IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CHAD ALLEN BEAUVAIS, Defendant-Appellant, Petitioner on Review.	Deschutes County Circuit Court No. 06FE0574SF CA A147355 SC S062346

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Deschutes County
Honorable STEPHEN P. FORTE, Judge

Opinion Filed: March 26, 2014
Author of Opinion: Schuman, S.J.
Before: Wollheim, P.J., and Duncan, J.

Continued. . .

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

INTRODUCTION

The principal issue in this case is whether this court should extend its holding in *State v. Southard*—which barred a diagnosis of sexual abuse that was unsupported by physical evidence—to prohibit all diagnoses of child sexual abuse under OEC 403, even if the diagnosis is supported by physical evidence. It should not. When a medical expert relies on physical evidence in reaching a diagnosis, that diagnosis is more probative than the diagnosis rejected by *Southard* because it helps the jury understand the significance of the physical evidence in relation to the victim's disclosure of abuse. Similarly, when the diagnosis is supported by physical evidence, it ceases to be a simple credibility determination by the expert and so there is little risk of unfair prejudice.

In this case, the victim sustained physical injuries as a result of sexual abuse, and a medical expert relied on evidence of those injuries to reach a scientifically valid conclusion that the victim had been abused. Because the medical diagnosis assisted the jury in understanding the significance of the physical evidence in light of the victim's disclosures, the trial court properly admitted the diagnosis.

First Question Presented

Is a diagnosis of sexual abuse admissible under OEC 403 when the diagnosis is supported by physical evidence of abuse?

First Proposed Rule of Law

Yes. When the basis for a diagnosis of sexual abuse includes physical evidence, the diagnosis is admissible under OEC 403. In that situation, the diagnosis assists the jury because it explains the significance of the physical evidence in light of the disclosure of abuse. Because the diagnosis is supported by physical evidence—and is not based solely on the credibility of the victim—there is little risk of unfair prejudice.

Second Question Presented

When the trial court has properly admitted a diagnosis of sexual abuse, may an expert witness testify regarding the criteria used to assess the victim?

Second Proposed Rule of Law

Yes. When a diagnosis of sexual abuse is admissible, an expert witness may explain the criteria used to diagnose the victim, so long as the expert does not comment impermissibly on the victim's credibility.

Third Question Presented[1]

Does a trial court abuse its discretion by denying a motion for mistrial when the state presented evidence regarding two alleged victims but later dismissed charges related to one of the victims?

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[1] The state, like defendant, relies on its briefing in the Court of Appeals regarding the third question presented.

Third Proposed Rule of Law

No. When, as here, the trial court properly joined the charges related to both victims, a defendant is not denied a fair trial by the admission of evidence regarding both victims. Any potential prejudice resulting from the dismissal of charges related one of the victims can be cured by a limiting instruction, should the defendant request one.

Statement of Material Facts

This case involves defendant's conviction of first-degree of sexual abuse of a child, (ER 1, 47). Before trial, defendant filed a motion *in limine* seeking to exclude a diagnosis of as having been sexually abused. The trial court denied the motion. On appeal, defendant assigned error to denial of his motion *in limine*. The following summary of facts is drawn from record before the trial court at the OEC 104 hearing.[2]

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[2] When reviewing the trial court's order, this court considers "the record made before the trial court when it issued the order, not the trial record as it may have developed at some later point." *State v. Pitt*, 352 Or 566, 575, 293 P3d 1002 (2012); *see also State v. Perry*, 347 Or 110, 116-17, 218 P3d 95 (2009) (analyzing record made at OEC 104 hearing to determine whether trial court erred in denying motion to exclude scientific evidence regarding delayed disclosure of sexual abuse).

In litigating this case on appeal, the state, defendant, and the Court of Appeals all considered evidence presented at trial in addition to the record developed at the motion *in limine*. Under *Pitt* and *Perry*, that was incorrect.

Footnote continued…

A. Historical Facts

On February 25, 2006, and spent the night in defendant's home to babysit his son. (SER 11). In the early hours of the morning, was awoken when defendant placed his hand inside her pants, touching her genitals. (SER 15, 22-23). called her mother asking to be picked up from defendant's home. (SER 11). father picked up the girls after contacting the police and then took the girls to the police station to be interviewed. (SER 11-12). Later that day, went to the hospital where she was examined by a sexual assault nurse examiner (SANE), Shelley White. (SER 2-3). White issued a report detailing physical injuries, including increased redness and swelling of the clitoris and upper labial folds, increased redness in the upper and lower portions of the hymen, and some abrading of the labia majora and minora. (SER 3-4). White did not diagnosis with any condition but did refer her to the Kid's Intervention and Diagnostic

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(…continued)

That error does not affect defendant's argument that the diagnosis was inadmissible under *State v. Southard*, because, as to the diagnosis, the record at the motion *in limine* is largely the same as the record developed at trial. But regarding defendant's vouching argument, the record at the OEC 104 hearing does not include the expert testimony that is the primary subject of defendant's argument on review. Defendant did not object at trial to any expert testimony concerning the diagnosis. As discussed in the argument below, to the extent that defendant challenges that trial testimony on review, his argument is unpreserved.

[3] The state also charged defendant with sex crimes related to The state dismissed those charges midway through trial.

Service Center (KIDS Center) for an evaluation. (SER 4). Staff at the KIDS Center evaluated about six weeks after the incident and diagnosed as having been sexually abused. (Tr 66; SER 9).

B. The Record at the OEC 104 Hearing

Defendant filed a motion *in limine* to exclude the KIDS Center report and diagnosis, arguing that the diagnosis was invalid as scientific evidence under OEC 702, was unfairly prejudicial under OEC 403, and was an improper comment on the credibility of (ER 3,5). At the OEC 104 hearing in May 2007, the state presented testimony from Dr. Michelle Kyriakos regarding the KIDS Center report diagnosing The state also introduced the KIDS Center report into evidence, as well as White's report detailing her physical findings from the day of the alleged abuse. (Tr 68, 112).

Dr. Kyriakos testified extensively regarding her qualifications, the scientific basis for a diagnosis of child sexual abuse, and the specific procedures she used for diagnosing In evaluating Dr. Kyriakos and the KIDS Center staff engaged in a four part methodology[4] that involved 1) gathering patient history, 2) examining objective evidence, 3) making an assessment using a differential diagnostic list, and 4) establishing a course of treatment:

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[4] This methodology is the same as the KIDS Center methodology examined in *State v. Southard*, 347 Or 127, 135-37, 218 P3d 104 (2009).

> You go in and you get the information from—say, if it's a kid, from a parent, and ask the kid question [sic], too, so you're getting the history. And then you do the objective part, which is doing the physical examination, or gathering any lab results or diagnostic tools. And you put those two components together, and you come up with an assessment, which is looking at a differential diagnostic list.
>
> And then the fourth part is—is making a plan. So planning what needs to be doing—what needs to be done next; treatment, medical follow-up, those type of things.

(Tr 82).

Dr. Kyriakos made clear that she relied on White's report describing the physical evidence in diagnosing (Tr 69, 146). White's report included the following description of injuries: "Clitoris and labia minora appear swollen and red. Anteriorly the medial walls of the labia majora and lateral walls of the labia minora appear abraided. Hymen appears red, with darker red areas between 3 and 5 o'clock and from 7 and 11 o'clock." (SER 3-4). Dr. Kyriakos summarized those findings as "redness and swelling around the labia majora and labia minora, as well as what [the SANE nurse] described as the lateral walls of the labia minora and the medial walls of the labia majora being abraded." (Tr 116). The physical findings were highly concerning to Dr. Kyriakos because had been examined the same day as the alleged abuse and Dr. Kyriakos could not "find another explanation for why she would have swelling and areas of abrasion along the labias." (Tr 146). The KIDS Center report notes that Dr. Kyriakos reviewed White's report in reaching her conclusion that "has been abused." (SER 9, 25).

In addition to the physical findings, the report summarized the criteria and non-physical findings used in diagnosing

> The core details of what [told us today are consistent with what she had previously told [law enforcement] and SANE. [was able to use drawings, her words, and her body as a reference to relay information about what had happened. The disclosure appears spontaneous in that [woke her friend [after the touching happened and then immediately called [mom. [also provided the sensory detail of "stinging" during the examination. Stinging is a sensory detail that would likely be known only if the child had actually experienced the sensation.

(SER 25).

Following the OEC 104 hearing, the trial court denied defendant's motion *in limine*. The court concluded that the KIDS Center report met the requirements of *State v. Brown* and *State v. O'Key* and made a general ruling that "[t]he KIDS Center reports and expert testimony are admissible[.]" (ER 40).

Between defendant's motion *in limine* and his trial, which did not occur until November 2010, this court issued its opinions in *State v. Southard* and *State v. Lupoli*. Defendant did not seek reconsideration of the court's denial of his motion. At trial, White, the sexual assault nurse examiner, testified regarding her examination of KIDS Center experts Dr. Kyriakos and Paula Glesne, a KIDS Center interviewer, testified regarding their interview, assessment, and diagnosis of Another KIDS Center expert, Carol Zancanella, testified regarding the KIDS Center methodology for interviewing and assessing a child. Defendant did not renew his objections to the KIDS Center report and the diagnosis of sexual abuse.

Nor did defendant object that the trial testimony from the KIDS Center experts Dr. Kyriakos, Glesne, and Zancanella was an impermissible comment on credibility.

On appeal, defendant assigned error to the trial court's denial of his motion *in limine* to exclude the KIDS Center report and expert testimony related to the report. The Court of Appeals affirmed and this court accepted defendant's petition for review.

Summary of Argument

A diagnosis of sexual abuse that is supported by physical evidence is scientifically valid and helpful to the jury. Accordingly, it is admissible under OEC 702 and 403. In *State v. Southard*, this court barred a diagnosis of sexual abuse that was not supported by physical evidence because the expert's opinion infringed on the jury's role in assessing credibility. But when, as here, a diagnosis is supported by physical evidence, the persuasive power of that evidence rests on the expert's consideration of the physical evidence in conjunction with the allegations of abuse. The diagnosis is not merely a credibility determination by the expert and does not interfere with the jury's function. In this case, the trial court properly admitted the KIDS Center diagnosis because it explained the source of injuries and therefore assisted the jury in understanding the evidence.

Additionally, when the trial court properly admits a diagnosis of sexual abuse, an expert witness is free to testify regarding the criteria used to evaluate the

victim, so long as the testimony does not comment impermissibly on the victim's credibility. Here, the evidence describing the criteria that Dr. Kyriakos used to assess was not tantamount to a comment on credibility. Accordingly, the trial court properly denied defendant's motion *in limine*.

ARGUMENT

I. A diagnosis of sexual abuse that is supported by physical evidence is admissible because the diagnosis assists the jury and does not infringe on the jury's function of determining credibility.

In *State v. Southard*, 347 Or 127, 218 P3d 104 (2009), this court expressly recognized that a diagnosis of sexual abuse is both scientifically valid evidence under OEC 702[5] and relevant under OEC 401 to prove sexual abuse. *Id*. at 139. Yet this court went on to hold that a diagnosis that is not supported by any physical evidence of abuse is inadmissible under OEC 403,[6] because the diagnosis is a nothing more than a credibility determination by the expert that the jury is equally

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[5] OEC 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

[6] OEC 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

capable of making. *Id*. at 142. This case presents the question of whether OEC 403 bars a diagnosis that *is* supported by physical evidence. As explained below, it does not. When an expert relies on physical evidence of sexual abuse in reaching a diagnosis, the diagnosis is admissible because it is more probative and less prejudicial than the unsupported diagnosis rejected by *Southard*.

A. In *Southard*, this court held that a diagnosis that is not supported by physical evidence of abuse is inadmissible under OEC 403.

To understand the rule why the rule from *Southard* should not extend to a diagnosis that is supported by physical evidence, it is important to understand what *Southard* held and why. In *Southard*, this court considered the narrow question of whether a diagnosis of child sexual abuse from a KIDS Center expert was admissible when the diagnosis was not supported by any physical evidence of abuse. The court first determined that the diagnosis of sexual abuse—even without physical evidence—was scientifically valid under *State v. Brown*, 297 Or 404, 687 P2d 751 (1984), *State v. O'Key*, 321 Or 285, 899 P2d 663 (1995), and OEC 702. That was so because the KIDS Center experts were "all qualified, the techniques used are generally accepted, the procedures rely on specialized literature in the field, and the procedures used are not novel." *Southard*, 347 Or at 137.

Despite being valid scientific evidence, however, this court held that the diagnosis was nevertheless inadmissible under OEC 403 because, in the absence of physical evidence, the diagnosis was essentially an opinion by the expert that the

victim was credible. This court noted that a diagnosis of sexual abuse determined "whether conduct (an act of sexual abuse by another person) has occurred; the conduct is not complicated and the ability to determine its occurrence often is a matter within a lay person's competence." *Id*. at 134-35. In the absence of physical evidence, such a diagnosis does not "turn on an abstruse matter of science; rather, it turn[s] primarily on the sort of credibility determination that lay jurors ordinarily make." *Id*. at 135. That was so because "the kinds of considerations that the KIDS Center used to determine whether to credit the [victim's] statements are standard fare in assessing credibility." *Id*. at 137. Accordingly, the probative value of the diagnosis in *Southard* was minimal because it "did not tell the jury anything that it was not equally capable of determining on its own." *Id*. at 140.

Because the diagnosis was simply a credibility determination by the expert, this court held that the danger of unfair prejudice outweighed the minimal probative value of the diagnosis. The diagnosis was "particularly problematic" because it "posed the risk that the jury will not make its own credibility determination, which it is fully capable of doing, but will instead defer to the expert's implicit conclusion that the victim's reports of abuse are credible." *Id*. at 141. Such a diagnosis fails to "tell the jury anything it could not have determined on its own." *Id*. at 143. The court emphasized that its holding was a narrow one, limited to a diagnosis that is not supported by physical evidence of abuse. *Id*.

Southard thus stands for two important propositions. First, an expert's diagnosis of sexual abuse made pursuant to the KIDS Center methodology is highly relevant and scientifically valid evidence. Second, despite the relevance and scientific validity of the diagnosis, when the sole basis for the diagnosis was the expert's credibility determination, OEC 403 bars its admission. *Id*. at 140-41; *see also State v. Lupoli*, 348 Or 346, 361, 234 P3d 117 (2010) (*Southard* diagnosis based "ultimately and only" on whether the expert believed the victim). The reason that OEC 403 bars a diagnosis of sexual abuse based on credibility determinations alone is that such a diagnosis does not tell the jury anything that it could not have determined on its own, and thus is not particularly useful. Relatedly, credibility determinations are reserved to the jury, so a diagnosis of abuse unsupported by any physical evidence compromises the jury's function.

B. A diagnosis that is supported by physical evidence of abuse is more probative and less prejudicial than a *Southard* diagnosis.

When physical evidence of abuse supports a diagnosis, the bases for excluding a diagnosis under OEC 403 identified in *Southard* do not exist. In contrast to a diagnosis that is unsupported by physical evidence, a diagnosis of sexual abuse that is supported by physical evidence gives the jury information "that it could not have determined on its own." *Southard*, 347 Or at 142. Unlike a medical expert, a jury is not equipped to assess the significance of physical evidence of abuse. When an expert relies on physical evidence to reach a

diagnosis of sexual abuse, the expert makes a causal connection between the type of abuse disclosed by the victim and the physical symptoms the victim manifests. That determination is not materially different than other medical diagnoses that are admissible. *See Marcum v. Adventist Health System/West*, 345 Or 237, 243-46, 193 P3d 1 (2008) (diagnosis that gadolinium exposure caused the plaintiff's vasospastic disorder admissible); *Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 309-10, 14 P3d 596 (2000) (diagnosis that ruptured silicone breast implants caused the plaintiff's neurological disorder admissible). In other words, when a diagnosis of sexual abuse derives from physical evidence, as well as the patient's history and description of the events, the diagnosis does hinge on an "abstruse matter of science," and a medical expert is uniquely qualified to explain the significance of physical evidence to the jury. Because a lay person is not capable of determining whether a particular physical symptom is the result of sexual abuse or whether the physical symptom has an innocent explanation, a diagnosis of sexual abuse is helpful to the jury so long as the expert relies on the physical evidence in arriving at the diagnosis. *See State v. Ovendale*, 253 Or App 620, 631, 292 P3d 579 (2012), *rev den*, 353 Or 714 (2013) (When a diagnosis "incorporate[s] physical evidence and a medical professional's determination of the physiological significance of that evidence * * * that diagnosis ceases to be one that a lay person can make as well as an expert.")

In addition to being more probative, the danger of unfair prejudice is greatly reduced when physical evidence supports a diagnosis of sexual abuse. Evidence is "unfairly" prejudicial when it tempts the jury to make a decision on a basis "unrelated to the power of the evidence to establish a material fact." *State v. Barone*, 328 Or 68, 87, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). The danger of unfair prejudice identified in *Southard* was that the jury would "defer to the expert's implicit conclusion that the victim's reports of abuse are credible" instead of making its own credibility determination. *Southard*, 347 Or at 140-41 (citing *Brown*, 297 Or at 440-41). But when a diagnosis relies on physical evidence of abuse, the persuasive power of the diagnosis does not rest on the expert's evaluation of the victim's credibility; rather the persuasive power arises from the expert's ability to explain the significance of the physical evidence in combination with the victim's other symptoms and medical history. Accordingly, the expert does not usurp the jury's function as in *Southard*, and any prejudice resulting from the jury's consideration of that evidence is not "unfair." *See State v. Middleton*, 294 Or 427, 435, 657 P2d 1215 (1983) ("Much expert testimony will tend to show that another witness either is or is not telling the truth. This, by itself will not render evidence inadmissible." (Citation omitted)).

Moreover, to the extent that some risk remains of the jury being overawed by the expert's "aura of reliability," that risk does not "substantially" outweigh the probative value of the diagnosis as required for exclusion under OEC 403. Rather,

the risk is no more than that associated with all scientific testimony on an ultimate issue. In *O'Key*, for example, this court held that the horizontal gaze nystagmus (HGN) test was not unfairly prejudicial. Although the evidence presented some danger because it "convey[ed] the imprimatur of science," the court noted that the jury was unlikely to "overvalue the evidence or * * * accept the results of the test without question." 321 Or at 322. This court noted that opposing counsel would have the opportunity to question the validity and probative value of an HGN test through cross-examination and rebuttal evidence. *Id*. In light of those considerations, the danger of unfair prejudice did not outweigh the probative value of the HGN test. *Id*.

For similar reasons, a diagnosis of sex abuse that is supported by physical evidence is likewise admissible. Because the probative value of the diagnosis arises out of its ability to explain the physical symptoms of the victim, it is less likely the jury would defer to the "imprimatur of science" that attaches to the diagnosis rather than assessing for itself whether to accept or reject the expert's conclusion. Additionally, defense counsel can put on rebuttal evidence to challenge the expert's diagnosis, including challenges to the significance of the physical evidence.

On review, defendant insists that any diagnosis, even one supported by physical evidence, is inadmissible. But his argument rests on the proposition that a diagnosis that is supported by physical evidence has the same probative value and

the same risk of unfair prejudice as an *unsupported* diagnosis.[7] That proposition is false. Defendant's argument unreasonably discounts the probative value of a diagnosis, which explains the physical evidence of abuse in light of the victim's disclosures.

Defendant argues that an expert can explain that physical evidence is "consistent" with a victim's disclosure of abuse without reaching the ultimate issue of whether sexual abuse occurred, and that, therefore, a diagnosis itself has marginal probative value. (App BoM at 16-17). The flaw in defendant's argument

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[7] To support his argument, defendant cites cases from a number of other jurisdictions. *See e.g., United States v. Whitted*, 11 F3d 782, 785 (8th Cir 1993) ("[A] doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible."); *Atkins v. State*, 243 Ga App 489, 495, 533 SE2d 152 (2000) (opinion that abuse in fact occurred not useful to the jury); *State v. Iban C.*, 275 Conn 624, 639, 881 A2d 1005 (2005) (same). Indeed, this court in *Southard* cited those same cases for the proposition that "a medical diagnosis on the 'ultimate issue of sexual abuse' does not tell the jury anything that it is not capable of determining without expert assistance." 347 Or at 141. Those cases, however, like *Southard*, involved diagnoses of sexual abuse that were *not* supported by physical evidence of abuse. *See Whitted*, 11 F3d at 785-76 (doctor's opinion based "solely" on witness statements because physical findings were consistent with consensual or non-consensual sexual activity); *Iban C.*, 275 Conn at 636, 881 A2d 1005 (diagnosis based almost entirely on the "history provided by the victim and the victim's mother" and thus improperly commented on the victim's credibility). *Cf. State v. Hammett*, 361 NC 92, 97, 63 SE 2d 518 (NC 2006) ("[T]he interlocking factors of the victim's history combined with the physical findings constituted a sufficient basis for the expert opinion that sexual abuse had occurred.").

is that it disconnects the probative value of the expert's ultimate conclusion[8] from the basis for that conclusion. The two cannot be separated. Rather, a diagnosis—which is a medically-valid conclusion that the victim was abused—has significant probative value *because* it is an expert's evaluation of the physical evidence, the victim's disclosures, and any other relevant symptoms, considered as a whole. Moreover, an expert opinion that the victim was abused is simply more probative than an opinion that the the physical evidence is "consistent" with the victim's disclosure.

Defendant also overestimates the risk of unfair prejudice. Unlike a diagnosis based on the victim's disclosure alone, a diagnosis that is supported by physical evidence does not invade the province of the jury because it is not a solely a credibility determination by the expert, which is the reason *Southard* barred an unsupported diagnosis under OEC 403. Accordingly, there is substantially less risk that the jury would make its decision on an improper basis when the diagnosis is supported by physical evidence.

Ultimately, the key inquiry under OEC 403 and *Southard* is whether the expert's diagnosis provides the jury with any information it could not have determined on its own. A diagnosis that is supported by physical evidence

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[8] Under OEC 704, expert testimony on an ultimate issue, such as a whether the victim suffered abuse, is permissible.

explains the significance of the physical evidence in light of the disclosure of abuse; the jury cannot determine the significance of that physical evidence without assistance. Accordingly, the diagnosis is not merely a credibility determination by the expert, and the problems presented by *Southard* do not exist.

C. Physical evidence of abuse supported the KIDS Center diagnosis and the diagnosis is therefore admissible.

Turning to the facts of this case, the trial court properly denied defendant's motion *in limine* because physical evidence of abuse supported the KIDS Center diagnosis.[9] The record at the OEC 104 hearing shows that the physical findings contained in White's report—which detailed injuries to genitalia on the day of the abuse—were an important factor in Dr. Kyriakos's diagnosis. That physical evidence provided an objective basis for Dr. Kyriakos to perform a differential diagnosis and conclude that had been abused. (*See* Tr 82, 147) (describing process of diagnosing sexual abuse)). In Dr. Kyriakos's opinion, there was no other explanation for the injuries suffered by (Tr 146). A lay juror is not

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[9] Defendant does not dispute that the physical evidence in this case supported Dr. Kyriakos's diagnosis. Whether physical evidence supports a diagnosis of sexual abuse is a question of fact to be litigated at an OEC 104 hearing. The answer necessarily depends on the abuse alleged and the physical evidence considered by the medical experts. As noted above, to avoid the problem identified in *Southard*, the expert must rely on the evidence of abuse in diagnosing the victim.

qualified to determine likely causes for genital injuries and could not come to the conclusion that injuries were caused by offensive touching without expert assistance. Because the diagnosis was based on physical evidence of abuse, the trial court and the court of appeals were correct in ruling that the evidence was admissible.

In arguing to the contrary, defendant asserts that the jury was "fully capable" of considering allegations and the physical evidence of abuse without Dr. Kyriakos's independent assessment that sexual abuse had occurred.[10] Defendant is incorrect for two reasons. First, the jury needed expert assistance to understand whether the physical evidence supported the allegations, and the diagnosis provided that assistance. Second, the KIDS Center report and Dr. Kyriakos's diagnosis were the *only* pieces of evidence explaining the significance of White's physical findings.[11] Dr. Kyriakos testified that the purpose

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[10] Defendant asserts that it would have been permissible for Dr. Kyriakos to testify that the physical evidence was "consistent" with the allegations of abuse and then argues that that probative value of the diagnosis was minimal in light of that assertion. (App BoM at 20). One problem with defendant's argument is that he never asked the trial court to limit Dr. Kyriakos testimony to stating that the physical injuries were "consistent" with abuse. But even if defendant had made such a request, for the reasons described in the text, the diagnosis was useful to the jury.

[11] White testified at trial that the abrasions were unlikely to have been caused by normal washing or wiping. (Tr 725). That testimony was not presented

Footnote continued…

of White's report was to document injuries because they heal very quickly; the purpose was not to perform a detailed sexual abuse evaluation, as occurs at the KIDS Center. (Tr 115). Because the KIDS Center report and diagnosis explained the significance of the physical evidence, the diagnosis was helpful to the jury and not unfairly prejudicial.

II. An expert witness may explain the criteria used to assess a child for sexual abuse so long as the testimony does not impermissibly comment on the credibility of the victim.

The second issue presented by this case is whether the trial court properly admitted evidence regarding the criteria that the KIDS Center used to diagnose as having been sexually abused. As explained below, when a diagnosis of sexual abuse is itself properly admitted, an expert may explain the basis for that diagnosis, so long as the expert does not comment impermissibly on the credibility of the victim. Here, evidence regarding the criteria used to assess was not tantamount to a comment on credibility. Accordingly, the trial court properly denied defendant's motion *in limine*.

(…continued)

to the court at the OEC 104 hearing, and, in any event, does not diminish the probative value of Dr. Kyriakos's diagnosis.

A. The only issue properly before this court is whether the KIDS Center report and the criteria it described were an impermissible comment on the credibility of the victim; defendant's objections to expert testimony offered at trial are not preserved.

As an initial matter, it is important to note that the only argument properly before this court is the one defendant made at the OEC 104 hearing on his motion *in limine*. There, defendant made a general objection that the "KIDS Center evidence is a comment on the credibility of the witness." (Tr 61; ER 10). Defendant also argued that testimony regarding the criteria employed by Dr. Kyriakos and described in the KIDS Center report was a comment on the victim's credibility because the evaluation criteria were "simply ways to determine whether the child is being deceptive or has been coached or has been contaminated." (Tr 281). Those objections were sufficient to preserve defendant's general argument that the KIDS Center report and the criteria it described were an impermissible comment on the credibility of the victim. *See State v. Foster*, 296 Or 174, 183-84, 674 P2d 587 (1983) (objection in motion *in limine* sufficient to preserve argument for review).

The same cannot be said of defendant's arguments with respect to the expert testimony offered *at trial*, which is the focus of majority of his brief on the merits. After the trial court denied his motion *in limine*, defendant did not object to any of the KIDS Center expert testimony offered at trial. Yet on review, defendant's primary argument is that the specific trial testimony of KIDS Center experts

Dr. Kyriakos, Zancanella, and Glesne was an impermissible comment on credibility. (App BoM at 25-28). But because defendant did not object to that testimony when it was offered, defendant's argument that the trial testimony is inadmissible is unpreserved and this court should not consider it. *See State v. Perry*, 347 Or 110, 116-17, 218 P3d 95 (2009) (pretrial ruling that the KIDS Center report and diagnosis were admissible did not relieve defendant "of the obligation to make specific objections to discrete pieces of that evidence at trial").

B. When an expert's diagnosis of sexual abuse is properly admitted, the expert may testify regarding the basis for that diagnosis.

Turning to the merits, this court's cases hold that an expert may explain the basis for a properly-admitted diagnosis so long as the expert does not comment on the credibility of the victim. In *Lupoli*, this court recognized that testimony about the criteria used to assess a child for sexual abuse is "the kind of expert opinion that can assist a jury and ordinarily would be admissible," provided that the diagnosis itself is admissible. *Lupoli*, 348 Or at 362. In that case, this court was considering whether expert testimony describing the basis for a diagnosis of sexual abuse was admissible when the diagnosis is itself was barred by *Southard*. In that context, the testimony explaining the expert's opinion was "inextricably bound" up with the inadmissible diagnosis—which was based "ultimately and only" on whether the expert believed the victim. *Lupoli*, 348 Or at 361, 362-63. Accordingly, the testimony was inadmissible. *Id.* at 362-63 ("When [the expert]

then was asked the basis for her diagnosis, she was implicitly declaring, with each statement and description, why she had found [the victim] to be credible.").

But in reaching that conclusion, this court expressly recognized that when a diagnosis *is* properly admitted,[12] an expert may testify regarding the criteria or "subsidiary principles" [13] used to evaluate victims of child sexual abuse. Those criteria include: 1) whether the child victim's comments were developmentally appropriate; 2) descriptions of changes in demeanor; 3) description of child's report as containing spontaneous and descriptive details; 4) description of the circumstances that can point to a child's suggestibility or the possibility that the

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[12] Even when the trial court does not admit a diagnosis, an expert may testify regarding criteria used in assessing a child for sexual abuse so long as the testimony is relevant, scientifically valid, and comment on the credibility of a witness. *See Lupoli*, 348 Or at 362-63 (noting that testimony regarding criteria used to assess a victim of sexual abuse is likely admissible "if offered to otherwise assist the jury, instead of to explain the expert's credibility-based opinion").

[13] In *Southard*, this court noted that the expert in that case had testified about the principles underlying the diagnosis of sexual abuse, including "the way that children typically express themselves to determine whether the [victim] had been coached or was using his own words to describe his experience," "a strong correlation between the [victim's] reported behaviors and sexual abuse," and how "the fact that the [victim] had not reported the abuse immediately did not necessarily mean that he had not been abused." 347 Or at 135 n 6. The court explained that in making a diagnosis, an expert may draw on such "subsidiary principles from the medical and social sciences." *Id.* But the court did not consider whether the testimony on the subsidiary principles used to make the diagnosis was proper because the defendant had not challenged it. *Id.*

child has been coached. 348 Or at 362. The rule recognized in *Lupoli* is admittedly dicta (because in that case the diagnosis was not properly admitted), but it is consistent with this court's case law, and the court should adhere to it.

Of course, in explaining the basis for a diagnosis, an expert witness "may not give an opinion on whether he believes a witness is telling the truth." *State v. Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983). *See also State v. Milbradt*, 305 Or 621, 629-30, 756 P2d 620 (1988) (reaffirming that principle, with emphasis, and noting that "[a]n opinion that a [witness] is not deceptive" is tantamount to giving an opinion on the credibility of the witness); *State v. Keller*, 315 Or 273, 284-85, 844 P2d 195 (1993) (reaffirming *Middleton* rule and clarifying that it "applies whether the witness is testifying about the credibility of the other witness in relation to the latter's testimony at trial or is testifying about the credibility of the other witness in relation to statements made by the latter on some other occasion or for some reason unrelated to the current litigation"). Nonetheless, a witness may give testimony that might permit the jury to infer that the victim was telling the truth but that does not "connect the dots" with the ultimate conclusion that the victim was telling the truth, and such testimony can be considered "helpful" to the trier of fact. *Middleton*, 294 Or at 438.

For instance, in *Middleton*, this court approved some testimony that explained why a victim might recant a report that her father had raped her. The expert explained that the victim's behavior was "very much in keeping with

children who have complained of sex molestation at home." 294 Or at 432. The expert also testified that the victim's behaviors were "very typical for a teenage sex abuse victim." *Id*. at 433. In ruling that the testimony was admissible, this court explained:

> It is true that if the jurors believed the experts' testimony, they would be more likely to believe the victim's account. *Neither of the experts directly expressed an opinion on the truth of the victim's testimony.* Much expert testimony will tend to show that another witness either is or is not telling the truth. *See State v. Stringer*, 292 Or 388, 639 P2d 1264 (1982). This, by itself will not render evidence inadmissible.

294 Or at 435 (emphasis added).

To summarize, as this court has already recognized, when a diagnosis of sexual abuse is properly admitted, an expert may testify regarding the criteria used to evaluate victims of child sexual abuse so long as the testimony does not comment impermissibly on the credibility of a witness.

C. Evidence describing the criteria that the KIDS Center used to assess is admissible.

The evidence describing the criteria that the KIDS Center used to assess is admissible. Neither the KIDS Center report—which describes the criteria used to assess —nor the testimony of Dr. Kyriakos at the OEC 104 hearing was an impermissible comment on credibility. In evaluating Dr. Kyriakos explained that, pursuant to the Oregon Medical Guidelines, she considered 1) the consistency of the core details reported by the child; 2) the child's ability to give information in more than one media form; 3) whether the disclosure was made

spontaneously; and 4) the child's ability to give specific sensory details. (Tr 95-97). Dr. Kyriakos emphasized that whether a child meets those criteria influences the diagnosis but does not mean that the child is truthful. (Tr 187-88). The KIDS Center report summarized the findings for those criteria:

> The core details of what [told us today are consistent with what she had previously told [law enforcement] and SANE. [was able to use drawings, her words, and her body as a reference to relay information about what had happened. The disclosure appears spontaneous in that [woke her friend [after the touching happened and then immediately called [mom. [also provided the sensory detail of "stinging" during the examination. Stinging is a sensory detail that would likely be known only if the child had actually experienced the sensation.

(SER 25).

None of the evidence presented at the OEC 104 hearing was a comment on credibility. First, Dr. Kyriakos's testimony and the report's assertion that had consistently reported the core details of the events to the KIDS Center, law enforcement, and the SANE nurse was not vouching. *See State v. Viranond*, 346 Or 451, 461, 212 P3d 1252 (2009) (holding that it is not improper vouching for a witness to testify that another's witness's statements were "consistent" with his or her previous statements). Similarly, the fact that reported her story spontaneously and used words, pictures, and movements in describing the events was not a statement that Dr. Kyriakos believed *See Lupoli*, 348 Or at 362 (noting that expert's description of victim "having included spontaneous and

descriptive details in her statements" is permissible or potentially permissible when underlying diagnosis is admissible).

The closest the report gets to vouching is the statement that reported stinging and "[s]tinging is a sensory detail that would likely be known only if the child had actually experienced the sensation." (SER 25). But even with that statement, the most direct inference is that had "likely" experienced a stinging sensation at some point and was therefore able to describe the sensation. The direct inference is not that had, in fact, experience the sensation or that was credible with respect to other details of her report of abuse.

In any event, even if some portion of the report were impermissible, that is not a basis to exclude the report as a whole. "It is well established that a general objection to testimony as a whole does not avail when part of it is admissible." *American Oil etc. Co. v. Faust*, 128 Or 263, 268, 274 P 322 (1929) (citations omitted). As discussed above, defendant litigated this issue solely through a general objection that the KIDS Center report and the criteria used to assess were an impermissible comment on her credibility. Defendant did not explain why the report as a whole was a comment on the credibility of or why the individual criteria described in the report were objectionable. Indeed, much of the KIDS Center report is clearly admissible, including statements to the KIDS center staff and the results of Dr. Kyriakos's physical examination. Accordingly, under *American Oil*, the trial court properly rejected defendant's argument that the report

and the criteria used to assess —as a whole—were a comment on her credibility.

D. Even if this court considers the evidence presented at trial, the KIDS Center experts did not comment impermissibly on credibility.

As noted, review in this court is limited to the arguments and record before the trial court when it ruled on defendant's motion *in limine*. *State v. Pitt*, 352 Or 566, 575, 293 P3d 1002 (2012); *Perry*, 347 Or at 116-17. But even if this court were to look at the record as it developed at trial, the state's witnesses did not directly or indirectly comment on credibility. First, defendant argues that the combination of Zancanella's and Glesne's testimony was "tantamount" to vouching. Defendant is incorrect. Zancanella testified that when interviewing an alleged child victim, she looks for a child's ability to give information "in a narrative form," "spontaneously," in detail, and with consistency in the core details, as well as whether the child uses his or her "body as a reference." (Tr 737-39). Later at trial, Glesne noted that statement of the core details was consistent with her previous statements and that used words, her body, and a drawing to describe what had happened to her. (Tr 841-42).

Neither Zancanella's testimony nor Glesne's was an impermissible comment on credibility. Neither witness stated directly or indirectly that was telling the truth or that she was not being deceptive. *See Keller*, 315 Or at 285 (testimony that the victim was "obviously telling you about what happened to her

body," and showed no evidence of being "coached" was impermissible vouching); *Milbradt*, 305 Or at 630 (testimony that the victim was "not deceptive," could "not lie without being tripped up," and "would not betray a friend" was impermissible vouching). Rather, their testimony explained the criteria used to evaluate and described the basis for the KIDS Center diagnosis. *See Middleton*, 294 Or at 433 (testimony that the victim's behaviors were "very typical for a teenage sex abuse victim" not an improper comment on credibility). Of course, as in *Middleton*, the fact that the KIDS Center diagnosed as having been abused supports an inference that the KIDS Center staff found to be credible. But the fact that the jury could make that inference does not mean that the testimony itself was an impermissible comment on credibility.

The same is true regarding Dr. Kyriakos testimony that a child's ability to "describe a sensation" (such as description of "stinging") is important. (Tr 864-65). As discussed above, that testimony does not directly suggest that allegations of abuse were truthful. Rather, that testimony, like the testimony by Zancanella and Glesne, described the basis for the properly-admitted diagnosis as allowed by *Lupoli*. 348 Or at 362. Because the KIDS Center testimony explained the basis for an admissible diagnosis and did not comment on credibility, the testimony was admissible.

CONCLUSION

The trial court correctly denied defendant's motion *in limine* to exclude expert testimony regarding the KIDS Center diagnosis of sexual abuse. This court should affirm the decision of the Court of Appeals and the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 22, 2015, I directed the original Brief on the Merits of Respondent on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Neil F. Byl, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7554 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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