STATE V. BAYLESS

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DANIEL L. BAYLESS,
Defendant-Appellant

No. 34,536

COURT OF APPEALS OF NEW MEXICO

December 23, 2015

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Fred T. Van Soelen, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Jane A. Bernstein, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Sergio Viscoli, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: RODERICK T. KENNEDY, Judge, LINDA M. VANZI, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE Judge.

{1} Defendant Daniel Bayless (Defendant) was convicted of criminal sexual penetration of a minor. [RP 227] In this appeal of the judgment and sentence resulting

from that conviction, Defendant asserts, among other things, that the district court erred by allowing a sexual assault nurse examiner (SANE nurse) who was not qualified as an expert "to testify that her findings were consistent with sexual abuse, to offer opinions, speculate as to the state of mind of witnesses, reference other cases and testify as to matters which were not facts she personally observed." [DS 8] Our calendar notice proposed to reverse on the basis that the witness was permitted to offer improper opinion testimony in violation of the rules of evidence. [CN 2]

{2} The State has filed a memorandum in opposition to that summary disposition arguing both that the testimony of the SANE nurse was not based upon "any sort of specialized knowledge outside the ken of the ordinary person," and also that any error in admitting her opinion testimony was harmless, given the SANE nurse's extensive training and expertise, which would have qualified her to testify as an expert had qualification been sought. [MIO 5, 7-8] Having duly considered the State's arguments, we are unpersuaded.

{3} In its memorandum, the State informs us that the relevant testimony described a "physical and forensic examination" of the victim, during which the SANE nurse took a statement, photographs, and swabbed for DNA. [MIO 4] Based upon that examination and her training and experience, the SANE nurse concluded that the victim's vagina was "abnormally red" and that the victim had experienced an assault, and the witness shared that conclusion with the jury. [MIO 5, 5 n.2] We are not persuaded that the knowledge, experience, and training necessary to reach such conclusions falls within "the ken of the ordinary person." [MIO 5]

{4} We are also not persuaded by the State's argument that the admission of such testimony without qualifying the witness as an expert amounted to no more than harmless error. [MIO 7-8] In order to assess whether improperly admitted evidence is harmless, this Court generally looks to whether the conviction can be supported by properly admitted evidence and whether the quality and volume of permissible evidence suggests that any improper evidence could not have contributed to the conviction. *State v. Moore*, 1980-NMSC-073, ¶ 4, 94 N.M. 503, 612 P.2d 1314. In this appeal, however, the State does not argue that "the amount of improper evidence [was] so miniscule that it could not have contributed to the conviction[.]" *Id.* Instead, the State points out that Defendant did not object, at trial, to the SANE nurse's qualifications and asks this Court to speculate that, if the State had sought to have the witness qualified as an expert, the district court would have qualified the witness, and her testimony would then have been proper. [MIO 8]

{5} We cannot say what would have happened in this case if the State had moved to qualify the SANE nurse as an expert witness because the State chose not to do so. Instead, when Defendant sought an order precluding her from offering opinion testimony, the State disclaimed any intent to have her provide expert testimony, and the district court agreed that she could testify as a lay witness. [RP 166] Once it was established that the testimony was being received pursuant to Rule 11-701 NMRA, which governs lay opinion, and not as expert testimony pursuant to Rule 11-702 NMRA,

Defendant’s objections that the witness was offering expert opinion were the proper objections to make. Indeed, once it was established that the SANE nurse was testifying as a lay witness, any objections to her qualifications would have been irrelevant to the admissibility of her testimony, since only expert witnesses must establish that they are qualified by “knowledge, skill, experience, training, or education” to offer their opinions. Rule 11-702. Ultimately, as a direct result of the fact that the State chose not to have the witness qualified as an expert, Defendant had no meaningful opportunity to challenge her qualifications.

{6} Because the conviction in this case rests upon improperly admitted opinion testimony, we reverse the judgment of the district court and remand the case to that court for further proceedings

{7} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

LINDA M. VANZI, Judge