IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Opinion Number: _____

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No. A-1-CA-41732

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

THOMAS A. SMITH,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Douglas R. Driggers, District Court Judge

Raúl Torrez, Attorney General
Teresa Ryan, Assistant Solicitor General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Melanie C. McNett, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

YOHALEM, Judge.

{1} Defendant Thomas A. Smith appeals from his conviction for one count of criminal sexual penetration of a minor (CSPM) in the first degree, contrary to NMSA 1978, Section 30-9-11(D)(1) (2009); and one count of criminal sexual contact of a minor (CSCM) in the third degree, contrary to NMSA 1978, Section 30-9-13(C)(1) (2003). Defendant contends that the testimony presented at trial by the State's expert in sexual abuse of minors improperly bolstered Victim's testimony and vouched for her credibility. Reviewing for plain error, we agree with Defendant that the expert repeatedly vouched for Victim's credibility and that this improper expert testimony creates grave doubts about the fairness and integrity of the trial. We reverse and remand for a new trial.

DISCUSSION

{2} Victim is Defendant's granddaughter. She lived with Defendant in his home with her six siblings and her mother from the time she was three years old until she disclosed sexual abuse by Defendant when she was thirteen years old.

{3} Defendant argues that the testimony presented at trial by licensed clinical social worker Sueann Kenney-Noziska, who was qualified by the district court as an expert in child sexual abuse and delayed disclosure of sexual abuse, improperly vouched for Victim's credibility. Defendant contends that the challenge to the

admission of the expert testimony raised on appeal was preserved, or, if not preserved, was plain error that requires reversal. The State concedes that a portion of Kenney-Noziska's testimony impermissibly bolstered Victim's credibility, but argues that Defendant failed to preserve this issue for appeal, invited the error, and that any error was not sufficiently prejudicial to amount to plain error.

{4} We conclude that Defendant's challenge on appeal, focused on specific testimony by Kenney-Noziska directly bolstering Victim's credibility, was not preserved by Defendant's motion in limine, which generally objected to her testimony as a whole. We also conclude that the invited error doctrine does not apply to bar our review for plain error. Because we conclude that the challenged expert testimony repeatedly bolstered Victim's credibility, putting the integrity of the proceedings and of the verdict in doubt, we reverse and remand for a new trial.

I. The Expert's Testimony

{5} Kenney-Noziska testified for the State as an expert in child sexual abuse and delayed disclosure of such abuse. She had not examined or treated Victim. In addition to relying on literature in the field of child sexual abuse, Kenney-Noziska testified at trial that she had prepared for her testimony by reviewing reports of the criminal investigation and by watching the safehouse interviews of Victim, and of two witnesses who would testify after Victim at trial—Brother, who testified for the defense, and Victim's fourth grade friend, who testified for the State. The safehouse

interviews reviewed by Kenney-Noziska were not introduced into evidence at trial, and so were never available to the jury.

{6} Much of the State's initial questioning of Kenney-Noziska focused on the psychological research about the way children typically react to sexual abuse. She began her testimony by telling the jury that her testimony would be very general and by saying that she was not interested in the credibility of the Victim and the witnesses or in whether they were telling the truth.

{7} Although the State's questioning began with general questions about the research on delayed disclosure and the kinds of barriers that can cause delayed disclosure of sexual abuse by a child, consistent with Kenney-Noziska's introduction to her testimony, the State's questioning soon elicited testimony from Kenney-Noziska regarding her opinion about the safehouse interviews of Victim and Brother that she had reviewed prior to trial. The following exchange took place:

> Prosecutor: Now going to the . . . forensic interviews that you had a chance to view. . . you . . . watched the interview of the [V]ictim, as well as [Brother]. What . . . were some elements that you noted there that spoke to the, I guess alignment with what the research says related to this delayed disclosure?
>
> Kenney-Noziska: So, when I watched [V]ictim's forensic interview . . . the way her disclosure unfolded, the things that she disclosed, all of that stuff for me as an expert, I was able to take it in and go, "Oh, that makes sense. That looks like the majority of the sexual abuse cases I've worked with in the last twenty -five years."

> I will say when I listen to [Brother's] interview, what took me back is even from the very beginning and then throughout the interview he was adamant that his job was to say his grandfather did not sexually abuse his sister and that his sister was a liar. Even when he was asked direct questions: "Tell me about . . . ."

Defendant interrupted at this point, objecting to this testimony. The district court sustained the objection. The reason stated for the objection was hearsay.

{8} The State returned to questioning Kenney-Noziska about circumstances the literature shows might delay or act as a barrier to disclosure by a child-victim of sexual abuse, giving examples chosen from Victim's circumstances, such as abuse by a close relative, abuse by someone living in the same home, financial dependency on the abuser, and the presence of other traumas in Victim's life, such as a father in prison. The State completed its examination and defense counsel began his cross-examination.

{9} Defense counsel questioned Kenney-Noziska about whether she had to take into account false disclosures by children, to which she responded, "Yes." She also affirmed that the research in the field of child sexual abuse discusses factors that might cause a child to make a false allegation, but testified she could not remember what these factors were. Defense counsel then refreshed Kenney-Noziska's memory of the factors discussed in the literature. Kenney-Noziska agreed with defense counsel that the reasons the literature in the field shows children might falsely

disclose sexual abuse include child custody disputes, mental health issues, a desire for revenge, a mistaken belief, material gain, malingering, and concealment—all issues the evidence showed were present in Victim's case. Kenney-Noziska then interjected the following comment: "[Y]ou're kind of cherry picking what you like from that article. And that's not what the whole article talks about either. So that's problematic because I feel like my testimony is misrepresenting the literature because you're just picking out the bits and pieces that fit with your narrative." Defense counsel then asked whether "there are other factors of false reporting that we need to know about," and, rather than answering the question, Kenney-Noziska responded that "what the experts say in the field is that the vast majority of allegations are simply true and that it's very rare that an individual lies about childhood sexual abuse." When defense counsel asked whether certain testimony of Victim, such as her disclosure that she resented being asked by her mother to do what she thought were excessive chores, would be a consideration, Kenney-Noziska responded as follows:

> With everything I reviewed and the forensic interviews that I watched, I mean, she, she has made four disclosures to different people and she was a child when she made her first disclosure. She was in fourth grade. I don't think she has the wherewithal to put together revenge or I'm gonna live with . . . my grandma in 2020 if I keep this story up. It just, it's so farfetched based on the number of outcries that she made over a period of time. . . . That factor [(revenge)] just doesn't ring true for the case, for me, when I looked at the reports and the forensic interview.

{10} Defense counsel later asked Kenney-Noziska to confirm that she is not an expert in truth versus lies and that she could not say that Victim is credible. She agreed.

{11} On redirect, the State elicited testimony repeating Kenney-Noziska's opinion that a child rarely makes a false allegation of sexual abuse. After recross and a bench conference, defense counsel asked Kenney-Noziska a question submitted by a juror: "Is there research on the prevalence of false disclosures?" She answered, "There's a statistic that says 92 to 98 percent of allegations of sexual abuse are true and only two to 8 percent are false." The State ended its reply closing argument by telling the jury that it would not be "a reasonable conclusion" for the jury to decide that Victim falls into the two to 8 percent category of children who are not telling the truth, echoing Kenney-Noziska's testimony.

II. The Alleged Error Was Not Adequately Preserved

A. Lack of Preservation

{12} Defendant argues that he adequately preserved his objection to Kenney-Noziska's challenged testimony in his pretrial motion in limine, and again when he renewed that motion prior to jury selection at trial. We do not agree.

{13} In his motion in limine, Defendant objected to Kenney-Noziska's intended testimony about the research in the field of child sexual abuse on delayed disclosure and other responses by children to having been sexually abused. The State

represented in their pretrial disclosure of Kenney-Noziska as an expert witness for the State that her testimony would not address Victim specifically, since she had not examined Victim, but that her testimony would be limited to general testimony about how children respond to sexual abuse. The defense sought the exclusion of this testimony on grounds that Kenney-Noziska had not examined Victim and that, therefore, her testimony about the research was irrelevant to prove any element of the charged crimes and would improperly bolster Victim's testimony. Defendant further argued that without the expert having examined Victim, there was no nexus between an expert's "generalized academic musings in the field of child abuse, child trauma, and delayed disclosure" and Victim's mental condition. The district court, consistent with New Mexico precedent, refused to exclude the expert testimony on this basis. *See State v. Barraza,* 1990-NMCA-026, ¶ 18, 110 N.M. 45, 791 P.2d 799 (holding that expert testimony based on research in the field disabusing the jury of any misconceptions it might have had regarding how rape victims react to the offense is appropriate).

{14} Defendant does not renew this objection on appeal. Instead, Defendant challenges Kenney-Noziska's testimony (1) bolstering Victim's credibility based on the expert's review of Victim's safehouse interview; (2) disclosing that Victim had alleged that Defendant was the perpetrator of the abuse; (3) opining that Brother was lying when he questioned Victim's allegations of sexual abuse by Defendant, (4)

reporting that it is extremely rare for a child who is sexually abused to lie; and (5) stating that statistics show only two to 8 percent of children lie about sexual abuse.

{15} To preserve an issue for review, "a party must fairly invoke a ruling or decision by the district court." *State v. Franklin*, 2018-NMSC-015, ¶ 8, 413 P.3d 861 (citing Rule 12-321(A) NMRA). "It is essential that the . . . grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." *Id.* (alteration, internal quotation marks, and citation omitted). We agree with the State that Defendant's motion in limine and pretrial objections did not adequately alert the trial court to the need to consider the relevance and potential prejudice of the testimony now challenged on appeal on the basis that it impermissibly vouches for the truth of Victim's testimony. Our review therefore must be for plain error.

B. The Invited Error Doctrine Does Not Bar Our Review for Plain Error

{16} The State argues that much of the challenged expert testimony was elicited by defense counsel's cross-examination, or was elicited on redirect by the State in response to that cross-examination, and that therefore, the invited error doctrine precludes our review of Kenney-Noziska's expert testimony for plain error. The invited error doctrine applies when the error challenged on appeal results from a defendant's own act. *See State v. Padilla*, 1986-NMCA-063, ¶ 18, 104 N.M. 446, 722 P.2d 697 (stating that a criminal defendant has not been denied a fair trial by the

state when an error results from their own act). We will not provide relief on appeal for such an invited error.

{17} Although many of the expert's challenged statements were made during cross-examination by defense counsel, this is not an appropriate case in which to apply the invited error doctrine. We do not agree with the State that it was Defendant who, for strategic advantage, invited the improper testimony at issue here. Our review of the record shows that it was the State, on direct examination of its expert witness, that first exceeded the bounds for Kenney-Noziska's expert testimony it had relied on in its response to Defendant's motion in limine by asking her to comment on the safehouse interviews she reviewed. This question elicited a full-blown response from Kenney-Noziska on the credibility of the witnesses. Kenney-Noziska stated her opinion that Victim's testimony was truthful, disclosed Victim's identification of Defendant as the perpetrator, and discredited Brother's credibility as to his testimony contradicting Victim's claims.

{18} The State had assured Defendant and the district court in responding to the defense's motion in limine that Kenney-Noziska's testimony would be limited to a general discussion of research concerning the reactions generally seen in children who have been sexually abused. The State acknowledged that Kenney-Noziska had not examined or treated Victim, and the State, therefore, assured defense counsel

and the court that she was "unable to directly testify as to whether [Victim] is telling the truth even if such testimony were admissible."

{19} Consistent with these limits on the scope of her testimony, Kenney-Noziska told the jury at the outset of her testimony that she would be speaking very generally. She stated specifically that she was not interested in the credibility of the Victim and the witnesses or in whether they were telling the truth. Then, minutes later, the State asked her about her impression of the safehouse interviews of Victim and Brother, both of whom would be testifying later at trial. Kenney-Noziska responded by stating her opinion that Victim's story "makes sense," commenting on both Victim's demeanor and the content of her testimony, and then testifying to her opinion that Brother was lying when he tried to discredit Victim's description of events. In the course of that testimony, Kenney-Noziska repeated Victim's identification of Defendant as the perpetrator of the abuse. Kenney-Noziska testified on direct examination by the State as follows:

> So, when I watched [Victim's] forensic interview . . . the way her disclosure unfolded, the things that she disclosed, all of that stuff for me as an expert, I was able to take it in and go, "Oh, that makes sense. That looks like the majority of the sexual abuse cases I've worked with in the last twenty years."
>
> I will say when I listen to [Brother's] interview, what took me back is even from the very beginning and then throughout the interview he was adamant that his job was to say *his grandfather* did not sexually abuse his sister and that his sister was a liar. Even when he was asked direct questions: tell me about . . . .

At this point, Defense counsel interrupted this testimony with a hearsay objection, which the district court sustained. Defense counsel did not preserve the arguments made on appeal for our review.

{20} On cross-examination, defense counsel attempted to remedy the damage caused by the quoted testimony. Defense counsel focused on the articles Kenney-Noziska had disclosed to the defense before trial, which addressed the factors in a child's life that might lead to a false disclosure of sexual abuse. Kenney-Noziska responded with testimony again vouching for the credibility of Victim and of Victim's story directly and indirectly by contending that child victims of sexual abuse rarely lie—testimony which the State pursued on redirect. *See supra.*, at 5-7.

{21} Because the State was the first to elicit on direct examination plainly improper expert testimony vouching for Victim's credibility, and in doing so, stepped outside the limits it had disclosed to the defense and the court for Kenney-Noziska's testimony, we reject the State's argument that we should apply the invited error doctrine and refuse to consider whether the admission of the challenged testimony was plain error. *See State v. Martinez*, 2026-NMCA-034, ¶¶ 21-22, 585 P.3d 1041 (refusing to apply invited error doctrine where the challenged testimony was first elicited by the prosecution on direct examination), *cert. denied*, 2026-NMCERT-003 (S-1-SC-41240); *see also State v. Martinez*, 2008-NMCA-052, ¶ 15, 143 N.M. 773, 182 P.3d 154 (observing that "circumstances not caused or initiated by [the

d]efendant" are not invited error); *State v. Foxen*, 2001-NMCA-061, ¶ 12, 130 N.M. 670, 29 P.3d 1071 (declining to hold that the defendant invited an error when "only a portion of the complete problem may have been 'invited'" by defense counsel and defense counsel's conduct was "simply the result of oversight or neglect").

III. The Challenged Expert Testimony Improperly Bolstered Victim's Credibility and Put in Doubt the Fairness and Integrity of the Proceedings

A. Standard of Review

{22} Rule 11-103(E) NMRA allows this Court to review evidentiary questions that are not preserved for plain error when the asserted error "affected substantial rights," of the defendant, even though they were not brought to the attention of the trial judge. *State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071 (internal quotation marks and citation omitted). To find plain error, we must first find that there was error in the admission of evidence. *State v. Gwynne*, 2018-NMCA-033, ¶ 27, 417 P.3d 1157. Mere error, however, is not enough; this Court must be convinced "that admission of the [evidence] constituted an injustice that created grave doubts concerning the validity of the verdict." *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (internal quotation marks and citation omitted); *see State v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521 ("We will not reverse on the basis of plain error unless the error affected a substantial right of the defendant." (alteration, internal quotation marks, and citation omitted)). The focus of our review after

finding error is on the error's effect on the overall fairness and integrity of the proceedings, rather than on whether the defendant's guilt is so doubtful it would shock the conscience to allow it to stand. *See Chavez*, 2024-NMSC-023, ¶ 11. "In determining whether there has been plain error, we must examine the alleged errors in the context of the testimony as a whole." *State v. Dylan J.*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44 (omission, internal quotation marks, and citation omitted).

B. The Expert's Challenged Testimony Improperly Bolstered Victim's Credibility and Its Admission, Therefore, Was Error

{23} Our Supreme Court has held in relation to expert testimony in a child sexual abuse prosecution that "[d]etermining the [victim]'s credibility or truthfulness is not a function for an expert in a trial setting, but rather is an issue reserved for the jury." *Lucero*, 1993-NMSC-064, ¶ 18. Our Supreme Court has acknowledged that psychologists, social workers and other experts in child sexual abuse have no special expertise in discerning who is telling the truth. *See State v. Alberico*, 1993-NMSC-047, ¶ 85, 116 N.M. 156, 861 P.2d 192 (acknowledging that experts have no "truth-telling machine."). The same rule applies to the admission of expert testimony on the truthfulness of a witness's testimony. *See State v. Martinez*, 1929-NMSC-040, ¶ 4, 34 N.M. 112, 278 P. 210 ("It is not proper to ask the opinion of one witness as to the credibility of another witness. It is the exclusive province of the jury to determine who has sworn the truth."). Testimony of an expert in child sexual abuse

is inadmissible under our rules of evidence when the testimony states an opinion or conclusion on the truthfulness of the victim or of a witness, something that an expert has no special skill in assessing. *See id.* ¶ 4 ("The tribunal will not listen to conclusions or opinions from persons who possess no more skill than the tribunal itself in drawing inferences from the premises." (internal quotation marks and citation omitted)).

{24} A therapist's testimony that a child has been diagnosed with post-traumatic stress disorder (PTSD) and has symptoms "consistent with" children who have been sexually abused is admissible because the relationship between PTSD symptoms and sexual abuse has been established by valid and reliable science and incorporated into the diagnostic manual used throughout the field. *See Alberico*, 1993-NMSC-047, ¶ 76 (stating that expert testimony establishing "that victims of sexual abuse may exhibit identifiable symptoms that have been catalogued in DSM III–R" indicates that, "[i]f a [victim] suffers from PTSD symptoms, . . . [they] might have been sexually abused. Thus, testimony regarding a [victim]'s PTSD symptoms has the tendency to show that [they] might have been sexually abused."). Such testimony informs the jury about behavior by children that might otherwise be unfamiliar to them and has been verified by reliable science. *See id.* ¶¶ 98-99.

{25} Expert testimony vouching for the truth of the story told by the victim—including that the abuse occurred or that the defendant was the perpetrator—on the

other hand, is improper because it directly comments on the credibility of the victim and the truth of their testimony. *See id.* ¶ 92; *Lucero*, 1993-NMSC-064, ¶¶ 15-17 (concluding that expert testimony that comments "directly upon the credibility of the [victim]" or opines that the victim's symptoms "were in fact caused by sexual abuse" intrudes "too far upon the jury's function as arbiter of the witnesses' credibility"); *State v. Smith*, 2024-NMCA-068, ¶ 9, 556 P.3d 988 (same).

{26} We now turn to the challenged expert testimony in this case to determine whether, under these principles of law governing the admission of expert testimony in cases concerning alleged sexual abuse of a child, Kenney-Noziska's testimony was permissible expert testimony based on reliable science that only indirectly bolstered the Victim's credibility, as the State argues, or whether the expert's testimony crosses the line into a prohibited direct or indirect comment on the Victim's truthfulness.

{27} The expert testimony at issue in this case is somewhat different than that analyzed in *Alberico* and *Lucero*, because the expert witness in this case did not examine, diagnose or treat Victim and did not claim that her testimony was based on diagnostic criteria recognized by the psychiatric profession about whether the Victim's symptoms were consistent with children who suffered abuse. In the course of our discussion on invited error, we have already briefly discussed the testimony elicited by the State's direct examination, where Kenney-Noziska commented on her

impression from reviewing the video of Victim's safehouse interview that Victim's story "made sense" to her and was much like what she has seen disclosed by other child victims—testimony that plainly conveyed to the jury Kenney-Noziska's opinion that Victim was telling the truth. It was in this answer, as well, where Kenney-Noziska stated her belief that Brother's testimony was not credible and revealed that Victim had identified Defendant as the perpetrator.

{28} The State concedes that Kenney-Noziska's testimony based on her review of Brother's safehouse interview—that "from the very beginning and then throughout the interview he was adamant that his job was to say *his grandfather* did not sexually abuse his sister and that his sister was a liar"—was also an impermissible comment, this time directly on the credibility of a witness rather than Victim. *See Lucero*, 1993-NMSC-064, ¶¶ 6, 21 (noting that expert comments based on a witness's demeanor suggesting that such demeanor revealed whether that the witness is lying is an impermissible direct comment on credibility, and concluding that "[b]ecause [the expert] . . . commented directly and indirectly upon the complainant's truthfulness, we have grave doubts concerning the validity of the verdict and the fairness of the trial"). We conclude that Kenney-Noziska's testimony not only is an impermissible direct comment on Brother's credibility, as the State concedes, it also improperly repeated Victim's identification of Defendant as the person who perpetrated the abuse. Our Supreme Court has recognized that the identity of the perpetrator is

outside the expertise of a psychiatrist, psychologist or social worker, noting that testimony repeating the Victim's accusations impermissibly bolsters the credibility of those accusations against the defendant. *See Alberico*, 1993-NMSC-047, ¶ 88 ("[A]llowing the psychologist to testify as to the identity of the accused serves only to repeat what the [victim] told the examining expert and thus bolster [the victim's] credibility.").

{29} We next turn to challenged expert testimony the State has conceded improperly commented on Victim's credibility. Kenney-Noziska stated in answer to defense's question on cross-examination about whether Victim's resentment about doing chores would factor in to any evaluation of Victim:

> With everything I reviewed and the forensic interviews that I watched, I mean, she, she has made four disclosures to different people and she was a child when she made her first disclosure. She was in fourth grade. I don't think she has the wherewithal to put together revenge or I'm gonna live with . . . my grandma in 2020 if I keep this story up. It just, it's so farfetched based on the number of outcries that she made over a period of time. . . That factor [(revenge)] just doesn't ring true for the case, for me, when I looked at the reports and the forensic interview.

The State agrees with Defendant that Kenney-Noziska's testimony giving her opinion that revenge as a motive for Victim's accusation of sexual abuse "just doesn't ring true for the case" is a direct statement telling the jury that, in her expert opinion, the Victim's claim of sexual abuse is credible, and that the evidence putting Victim's credibility in doubt is not true. Kenney-Noziska's statement also accepts as true, and repeats to the jury as fact, Victim's claim that she made four disclosures

of sexual abuse beginning when she was in the fourth grade. Whether Victim actually made four disclosures of sexual abuse was in dispute at trial. The only evidence supporting the disclosure in fourth grade, which Kenney-Noziska found especially important to Victim's credibility, was the testimony of Victim's fourth grade friend that there was a time in fourth grade that Victim seemed to need help, but that Victim never disclosed what was upsetting her. Repeating Victim's disputed statement that she made four disclosures many years earlier as settled fact has been identified by our Supreme Court as an impermissible comment that serves to bolster the credibility of the victim. *See Lucero*, 1993-NMSC-064, ¶ 19 ("[A]llowing the expert . . . to repeat to the jury the [victim]'s statements . . . amounts to an indirect comment on the alleged victim's credibility."). We therefore agree with both Defendant and the State that this testimony amounted to impermissible vouching designed to communicate to the jury the message that Victim was not fabricating her story and that it was true.

{30} We finally address the testimony of Kenney-Noziska that false accusations of sexual abuse by children are extremely rare, and that 92 to 98 percent of children who disclose sexual abuse are telling the truth. There was again no defense objection on the record to the court allowing this question to be asked. (There was a bench conference, but it was not audible on the recording.) The State relied on the statistics on truth-telling elicited by this question to argue in closing to the jury that it would

"not [be] a reasonable conclusion" to decide that Victim was among the only two to 8 percent of children claiming sexual abuse who are not telling the truth. Although indirect bolstering of credibility by scientific evidence is relevant to establish facts concerning the cause of an injury or to inform the jury that a child's symptoms are consistent with the symptoms of children who have been raped, statistics on the probability that a victim is telling the truth cross the line into assessment of the credibility of witnesses that is within the exclusive province of the jury. *See State v. Soto*, 2025-NMSC-051, ¶¶ 46-51, 580 P.3d 781; *State v. Espinoza*, 2023-NMCA-012, ¶ 31, 525 P.3d 429 (distinguishing as admissible "incidental verification of an alleged victim's story or indirect bolstering of their credibility" from impermissible testimony "offered to establish that an alleged victim is telling the truth." (text only) (citation omitted)); *see also People v. Julian*, 246 Cal. Rptr. 3d 517, 523 (Ct. App. 2019) (holding that statistical evidence may not be used to bolster the credibility of a witness).

{31} Because this statistical evidence served the improper purpose of bolstering Victim's credibility, and the State encouraged the jury to use it in that manner, we conclude that its admission was improper.

C. The Admission of the Expert's Challenged Testimony Amounted to Plain Error

{32} The State argues that even if Kenney-Noziska's challenged testimony improperly vouched for the truth of Victim's accusations, any harm did not rise to

the level of plain error justifying reversal. The State's argument recites the evidence in the record that the jury could have relied on to support its guilty verdict, claiming that "other, unchallenged evidence independently demonstrated Defendant's guilt, [or] neutralized the taint of the at-issue testimony, or both." We do not agree that the presence of evidence that would support a guilty verdict overcomes the prejudice caused by repeated vouching for the truthfulness of Victim by the only expert in child sexual abuse who testified at trial.

{33} The test for plain error, much like the test for harmless error, requires us to consider the role of the error in both the expert testimony as a whole and in the trial as a whole, looking both at whether the inadmissible evidence likely influenced the jury, and at whether that influence was so profound that the error affected the fairness and integrity of the trial. *See Chavez*, 2024-NMSC-023, ¶ 11.

{34} In this case, credibility was the pivotal issue at trial. Not only were Victim and Defendant the only individuals with direct knowledge of what actually happened, the defense in this case was that Victim had reasons to lie that are supported by the evidence and by the scientific research on when a child might falsely disclose sexual abuse. Victim admitted to not liking her mother, to feeling that she was being abused by overwork at home, to wanting to move in with her paternal grandmother, and, perhaps most importantly, to wanting revenge against her sisters for having reported that they were sexually abused by Victim's father, leading to his incarceration and

absence from Victim's life. Victim's grandmother had reintroduced her to her father, taking her on multiple visits to see him in prison just before Victim alleged the sexual abuse by Defendant.

{35} The State relies heavily on what they claim is a confession by Defendant, but the law enforcement officer who interviewed Defendant admitted on cross-examination that he may have misunderstood Defendant, confusing testimony about sleeping in the same bed as Victim when she was three years old, with a confession about something that happened when she was ten to thirteen years old.

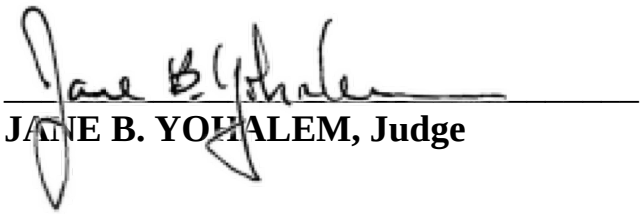
{36} Although we agree with the State that there was sufficient evidence to convict Defendant, the defense raised significant questions about the credibility of Victim and about possible motives for Victim to falsely disclose sexual abuse by Defendant that could have supported acquittal. In this context, the admission of improper expert testimony both directly and indirectly bolstering the credibility of Victim, repeating[1] to the jury Victim's statement naming Defendant as the perpetrator, and providing statistics on the percentage of children who falsely claim to have been sexually abused for the purpose of showing how unlikely it was that Victim was lying, leaves us with grave doubts concerning the fairness of the trial.

[1]The State argues that this repetition made the later testimony cumulative, and therefore, not harmful. We do not agree. The repetition of testimony vouching for Victim's credibility throughout the expert's testimony contributed to the prejudice caused by that testimony.

CONCLUSION

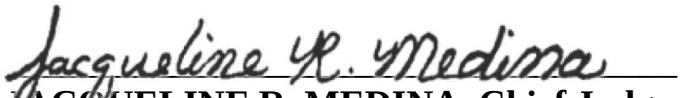
{37} Concluding that the admission of the challenged expert testimony was plain error, we vacate Defendant's convictions and remand to the district court for retrial consistent with this opinion.

{38} **IT IS SO ORDERED.**

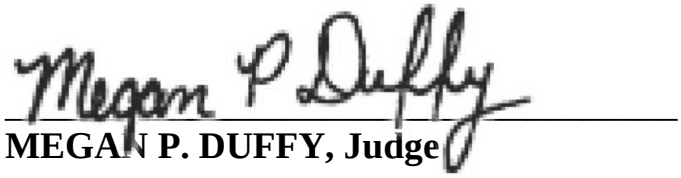


JANE B. YOHALEM, Judge

WE CONCUR:



JACQUELINE R. MEDINA, Chief Judge



MEGAN P. DUFFY, Judge