MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Bruce A. Vanlue,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 23, 2023

Court of Appeals Case No. 23A-CR-755

Appeal from the Knox Circuit Court

The Honorable Monica C. Gilmore, Judge

Trial Court Cause No. 42C01-1704-F1-4

Memorandum Decision by Judge Brown
Judges Crone and Felix concur.

Brown, Judge.

[1] Bruce A. Vanlue appeals his convictions for two counts of child molesting, as level 1 felonies, and one count of performing sexual conduct in the presence of a minor, a level 6 felony. He argues his trial counsel was ineffective based on a conflict of interest, and the trial court erred in admitting testimony from a social worker. We affirm.

Facts and Procedural History

[2] Vanlue, who was born in 1966, is married and is the paternal grandfather of J.V. and L.V. (collectively, "the Children"). In 2016 and early 2017, when J.V. was eight years old and L.V. was six years old, the Children would spend time at Vanlue's home before and after attending school and, on at least one occasion, spent the night. The Children enjoyed visiting with their grandparents and with their aunt and uncle, Vanlue's other children who are close in age to J.V. and L.V. However, sometime in 2017, when the Children's father ("Father") suggested that the Children stay overnight at Vanlue's home, the Children told Father they did not want to go.

[3] In February 2017, J.V. told her mother ("Mother")[1] Vanlue had sex with her. J.V. had the conversation with Mother approximately one week after the Children indicated they no longer wanted to go to Vanlue's home, and one week after Vanlue last touched J.V. inappropriately.

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[1] In February 2017, Mother and Father were married, but later initiated dissolution proceedings.

[4] Vanlue made J.V. engage in vaginal and anal sex in the front room, kitchen, and bedroom in his house. When J.V. was in the bedroom, Vanlue made her remove her clothes and get down on her hands and knees. Vanlue was behind J.V., and J.V. felt his penis "inside" her. Transcript Volume II at 237. In the kitchen, Vanlue made J.V. remove her pants and lie down on a bench, and he inserted his penis inside her. When J.V. spent the night at Vanlue's home, Vanlue came to the front room where J.V. was sleeping, removed her blanket, pulled down her pants, and inserted his penis in J.V. When Vanlue was done, J.V. ran to the bathroom to take a shower, and Vanlue masturbated while he watched J.V. shower.

[5] After J.V. disclosed what Vanlue had done to her, L.V. told Mother that Vanlue had sex with her also. Vanlue would take L.V. into the bedroom, make her lie on the bed on her back, and Vanlue would insert his penis inside her. He would also insert his penis into L.V.'s mouth. Vanlue performed the acts on L.V. in the bathroom and in other rooms in the home. One time, when L.V. was in the front room watching television, she saw Vanlue having sex with J.V. in the kitchen. Vanlue made a hand gesture to L.V., indicating she should look away and watch television. Vanlue showed pornographic videos to L.V. in the bedroom.

[6] After the Children disclosed what Vanlue had done to them, Mother called the police and Father. Father arrived at his home after the police arrived, and he "bypass[ed]" the police, went "directly" to the Children, and asked: "Did he touch you?" Transcript Volume III at 40. The Children answered, "Yes[,]"

Father immediately drove to Vanlue's home at a high rate of speed, the police pursued Father, and they ordered him at gunpoint to step off Vanlue's porch. *Id.* at 40. The next day, the Children were interviewed by the police but were not physically examined by a medical professional.

[7] On April 4, 2017, the State charged Vanlue with ten counts of level 1 felony child molesting and two counts of level 6 felony performing sexual conduct in the presence of a minor, which, on January 31, 2023, were amended to two counts of the level 1 felony and one count of the level 6 felony. In February 2023, the court held a two-day jury trial.[2]

[8] Gary Brock served as Vanlue's defense counsel ("Defense Counsel"). When the two-day trial commenced, Father's divorce from Mother was pending, and Defense Counsel had been representing Father in the dissolution proceedings. Before testifying as a State's witness, and outside the jury's presence, Defense Counsel and the prosecutor questioned Father about Defense Counsel's representation. Father testified that Father had no objection to Defense Counsel serving as Vanlue's defense counsel or cross-examining Father in the criminal case, Defense Counsel had never discussed Vanlue's case with Father, and Defense Counsel had recently told Father that Father would need to find another attorney to represent him in the dissolution proceedings.

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[2] The record indicates Vanlue's jury trial was delayed due to, among other reasons, the COVID-19 pandemic.

[9] Morgan Marczak, a licensed social worker and mental health therapist employed at an outpatient youth intensive services center, testified that J.V. and L.V. were her clients. Marczak holds a master's degree in social work with a minor in psychology and is able to diagnose clients only under the supervision of a licensed clinical social worker. Marczak testified she diagnosed J.V. with post-traumatic stress disorder ("PTSD") and generalized anxiety disorder in 2021, and agreed that under a PTSD diagnosis, the patient would have had a traumatic event in their past. She explained that because of these diagnoses, J.V. might appear anxious, shut down, rock back and forth to comfort herself, rub her hands back and forth, apologize profusely and say she is sorry, and may have difficulty opening up and sharing her thoughts. Marczak testified she diagnosed L.V. with generalized anxiety disorder and that when L.V. testified, she might exhibit the same behaviors as her sister. Marczak further testified that her supervisor approved the Children's diagnoses.

[10] However, before Marczak testified, and outside the presence of the jury, a colloquy took place between the parties' counsel and the court on the admissibility of Marczak's testimony on grounds the testimony would amount to impermissible vouching. Transcript Volume II at 195-197. Defense Counsel's associate counsel argued:

> I think [the testimony Marczak will present] absolutely is vouching. I mean, even if the therapist does not come in and say well, I'm seeing the girls because they were referred to me. [The a]llegation is, my client molested them. Okay. They come in and they say hey, I have anxiety and PTSD. We're here for a child molesting trial. These 13 people in the back here

> understand that. They've been instructed as to that. They sat through three hours of voir dire. They know that. They're going to make that jump. It's highly prejudicial and it serves no purpose. And Judge, it is vouching. It is.

Id. at 196-197.

[11] During Marczak's testimony, Defense Counsel objected on foundational grounds, stating:

> And Your Honor, I'm going to object to the diagnosis based upon her previous testimony. She said she's only allowed to make a diagnosis under the supervision of the supervisor. General statements, and we don't have a foundation for any testimony regarding diagnosis without the – some kind of foundational evidence or testimony regarding the supervision – supervisor. We don't know who the supervisor is, we don't know when that diagnosis was approved by the supervisor. We don't know how that approval came about.
>
> So based upon that, it's a lack of foundation and possibly they will not be able to create a foundation. Based on what I've heard so far, we'd object to any testimony regarding a diagnosis from this witness.

Id. at 205. Defense Counsel did not object to the testimony on grounds that it constituted impermissible vouching. The trial court overruled the objection.

[12] The jury found Vanlue guilty as charged, and the trial court sentenced him to forty years on each level 1 felony count and two years on the level 6 felony count to run consecutively.

Discussion

I.

[13] Vanlue argues he received ineffective assistance of counsel because a conflict of interest resulted from Defense Counsel's representation of both him and Father.[3] Vanlue contends the conflict exists because, to effectively represent him, Defense Counsel would have to cross-examine Father about the Children, and the Children were integral to both cases. Vanlue maintains Defense Counsel's performance was adversely affected by the alleged conflict, evidenced by counsel allowing Father to testify without objection to: the Children's response of "[y]es" when Father asked if Vanlue touched them; Father's attempt to confront Vanlue; Father's subsequent removal from Vanlue's porch by law enforcement; and Father's acknowledgment that he went to Vanlue's home with "bad intentions[.]" Transcript Volume III at 48.

[14] A defendant claiming ineffective assistance of counsel must show that his counsel was deficient in performance and that the deficiency resulted in prejudice. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006).

> To satisfy the first prong, the petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that counsel committed errors so serious that petitioner did not have the "counsel" guaranteed by the Sixth Amendment. To show

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[3] "A defendant may raise a claim of ineffective assistance of counsel on direct appeal; however, the defendant is foreclosed from subsequently relitigating that claim." *Heyen v. State*, 936 N.E.2d 294, 303 (Ind. Ct. App. 2010), *trans. denied*.

> prejudice, the petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

Id. (internal citations omitted).

[15] The constitutional right to effective assistance of counsel "necessarily includes representation that is free from conflicts of interest." *Edwards v. State*, 807 N.E.2d 742, 745 (Ind. Ct. App. 2004). Joint representation without impaired performance is not a per se violation of the constitutional guarantee of effective assistance of counsel. *Id.* "In order to establish a violation of the Sixth Amendment due to a conflict, a defendant who failed to raise the objection at trial must demonstrate: (1) that trial counsel had an actual conflict of interest; and (2) that the conflict adversely affected counsel's performance." *Id.* Once these two prongs are met, prejudice is presumed. *Id.*

> An adverse effect on performance caused by counsel's failure to act requires a showing of (1) a plausible strategy or tactic that was not followed but might have been pursued; and (2) an inconsistency between that strategy or tactic and counsel's other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict.

Woods v. State, 701 N.E.2d 1208, 1223 (Ind. 1998), *reh'g denied* (1999), *cert. denied*, 528 U.S. 861 (1999).

[16] To the extent Vanlue argues Defense Counsel failed to ask him if he objected to counsel representing him, we note Vanlue did not explicitly object to his counsel's representation. And the record reveals that Defense Counsel

consulted with Vanlue as to whether Vanlue objected to Defense Counsel's continued representation, and Vanlue indicated he had no objection. The prosecutor and Defense Counsel engaged in the following colloquy:

> [Prosecutor]: If I could, Your Honor?
>
> [DEFENSE COUNSEL]: I just wanted to clarify that, Your Honor. No, he doesn't have [an] objection, Your Honor.
>
> [Prosecutor]: Okay. I just want to make sure that Mr. Vanlue also was okay with what we were doing here.

Transcript Volume III at 35.

[17] Regarding Vanlue's argument that a conflict of interest exists because the Children are subjects of both the criminal and the divorce cases and because Defense Counsel maintained dueling loyalties to Vanlue and Father, we disagree. Father's divorce case was unrelated to Vanlue's criminal case. Vanlue presented no evidence that Father's divorce case involved a custody dispute. And Defense Counsel had effectively ended his representation of Father when Vanlue's trial took place. Defense Counsel revealed on the record his prior dual representation but stated he had told Father he needed to retain new counsel prior to Vanlue's trial. Also, Father testified that he and Defense Counsel never discussed Vanlue's case. Thus, we find when Vanlue's trial took place, there was no actual conflict of interest with his counsel's representation. Even assuming arguendo that a conflict of interest existed, and we find no such support in the record, Vanlue has failed to show the alleged conflict adversely

affected Defense Counsel's performance. Although Defense Counsel did not object to Father's testimony in question, the record reveals counsel showed no inconsistencies with his trial strategy which was to contend the State presented insufficient evidence to prove the Children's allegations. Vanlue was not denied effective assistance of counsel.

II.

[18] Next, Vanlue argues the court erred in admitting Marczak's testimony that she had diagnosed J.V. with PTSD and L.V. with generalized anxiety disorder, and under a PTSD diagnosis, the patient would have experienced a traumatic event in the past. Vanlue contends Marczak's testimony regarding the behaviors the Children might exhibit on the witness stand – that is, appear anxious, shut down, rock back and forth to comfort themselves, and have difficulty opening up and sharing their thoughts – amounted to impermissible vouching for the truthfulness of the Children's allegations.

[19] A trial court has broad discretion in ruling on the admissibility of evidence, and we will disturb its rulings only where it is shown that the court abused that discretion. *Hoglund v. State*, 962 N.E.2d 1230, 1237 (Ind. 2012), *reh'g denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

A.

[20] Vanlue claims Marczak's testimony regarding her diagnosis of the Children was improper because Marczak: was not a qualified expert under Ind. Evidence

Rule 702(a); was only qualified to diagnose clients under the supervision of her supervisor and her supervisor did not testify at trial; and was unsure if a psychiatrist had been involved in the diagnosis of the Children. Vanlue argues Marczak's testimony corroborated the Children's allegations, and the prosecutor, during closing arguments, used the testimony to aid the jury in "connect[ing] the dots" in the case. Appellant's Brief at 17.

[21] Ind. Evidence Rule 702(a) governs the admission of testimony by expert witnesses and provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

In construing this rule, only one of these characteristics – knowledge, skill, experience, training, or education – is necessary to qualify an individual as an expert. *Lyons v. State*, 976 N.E.2d 137, 141-142 (Ind. Ct. App. 2012). The Indiana Supreme Court has determined that the "specialized knowledge" set forth in Evidence Rule 702(a) is not necessarily scientific knowledge, and it need not be proven reliable by means of "scientific principles." *Malinski v. State*, 794 N.E.2d 1071, 1085 (Ind. 2003). Rather, such evidence is governed only by the requirements of Rule 702(a), and any weaknesses or problems in the testimony go only to the weight of the testimony, not to its admissibility, and should be exposed through cross-examination and the presentation of contrary evidence. *Lyons*, 976 N.E.2d at 142 (citing *Turner v. State*, 953 N.E.2d 1039,

1050 (Ind. 2011)). A social worker can qualify as an expert witness. *B.H. v. Ind. Dep't of Child Servs.*, 989 N.E.2d 355, 316 (Ind. Ct. App. 2013). Under Evidence Rule 703, "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed."

[22] Marczak is a licensed social worker and a mental health therapist and has a master's degree in social work with a minor in psychology. Marczak has been employed for five years at an outpatient youth intensive services center which provides services to children and adolescents. Her job requires her to participate in continuing education programs, including instruction on child interviews, therapeutic services, and trauma. Marczak performs initial evaluations of clients, provides individual and family therapy, and can provide clients with referrals. She testified she has met with "hundreds" of clients, and her clients range in age from three years old to twenty-three years old. Transcript Volume II at 202. Marczak can diagnose clients under the supervision of her supervisor who is a licensed clinical social worker. The Children have been Marczak's clients since 2021. And Marczak diagnosed the Children with PTSD and generalized anxiety disorder under the direction and approval of her supervisor.

[23] Based on her education and practical experience, the trial court had sufficient information to qualify Marczak as an expert witness to testify to her diagnosis of the Children. Therefore, we conclude the trial court did not abuse its discretion in admitting Marczak's testimony on the Children's diagnoses; that the behavior the Children might exhibit on the witness stand is consistent with

behavior that might be displayed by an individual diagnosed with PTSD and/or generalized anxiety disorder; and that a client diagnosed with PTSD would have experienced a traumatic event in the past.

[24] We also note that Vanlue, by counsel, had the opportunity to cross-examine Marczak on her qualifications and the testimony she provided. Defense Counsel questioned Marczak extensively about her supervisors and their credentials, and whether a psychiatrist was involved in determining the Children's diagnoses. Defense Counsel also questioned Marczak regarding her testimony to the behaviors the Children might exhibit on the witness stand, asking Marczak whether "any child would be anxious testifying in court, in front of a jury, regardless of diagnosis?" *Id.* at 220. The cross-examination allowed Defense Counsel to expose possible weaknesses or problems with Marczak's testimony, including needing her supervisor's approval to diagnose her clients, and did not affect the admissibility of Marczak's opinion testimony. *Lyons*, 976 N.E.2d at 142. The trial court did not abuse its discretion in admitting the testimony.

[25] Regarding Vanlue's argument that Marczak's testimony corroborated the Children's allegations, and the prosecutor, during closing arguments, used the testimony to impermissibly aid the jury in "connect[ing] the dots" in the case, we disagree. Appellant's Brief at 17. Vanlue focuses our attention on the following remarks made by the prosecutor during closing arguments:

> A 14-year-old who is diagnosed with post[-]traumatic stress disorder, generalized anxiety disorder, social phobia. You saw

> her up here fiddling with that little fidget – whatever they call it, the whole time, and we heard the counselor say she was going to rub her legs, and she did that, and she rocked back and forth a little bit.
>
> * * * * *
>
> Th[e Children have] had to go through therapy. They suffer from anxiety. They have post[-]traumatic stress disorder.

Transcript Volume III at 102, 104. However, Marczak did not testify that the PTSD and generalized anxiety disorder diagnoses meant the Children must have suffered sexual abuse. She testified that an individual diagnosed with PTSD would have suffered a traumatic event in the past and that the behavior the Children might exhibit would be consistent with such a diagnosis. And the prosecutor, in his closing remarks, spoke to what the jury would have witnessed regarding the Children's behavior and then summed up Marczak's testimony. No error occurred here.

B.

[26] To the extent Vanlue argues Marczak's testimony amounted to impermissible vouching for the truthfulness of the Children's allegations, his argument is waived. Vouching testimony is specifically prohibited under Ind. Evidence Rule 704(b), which states: "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." This testimony is considered an "invasion of the province of the jury in determining what

weight they [sh]ould place upon the child's testimony." *Head v. State*, 519 N.E.2d 151, 153 (Ind. 1988).

[27] The record indicates that Vanlue did not preserve his claim of error by raising a proper objection at trial. To the extent Defense Counsel's associate counsel argued that Marczak's testimony would amount to impermissible vouching, we note that this occurred prior to Marczak's testimony, and his objection was not contemporaneously raised during Marczak's testimony. Vanlue did make a contemporaneous objection based on a lack of foundation that Marczak possessed the requisite qualifications to testify to the diagnoses, but he did not make a contemporaneous objection on grounds the testimony amounted to impermissible vouching. *See* Transcript Volume II at 205-206. Thus, his claim is waived. *See Banks v. State*, 567 N.E.2d 1126, 1129 (Ind. 1991) (finding, failure to properly object at trial waives any error on appeal). And because Vanlue has waived his impermissible vouching claim, we do not address his claim that the State used Marczak's alleged vouching testimony to "preemptively rebut any questions or concerns regarding the upcoming testimony of J.V. and L.V." Appellant's Brief at 18.

[28] To avoid this procedural default, Vanlue needed to establish that fundamental error occurred. "Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014) (internal quotation and citations omitted), *reh'g denied*. "A finding of fundamental error essentially

means that the trial judge erred . . . by not acting when he or she should have[.]" *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012). "Fundamental error is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error." *Ryan*, 9 N.E.3d at 668.

[29] However, Vanlue offers no argument that his unpreserved claim of error amounted to fundamental error. Therefore, he has waived that claim for appeal as well. *See Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011) (holding, where the defendant "failed to allege fundamental error in his principal appellate brief, this issue is waived").

[30] For the foregoing reasons, we affirm Vanlue's convictions.

[31] Affirmed.

Crone, J., and Felix, J., concur.