

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-0620 (Kanawha County 07-F-585)

**James Ellis Spuduck,
Defendant Below, Petitioner**

FILED

**March 9, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner James Ellis Spuduck, convicted by jury of three counts of first degree sexual abuse and three counts of sexual abuse by a parent, guardian, custodian or person in position of trust, appeals the circuit court's order sentencing him to serve one to five years on each count of first degree sexual abuse and ten to twenty years on each count of sexual abuse by a parent, guardian, custodian or person in position of trust, all to run concurrently. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response. Petitioner has filed a reply.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was indicted for sexually abusing the eight-year-old daughter of the woman with whom he co-habitated on at least three occasions. The victim was examined by a child advocate, Maureen Runyon, and a pediatrician, Dr. Joan Phillips, both of whom later testified at trial. Ms. Runyon and Dr. Phillips were qualified as expert witnesses, without objection. Both testified that in their professional opinions, the victim was credible and was the victim of sexual abuse. Both testified that the victim has stated that the perpetrator was the petitioner. There was some question as to whether one of the abuse incidents happened in the petitioner's truck or the victim's mother's vehicle, and this issue was contested at trial. The child also testified, identifying the petitioner as the perpetrator. Petitioner was convicted on all counts.

On appeal, petitioner argues that the circuit court erred in allowing a doctor and social worker to testify as credibility experts, impermissibly bolstering the alleged victim's accusation and usurping the jury's role as the sole judge of credibility. Petitioner states that no State witness may vouch for the credibility of another state witness, especially when the one testifying is clothed with the authority of an expert. Syl. Pt. 3, *State v. Martin*, 224 W.Va. 577, 687 S.E.2d 360 (2009)(quoting Syl. Pt. 7, in part, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990)). Despite this, petitioner argues that the State asked both Dr. Phillips and Maureen Runyon to opine as to whether they believed the alleged victim's accusation against petitioner. Petitioner argues that the admission of this evidence is plain error. Because petitioner denied the conduct on the stand, the jury had to make a determination as to who to believe. Thus, allowing these experts to opine regarding the child's credibility prejudiced the defendant by invading the province of the jury.

The State responds, arguing first that petitioner failed to object to the subject testimony and therefore has waived any alleged error pursuant to *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996). The State contends that the witnesses in question did not name petitioner as the abuser and did not state a belief in the child's credibility. Petitioner's defense at trial was that the child was coached due to the mother's affair, but the jury rejected this contention. Moreover, the petitioner directly contradicted two of his own witnesses by admitting that he had in fact driven the car in question. The State further argues that this case is similar to *State v. Wood*, 194 W.Va. 525, 460 S.E.2d 771 (1995), wherein a victim's teacher testified that he concluded that the victim was being truthful. This Court found that despite the fact that the teacher's testimony violated the limitations on rehabilitating the credibility of a witness in Rule 608, it did not affect the fairness of the proceedings. Also in that case, the expert testified that the child gave a credible statement. Thus, the issue did not raise to the level of plain error, and the testimony in this matter does not rise to the level of plain error.

This Court has stated that:

Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

Syl. Pt. 7, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990). Since petitioner failed to object to the subject testimony at trial, the alleged errors must be examined under the plain error doctrine. “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *State v. Miller* 194 W.Va. 3, 459 S.E.2d 114 (1995). An examination of the testimony at trial shows that Ms. Runyon and Dr. Phillips testified that the child’s claims were credible in their professional opinions. Despite the child’s tender age, she testified that petitioner was the man who sexually abused her. This testimony was enough for the jury to convict the petitioner. The opinion testimony of Ms. Runyon and Dr. Phillips did not affect the fairness and integrity of the court proceedings and did not cause a miscarriage of justice.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 9, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin