State v. Konechny, 134 Idaho 410, 419, 3 P.3d 535, 544 (Ct. App. 2000); State v. Allen, 123 Idaho 880, 885, 85 P.2d 625, 630 (Ct. App. 1993)). However, “[o]nly venturing beyond that point would usurp the jury function.” State v.

Critchfield, 153 Idaho 680, 684, 290 P.3d 1272, 1276 (Ct. App. 2012). Thus, while a witness may not opine on the truthfulness of another witness' statement, an expert may impart knowledge that will assist the jury to make its own evaluation. See State v. Almaraz, 154 Idaho 584, 599-600, 301 P.3d 242, 257-58 (2011) (expert opinion helping jury determine reliability of eyewitness identification admissible); Critchfield, 153 Idaho at 684-85, 290 P.3d at 1276-77 (same).

Nurse Ortega did not “venture beyond [the] point” of “pass[ing] upon the credibility of witnesses or the weight of disputed evidence.” Rather, she merely provided many factors she employed when deciding whether to diagnose sexual abuse. The testimony Herod objected to was as follows:

Q. What sort of things do you look at to determine whether the allegation is false?

A. We look at how much detail the [REDACTED] can give. If they're not able to give any detail, well, he did this and that's it, you know, you start to question. You know, they're asked well, you know, how were your clothes? What were you wearing? If they're not able to give any type of detail about how it may have felt or what they heard or saw or anything like that, you start to question a little bit.

Now, if they're able to give a lot of detail, well, they were wearing this, this, and this, I was wearing this, you know, it felt like this, you know, then you think okay, it's probably true, probably plausible.

(Trial Tr., p. 153, Ls. 9-24.) This testimony, while *relevant* to credibility, was not an opinion on the credibility of the victims in this case. Like the other factors Nurse Ortega testified about (such as age, development, physical signs of abuse, otherwise unexplained knowledge of sexual matters, and an unusual amount of repetition in describing the alleged abuse), this merely provided assistance to the

trier of fact in evaluating the victims' disclosures and statements regarding sexual abuse.

Herod argues that Nurse Ortega "indirectly vouched for the truth of T.W.'s and A.M.'s accounts." (Appellant's brief, p. 11.) A synonym for "indirectly vouched" is corroborated. Corroboration is not impermissible, however. No doubt had the factors Nurse Ortega testified to ultimately run in Herod's favor, she would have been a defense witness.

Herod's "indirectly vouched" argument was effectively rejected by the Idaho Court of Appeals in State v. Blackstead, 126 Idaho 14, 21-22, 878 P.2d 188, 195-96 (Ct. App. 1994). In that case the state's expert testified as to why many victims delay disclosing sexual abuse. Id. at 22, 878 P.2d at 196. The defendant argued this testimony "amounted to nothing more than vouching for the victim's credibility" when she testified why she delayed disclosing the abuse. Id. This argument, stated the Court, "overlooks the distinction between testimony that merely opines as to the victim's credibility and testimony which corroborates elements of the victim's story or aids the jury in evaluating the victim's truthfulness." Id.; see also State v. Dutt, 139 Idaho 99, 104-05, 73 P.3d 112, 117-18 (Ct. App. 2003) ("whether the victim's conduct in disclosing the details of her sexual abuse in the present case was consistent with the behavior of other sexually abused children was a ... proper subject of testimony by a qualified expert").

Nurse Ortega's testimony did not vouch, directly or indirectly, for T.W.'s and A.M.'s testimony. Rather, she provided expert testimony on several factors

employed by her professionally within her training and experience to evaluate alleged victims of sexual abuse. Herod's argument "overlooks the distinction between testimony that merely opines as to the victim's credibility and testimony which corroborates elements of the victim's story or aids the jury in evaluating the victim's truthfulness." Blackstead, 126 Idaho at 22, 878 P.2d at 96. Because the testimony was admissible, Herod has failed to show an abuse of discretion.

D. Any Error Is Necessarily Harmless

A trial error can be declared harmless if the appellate court concludes on *de novo* review it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). To show harmless error the state has "the burden of showing that it was clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Premo v. Moore, 562 U.S. 115, 130 (2011) (internal quotations omitted). Where the error placed impermissible evidence, argument or information before the jury the Supreme Court has required the prosecution to show beyond a reasonable doubt that the error did not contribute to the conviction. Chapman, 386 U.S. at 24 (admission of confession that should have been suppressed); Arizona v. Fulminante, 499 U.S. 279, 295-96 (1991) (argument for guilt from defendant's silence); Deck v. Missouri, 544 U.S. 622, 635 (2005) (visible shackles without cause at jury trial). An "otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). In conjunction with the review of the whole record, review of the strength

of the state's evidence is appropriate. Neder v. United States, 527 U.S. 1, 16-20 (1999); see also Premo, 562 U.S. at 129-31. The analysis ultimately focuses "on the underlying fairness of the trial." Neder, 527 U.S. at 18-19.

Even if, despite overwhelming authority to the contrary, this Court should adopt Herod's "indirectly vouched" standard and hold inadmissible that portion of Nurse Ortega's testimony regarding amount of detail being a consideration in whether the alleged sexual abuse happened, such error is necessarily harmless. Certainly the jury, either on its own or upon invitation of either the prosecutor or defense counsel, could have considered the amount of detail in T.W.'s and A.M.'s statements and testimony as factors weighing on truth. See, e.g., State v. Phillips, 123 Idaho 178, 181, 845 P.2d 1211, 1214 (1992) ("details and generalities" proper considerations in jury's assessment of credibility (internal citation omitted)); State v. Lindsey, 115 Idaho 184, 186, 765 P.2d 695, 697 (Ct. App. 1988) (the "precision of detail" provided by an informant properly considered to support his credibility). Because the jury was already free to consider the amount of detail provided by the witnesses in assessing their credibility, nothing in the record indicates that the challenged testimony could have played any improper role in the verdict.

Equating Nurse Ortega's testimony to polygraph evidence, Herod argues that credibility of the victims was of central importance in the case, but offers no theory on how the jury would have weighed the amount of detail in the victims' statements differently had the challenged testimony not been presented. (Appellant's brief, pp. 14-15.) That Herod equates the challenged testimony to

polygraph evidence shows that his argument truly “overlooks the distinction between testimony that merely opines as to the victim’s credibility and testimony which corroborates elements of the victim’s story or aids the jury in evaluating the victim’s truthfulness.” Blackstead, 126 Idaho at 22, 878 P.2d at 96. Encouraging the jury to consider the detail the victims were able (or not able) to provide in their statements is in no way analogous to claiming they passed polygraphs. Herod’s reliance on such an inapt analogy shows the weakness of his argument.

Nurse Ortega testified that she considers the child’s ability or inability to provide detail about the alleged incident of sexual abuse in determining whether the abuse in fact happened. Although this was admissible testimony, even if it was not admissible the jury was allowed to consider the presence or absence of detail in T.W.’s and A.M.’s accounts in judging their credibility. Thus, the testimony Herod claims was inadmissible merely invited to the jury to do what it could have done anyway. Admission of the challenged testimony had no possible effect on the jury’s determination of credibility and could therefore have had no perceivable prejudicial effect on the outcome of the case. Its admission was, if error, harmless error.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 17th day of March, 2016.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of March, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. McGREEVY
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/s/ Kenneth K. Jorgensen
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KKJ/dd