
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
Case No. 06FE0574SF

CA A147355

S062346

PETITIONER'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals on an appeal from a judgment of the
Circuit Court for Deschutes County
Honorable Stephen P. Forte, Judge

Opinion Filed: March 6, 2014
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Before Wollheim, Presiding Judge, and Duncan, Judge,
and Schuman, Senior Judge

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This brief addresses two issues: (1) whether a diagnosis of sexual abuse is admissible when it partially relies upon physical evidence consistent with the complainant's report, and (2) whether an expert witness may state the attributes of a truthful statement and testify that those attributes of truth were present in the complaining witness's statements?

The state jointly prosecuted two cases against defendant involving two victims, JC and KS. The state dismissed the case involving JC mid-trial, and the jury convicted defendant of one count of first-degree sexual abuse involving KS.

Questions Presented and Proposed Rules of Law

First Question Presented. In *State v. Southard*, 347 Or 127, 218 P3d 104 (2009), this court left open the question of whether a diagnosis of child sexual abuse is admissible when that diagnosis partially relies upon physical evidence of abuse. Here, the trial court admitted into evidence a diagnosis of child sexual abuse that partially relied upon physical evidence consistent with the complainant's report. Is an expert's diagnosis of child sexual abuse admissible if that diagnosis partially relies upon physical evidence consistent with the complainant's report?

First Proposed Rule of Law. No. An expert's diagnosis of child sexual abuse is inadmissible even if it partially relies upon physical evidence consistent with the alleged sexual contact. The probative value of the diagnosis is minimal because a jury is equally capable of determining whether abuse occurred based on the underlying evidence. The danger of unfair prejudice is great because a jury is likely to overvalue the expert's opinion and defer to the expert's assessment of the evidence in making the legal determination of whether sexual abuse occurred.

Second Question Presented. At trial, may an expert witness state the attributes of a truthful statement and testify that those attributes were present in the complaining witness's statements?

Second Proposed Rule of Law. No. That evidence falls well within this court's rule that a witness may not comment on the credibility of another witness.

Third Question Presented.¹ Should a trial court grant a mistrial when the jury has heard prejudicial evidence regarding a different victim and the state dismisses all charges related to that victim mid-trial for lack of evidence?

Third Proposed Rule of Law. Yes. Defendant was substantially prejudiced by the jury hearing evidence regarding a different child victim, and

¹ Defendant relies upon the arguments made in his opening brief before the Court of Appeals for his third question presented. ORAP 9.20(4).

therefore the trial court erred in denying the motion to sever and motion for a mistrial.

Summary of Historical and Procedural Facts

On February 25, 2006, JC and her friend KS went to defendant's house to babysit defendant's son. (Tr 464, 528). JC was eleven years old and KS was 10 years old. (Tr 453). Defendant and his wife left for dinner around 8:00 p.m. but returned to the house after dinner to retrieve defendant's wife's wallet. (Tr 464, 468). After defendant and his wife left for the second time, JC and KS made their bed on the floor in the living room and watched movie. (Tr 470). The two girls shared a comforter and fell asleep while the movie was playing. (Tr 475, 535).

JC woke up and felt someone touching her feet over the blanket, as if someone was tucking in her feet. (Tr 475). JC looked and saw that it was defendant. (Tr 475). JC looked for defendant's wife and saw that the bathroom light was on with the door closed. (Tr 475). She heard what she thought was "puking" sounds coming from the bathroom. (Tr 475). JC closed her eyes and went back to sleep. (Tr 476).

KS woke up to find that defendant was kneeling down almost on top of her with his hand down her pants. (Tr 535). KS heard a door open, and defendant left to join his wife in another room. (Tr 537). KS sat up, and

defendant came back into the room. (Tr 537). Defendant asked her if she was okay, and she replied, “Yeah. I don’t feel good. I have a headache.” (Tr 537). Defendant asked if she wanted some aspirin, and KS said, “No.” (Tr 537). KS asked defendant if she could watch television, and defendant said that he could not find the remote. (Tr 537). Defendant asked KS if she wanted to get up so that he could look for the remote. (Tr 538). KS said, “No, it’s okay. I can just go back to sleep.” (Tr 538). Defendant left the room. (Tr 538).

KS woke JC. (Tr 476, 538). JC told KS to go back to sleep. (Tr 476). KS told JC, “I want to go home. He – I woke up and I – he was touching me and – in my private area, and I – I want to go home. I want to call my mom.” (Tr 476). KS had tears in her eyes and acted very scared. (Tr 476).

JC called her father. (Tr 477). JC’s father said he was on his way to pick them up and that he would call the police. (Tr 477).

Defendant was not in the room when JC’s dad arrived to collect JC and KS. (Tr 478). Defendant’s wife answered the door in tears and said, “I don’t know how [KS]’s pants were pulled down. I don’t know. I don’t know how that would’ve happened. My husband is an honorable man of the military, and he would never, ever do anything like this. But my father, he molested me, and he’s nothing like my father.” (Tr 583).

JC’s father took them to the police station where the police interviewed them for three hours. (Tr 585). JC’s father convinced JC and KS to go to the

hospital for an evaluation later that evening. (Tr 586). Shelly White, a nurse at St. Charles Medical Center examined JC and KS that evening. (Tr 704-08).

Several weeks later, on March 31, 2006, medical examiner Jill Hartley and interviewer Carol Zancanella evaluated JC at the KIDS Center. (Tr 740, 745). On April 5, 2006, physician Michelle Kyriakos and interviewer Paula Glesne evaluated KS at the KIDS Center. (Tr 841, 860). Kyriakos produced a written assessment of KS in which she concluded, “it is our opinion that [KS] has been sexually abused.” State’s Exhibit #11, *KIDS Center Evaluation of KS*, ER-1.

The state charged defendant with one count of sexual abuse in the first degree involving KS on or about February 25, 2006, and two counts of attempted sexual abuse in the first degree involving JC between or about February 25, 2005 and February 25, 2006.²

Prior to trial, defendant submitted a Motion in Limine. Defendant anticipated that the state would call Michelle Kyriakos and Paula Glesne of the Kid’s Intervention and Diagnostic Service Center “to testify as to what [KS] told them and to testify that in their opinion they believe that [KS] was sexually abused.” Defendant stated that he objected to the state offering such evidence at trial because it was “without sufficient foundation.”

² The state’s allegations as to JC involved an alleged tickling incident on a different occasion than the one involving KS.

The state filed a response to defendant's motion, arguing that it would lay the necessary foundation under *State v. Brown*, 297 Or 404, 687 P2d 751 (1984), and *State v. Marrington*, 335 Or 555, 73 P3d 911 (2003). Applying *Brown*, the state argued that the evidence was relevant under OEC 401, would assist the trier of fact under OEC 702, and should not be excluded on grounds that the evidence was prejudicial under OEC 403.

Defendant filed a lengthy reply detailing examples of the testimony defendant anticipated the state would offer. That list included, "Evidence of a diagnosis of child sex abuse." Defendant argued that "[a]ny such evidence would be an impermissible comment on the credibility of another witness" and that the proposed testimony does not meet the admissibility standards of *Brown* and *State v. O'Key*, 321 Or 285, 899 P2d 663 (1995). Defendant stated that his motion "is based on OEC 702, 401, and 403."

During a motion in limine hearing at which Kyriakos testified, defendant argued that Kyriakos's diagnosis did not meet the standards of admissibility under *Brown* and *O'Key*, and that the testimony and KIDS Center report should be excluded because they contained information that constituted an improper comment on the credibility of another witness. (Tr 280-81). Defense counsel specifically argued that any testimony by the experts assessing the credibility of JC and KS should be excluded. (Tr 280-81).

The trial court denied defendant's motion. *Order on Defendant's Motions*.

The state dismissed the counts involving JC mid-trial because the state did not believe it had enough evidence to proceed. (Tr 880). A jury found defendant guilty of one count of sexual abuse in the first degree involving KS. The trial court sentenced defendant to 75 months in prison and 10 years of post-prison supervision, less time served.

On appeal, defendant raised three assignments of error. First, he argued that the trial court erred in admitting testimony by KIDS Center interviewers that constituted impermissible comments on the credibility of KS. Second, he argued that the trial court erred in admitting the diagnosis of sexual abuse. Third, he argued that the trial court erred in denying defendant's motion to sever and motion for a mistrial.

The Court of Appeals affirmed defendant's conviction in a written opinion. First, applying the three-part test from *State v. Ovendale*, 253 Or App 620, 292 P3d 579 (2012), *rev den*, 353 Or 714 (2013), it held that the physical evidence was sufficiently corroborative of abuse to allow admission of the sexual abuse diagnosis. Second, it held that the interviewers' comments on the attributes of truthful statements, followed by their testimony that KS's statements contained those attributes, were admissible under *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010), because the diagnosis was admissible and

those comments did not directly comment on the truthfulness of KS. Third, it held that the trial court did not err in denying defendant's motion to sever and motion for a mistrial. *State v. Beauvais*, 261 Or App 837, 322 P3d 1116 (2014).

Summary of Argument

This brief addresses two issues. First, whether a diagnosis of sexual abuse is admissible when it relies upon physical evidence consistent with the complainant's report? And second, whether an expert witness may state the attributes of a truthful statement and testify that those attributes of truth were present in the complaining witness's statements?

This court has already held that a medical diagnosis of child sexual abuse is inadmissible when there is no physical evidence of abuse, because the question of whether abuse occurred is not "abstruse" or medically complicated and the danger of unfair prejudice substantially outweighs the probative value. This court should hold that the same is true even when the diagnosis partially relies upon physical evidence that is consistent with the alleged sexual contact.

Even when the diagnosis partially relies upon physical evidence, the probative value of the diagnosis is slight because it does little to advance the jury's ability to evaluate the evidence. A medical diagnosis is helpful when it provides jurors with information that is beyond their common experience by identifying the occurrence of a complex medical condition. A diagnosis of

child sexual abuse is different because it determines whether particular conduct has occurred. That conduct (an act of sexual abuse by another person) is not complicated and is within a lay person's ability to determine from the evidence provided at trial. By diagnosing the complaining witness with child sexual abuse, the expert is offering her opinion as to whether a crime has occurred. That evidence does little to assist the jurors in reaching *their own* conclusion as to whether the crime occurred. To the contrary, the risk of unfair prejudice is great because there is a substantial risk that the jury will defer to the expert's opinion in determining whether the crime of sexual abuse has been committed.

Regarding the second issue, the experts here offered testimony about the credibility of the complaining witness that is inadmissible regardless of whether it is offered to explain an admissible medical diagnosis. In Oregon, a witness, expert or otherwise, may not offer testimony about the credibility of another witness. Here, the state's experts testified about the attributes of a truthful statement and testified that those attributes of truth were present in the complaining witness's statements. That testimony constituted an impermissible comment on the credibility of the complaining witness.

Even if the diagnosis of child sexual abuse was admissible, the expert testimony concerning the credibility of the complaining witness was inadmissible. First, although it is true that pursuant to OEC 703 an expert may

rely on inadmissible evidence in reaching an opinion, OEC 703 does not sanction bringing inadmissible evidence before the jury whenever such evidence qualifies as the basis for an expert opinion; the underlying evidence must be independently admissible before it is presented to a jury. Second, although it may be true that an expert is ordinarily allowed to testify as to the subsidiary principles of social science that inform her expert opinion, those principles do not extend to the science of truth-telling, because it is for the jury alone to determine whether a witness is telling the truth.

Argument

I. A diagnosis of child sexual abuse is inadmissible because a jury is equally capable of weighing the same evidence, and the danger that the jury will defer to the expert's conclusion is great.

A. *Southard* holds that a diagnosis of child sexual abuse that is based on an assessment of the complaining witness's credibility and evidence that the complaining witness exhibited behavior consistent with having been sexually abused is inadmissible.

In *Southard*, 347 Or 127, this court applied the test for the admissibility of scientific evidence in *Brown*, 297 Or 404, and *O'Key*, 321 Or 285, to a diagnosis of child sexual abuse. This court held that (1) a diagnosis of child sexual abuse possesses sufficient indicia of scientific reliability to be admissible, but (2) an expert's diagnosis of child sexual abuse is inadmissible under OEC 403. *Southard* did not include physical evidence of abuse, and this

court did not decide whether an expert's diagnosis of sexual abuse is admissible if that diagnosis partially relies upon physical evidence.

In *Southard*, a KIDS Center physician diagnosed the complaining witness with sexual abuse. Because there was no physical evidence of abuse, the physician's diagnosis was based on: "(1) the [complaining witness's] reported behaviors and (2) [a] determination that the [complaining witness's] reports of sexual abuse were credible." 347 Or at 137. In deciding whether to credit the complaining witness's reports of abuse, the physician "considered whether the [complaining witness] had used age-appropriate terms to describe the abuse, whether he had provided specific details, and whether the events that he described were consistent with other historical facts. [The physician] also considered whether the behaviors that the mother and foster mother had reported were consistent with the reported abuse." *Id.* at 131.

This court concluded that the diagnosis was scientifically valid, but was inadmissible under OEC 403. Specifically, this court found that "the criteria that the staff used to decide whether to credit the [complaining witness's] testimony are essentially the same criteria that we expect juries to use every day in courts across this state to decide whether witnesses are credible." *Id.* at 140. As a result, this court held that the risk of prejudice in admitting the diagnosis was great in relation to its probative value because, "the diagnosis, which was based primarily on an assessment of the [complaining witness's] credibility,

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.

In other words, this court held that the diagnosis of child sexual abuse was inadmissible under OEC 403 because it was largely based on the expert's evaluation of the complaining witness's credibility using the same criteria that we expect juries to employ when making their own credibility determination. Importantly, the diagnosis in *Southard* was also based on expert testimony about the complaining witness's reported behaviors, which "did not necessarily establish that the boy had been abused," although the expert testified that "research showed a strong correlation between sexual abuse and those types of behaviors." *Id.* at 136 n 7. This court therefore recognized that a scientific diagnosis of abuse that is based primarily, yet not exclusively, on an assessment of the credibility of the witness is inadmissible.

B. A diagnosis of child sexual abuse that partially relies on physical evidence that is consistent with the alleged sexual contact is inadmissible for the same reasons articulated in *Southard*.

If, as this court held in *Southard*, a diagnosis of child sexual abuse is inadmissible if it relies on (1) an assessment of the credibility of the complaining witness and (2) behavioral evidence that is consistent with abuse, then the same should hold true of a diagnosis that also partially relies on

physical evidence that is consistent with the alleged sexual contact. That is because a jury is equally capable of assessing the credibility of the complaining witness and weighing the physical evidence, the behavioral evidence, and all other evidence presented at trial to determine whether an act of child sexual abuse occurred.

As this court recognized in *Southard*, the probative value of a child sexual abuse diagnosis is slight because it determines whether relatively uncomplicated conduct has occurred, and a lay person is often able to determine whether such conduct has occurred without expert assistance:

“In undertaking that inquiry in this case, we note that a diagnosis of child sex abuse differs from other medical diagnoses. Most medical diagnoses provide jurors with information that is beyond their common experience; the diagnoses identify the occurrence of a complex medical condition, determine its cause, or predict the future resolution of the condition. *See [Marcum v. Adventist Health System, 345 Or 237, 245–46, 193 P3d 1 (2008)]* (diagnosis that gadolinium exposure caused the plaintiff’s vasospastic disorder); *[Jennings v. Baxter Healthcare, 331 Or 285, 309–10, 14 P3d 596 (2000)]* (diagnosis that ruptured silicone breast implants caused the plaintiff’s neurological disorder). A diagnosis of child sex abuse, however, determines 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. In this case, for example, if a lay person were to credit the boy’s statements that defendant made him and his sister engage in oral sex, then it follows that the children were sexually abused. It also follows that the doctor’s ultimate conclusion in this case—that sexual abuse had occurred—did not turn on an abstruse matter of science; rather, it turned primarily on the sort of credibility determination that lay jurors ordinarily make.”

Id. at 134-35.

This court also recognized that courts in other jurisdictions have excluded expert testimony on the ultimate issue of whether sexual abuse occurred because such a medical diagnosis “does not tell the jury anything that it is not capable of determining without expert assistance.” *Id.* at 141. As this court understood those decisions, “they rest on the proposition that the degree to which the diagnosis advances the jury’s ability to evaluate the evidence is minimal and that the risk that the jury will defer to the expert’s assessment outweighs whatever probative value the diagnosis may have.” *Id.* at 141-42. In other words, “those courts have balanced the probative value of the diagnosis against the risk of prejudice and held, as we do, that the diagnosis is not admissible.” *Id.* at 142. Importantly, two of those cases hold that the diagnosis of child sexual abuse is inadmissible even when the diagnosis partially relies upon physical evidence.

For example, in *United States v. Whitted*, 11 F3d 782, 785 (8th Cir 1993), the court explained that although an expert could offer some opinion evidence, it could not offer an opinion as to whether sexual abuse had occurred, because that opinion is not useful to the jury:

“In the context of child sexual abuse cases, a qualified expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits. A doctor who examines the victim may repeat the victim’s statements identifying the abuser as a family member if

the victim was properly motivated to ensure the statements' trustworthiness. A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse. Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible."

(Citations omitted).

Similarly, in *Atkins v. State*, 243 Ga App 489, 495, 533 SE2d 152 (2000), the Georgia Court of Appeals reasoned that it was improper to allow an expert to definitively testify whether sexual abuse occurred because the jury was equally capable of weighing the evidence:

"To stop the expert from overstepping his or her bounds and invading the province of the jury, he or she is prevented from definitively stating that molestation or abuse actually occurred. This is the appropriate result, as the determination of this ultimate issue may turn on numerous facts in evidence beyond the medical or psychological evidence which requires the specialized knowledge of the expert to understand. In other words, although it may be beyond the ken of the jury to determine whether certain physical and psychological symptoms were consistent with abuse, it would not be beyond their ken to determine whether an expert's opinion that the symptoms were consistent with abuse in conjunction with all of the other evidence elicited at trial proves that the victim was both molested and molested by the defendant."

See also, State v. Iban C., 275 Conn 624, 639, 881 A2d 1005 (2005) ("When viewed in isolation, [the expert's] diagnosis of '[c]hild [s]exual [a]buse' did not provide any assistance to the jury in understanding the facts presented at trial or the issue on which it needed to deliberate."); *State v. Batangan*, 71 Haw 552,

558, 799 P2d 48 (1990) (“[C]onclusory opinions that abuse did occur and that the child victim’s report of abuse is truthful and believable is of no assistance to the jury, and therefore should not be admitted. * * * The jury is fully capable, on its own, of making the connections to the facts of the particular case before them and drawing inferences and conclusions therefrom.”).

Those cases and others like them have recognized that when an expert testifies as to whether sexual abuse has occurred, he or she is weighing the same (and often less) evidence that the jury evaluates in determining whether criminal conduct has occurred. As this court observed in *Southard*, it is within a lay person’s competence to determine whether such uncomplicated criminal conduct has occurred. The expert’s ultimate opinion that sexual abuse occurred does little to advance the layperson’s understanding of the underlying evidence.

The fact that the expert relied on physical evidence to reach her diagnosis does not make the expert’s diagnosis any more helpful to the jury. The expert is still permitted to tell to the jury about the physical evidence she observed and offer an opinion as to whether the physical evidence is consistent with the alleged sexual contact. For example, in *State v. Sanchez-Alfonso*, 352 Or 790, 796, 293 P3d 1011 (2012), an expert permissibly testified that the victim’s skull fracture was consistent with the victim having been thrown head-first into the dresser. Similar testimony about whether the alleged victim’s physical

symptoms were consistent with the alleged sexual contact would assist the jury in making a determination as to whether sexual abuse occurred.

But a jury is equally capable of applying its own common knowledge and good sense to evaluate the physical evidence and the expert's assessment of that physical evidence along with the other evidence introduced at trial to form its own conclusion as to whether sexual abuse occurred. An expert opinion that sexual abuse occurred does not "turn on an abstruse matter of science" and therefore does little to advance the jury's own assessment of that same evidence. Instead, admission of the diagnosis introduces the great risk that the jury will defer to the expert's assessment instead of engaging in its own probing assessment of the evidence presented at trial.

C. Kyriakos's diagnosis that KS had been sexually abused did little to assist the jury in evaluating the evidence and was unfairly prejudicial.

As in *Southard*, the diagnosis here did little to assist the jury in evaluating the evidence because (1) the jury was equally capable of weighing the evidence upon which Kyriakos relied when arriving at her diagnosis and (2) Kyriakos's diagnosis relied heavily upon her own assessment of KS's credibility.

At the pretrial hearing, Kyriakos explained what she looks for in diagnosing child sexual abuse. She stated that she looks for the following information, which can be summarized in these three categories of evidence:

- Indicators that the child’s account was credible, including whether the core details of her story were consistent over time, whether the child was able to give “multiple details,” and if the child “was able to give information in more than one * * * media form,” whether the child’s disclosure was spontaneous, and whether the child was able to provide “sensory details.” (Tr 96-97).
- Behavioral changes that reflect a deviation from the child’s baseline. (Tr 97).
- Physical signs (Tr 96).

Kyriakos diagnosed KS with child sexual abuse based on information she collected in those three categories of evidence, summarized as follows:

1. KS’s statements and Kyriakos’s credibility assessment

Kyriakos noted in her testimony “the consistency of [KS’s] core details, compared to what she had previously said”; “the fact she was able to give multiple details, such as who, what, where, when”; that “her disclosure was spontaneous”; that she gave information in “multiple media”; and that she used “sensory detail”. (Tr 145-46).

In her written report, which was submitted into evidence, Kyriakos summarized KS’s account and noted that:

“The core details of what [KS] told us today are consistent with what she had previously told LEA and SANE. [KS] 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 [KS] woke her friend [JC] after the touching happened and then immediately called [KS’s] mom. [KS] also provided 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.”

State’s Exhibit #11, ER-1.

2. KS’s behavior

Kyriakos noted in her written report that KS had exhibited behavioral changes that were concerning for abuse but that could also have been attributable to other stressors in her life:

“Mom shared during the caregiver history that [KS’s] demeanor had changed drastically since the touching incident occurred. Mom described that [KS] has become clingier, fearful of being alone, wants to only be with Mom or [KS’s] sister, and refuses to sleep by herself. These behavioral changes are concerning for abuse in that the behaviors represent a change from [KS’s] baseline. However, these behavioral changes could also be due to other stressors in [KS’s] life. Some of these stressors include her parent’s recent separation and pending divorce, [KS] having little contact with her father, limited social support for [KS] and her family, Mom’s recent mental health diagnosis, and financial difficulty for [KS’s] family.”

State’s Exhibit #11, ER-1-2.

3. KS’s physical symptoms

Kyriakos did not reference any physical symptoms in her written report as a basis for her diagnosis. However, she testified that she “looked at” Shelly White’s physical examination report of KS documenting that KS had “redness and the swelling and the abraded areas on the labias” the same day of the reported incident. (Tr 146). She stated the physical findings were “highly concerning” because “we couldn’t find another explanation for why she would

have swelling and the areas of abrasion along the labias.” (Tr 146). She said that she agreed with White that the physical findings that White noted were consistent with the way in which KS described that she had been touched. (Tr 863). Kyriakos testified that rubbing with a washcloth or a hand when bathing “perhaps” would cause abrasions, but she did not think that would make a lot of sense. (Tr 875). She said that in order to produce the results documented in White’s report, KS would “have to be rubbing pretty vigorously or with, you know, something that was sharper, like there was an edge on something she was rubbing with, or a sharp fingernail.” (Tr 877). But she noted, “I would think as soon as somebody starts to - - to feel that they’re causing themselves pain, they would - - they would stop and not continue, would be my thought.” (Tr 877).

Kyriakos’s diagnosis therefore was based on the following information: (1) KS’s account and Kyriakos’s assessment that KS was telling the truth about what had happened, (2) KS’s reported behaviors (that did not necessarily establish that she had been abused), and (3) her opinion that KS’s physical symptoms were consistent with KS’s account. The jury was fully capable of listening to what KS said in the interview, making its own determination as to whether KS was telling the truth, and crediting Kyriakos’s opinion about whether the behavioral and physical evidence was consistent with KS’s account with whatever weight it thought appropriate. Kyriakos’s independent assessment of that evidence and ultimate conclusion that a crime had been

committed did little to assist the jury in assessing that same evidence along with the other evidence presented at trial.

Furthermore, as was the case in *Southard*, Kyriakos's diagnosis was not very helpful to the jury because it was based primarily on an assessment of KS's credibility. Because the behavioral and physical evidence did not necessarily establish that KS had been abused, Kyriakos had to believe that KS was telling her the truth in order to arrive at her diagnosis. In fact, Kyriakos's written assessment explaining the basis of her diagnosis, which was admitted into evidence, is heavily based on an assessment of KS's credibility and does not mention KS's physical symptoms at all. State's Exhibit #11, ER-1-2.

In sum, Kyriakos's diagnosis had minimal probative value because it was based on information and inferences that a lay person would be able to independently understand and draw. Furthermore, the diagnosis, as was the case in *Southard*, relied heavily on Kyriakos's assessment of KS's credibility because the behavioral and physical evidence did not necessarily establish that KS had been abused. And finally, as was the case in *Southard*, there was a substantial risk that the jury would overvalue Kyriakos's expert evaluation of the evidence and defer to her assessment of that evidence instead of weighing the evidence itself. Therefore, the diagnosis was inadmissible, and the trial court erred in receiving it into evidence both in oral and written form.

D. The error was not harmless.

An evidentiary ruling by the trial court must be both erroneous and prejudicial to warrant reversal. The appellate court may affirm despite the error only if it determines that there is “little likelihood that the error affected the verdict.” *State v. Hansen*, 304 Or 169, 180, 743 P2d 157 (1987).

Here, Kyriakos offered her expert opinion on the ultimate issue in this case, whether KS had been sexually abused. Defendant presented a vigorous defense. Both defendant and defendant’s mother testified that KS had asked for a beer before they left for the evening. (Tr 960, 1072). Defendant explained that he had felt around the cushions where the girls were sleeping in order to look for the television remote control, but had never touched KS inappropriately. (Tr 1072, 1086, 1101).

Defendant’s wife testified on defendant’s behalf, stating that KS seemed “pissy” when defendant told her that she could not watch television after they came home. (Tr 1010). She testified that she witnessed defendant put a blanket over the girls’ feet and search the cushions near them for the television remote control. (Tr 1009).

The case was a close one, resulting in a 10-2 verdict. Under those conditions, this court cannot say that the erroneously admitted diagnosis, which was “surrounded with the hallmarks of the scientific method,” had little likelihood of affecting the verdict. *Southard*, 347 Or at 140.

II. Expert testimony about the attributes of a truthful statement, followed by testimony that another witness's statement contained those attributes of truth, is inadmissible because it is testimony by one witness concerning the credibility of another witness.

A. Expert testimony concerning the credibility of another witness is inadmissible.

Oregon courts have long held that one witness may not comment on the credibility of another witness. In *State v. Middleton*, 294 Or 427, 657 P2d 1215 (1983), this court held that “in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth.” *Id.* at 438. This court strongly reiterated that holding in *State v. Milbradt*, 305 Or 621, 756 P2d 620 (1988):

“We have said before, and we will say it again, but this time with emphasis – we really mean it – *no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state.* The assessment of credibility is for the trier of fact and not for psychotherapists.”

Id. at 629 (emphasis in original) (footnote omitted). In that case, this court held that expert testimony that falls short of overt vouching, yet concerns whether another witness is credible, is inadmissible. This court found inadmissible testimony that a mentally retarded sex abuse victim was not deceptive, could not lie without being tripped up, and would not betray a friend. *Id.* at 630.

In *State v. Keller*, 315 Or 273, 844 P2d 195 (1993), this court held that an expert's testimony that “[t]here was no evidence of leading or coaching or fantasizing” by an alleged child victim of sexual abuse, and that the child was

“obviously telling you about what happened to her body,” was an improper comment on the witness’s credibility. *Keller*, 315 Or at 285.

And in *Brown*, 297 Or at 440-41, this court held that polygraph evidence was inadmissible because it intruded upon the jury’s role in evaluating the credibility of witnesses and there was a great risk that jurors would overvalue such testimony:

“Polygraph evidence may well divert the trier of fact from the direct and circumstantial evidence presented in a case to a distorted valuation of the polygraph evidence. Polygraph evidence is not just another form of scientific evidence presented by experts such as ballistics analysis, fingerprint and handwriting comparisons, blood typing and neutron activation analysis. These other tests do not purport to indicate with any degree of certainty that the witness was or was not credible. By its very nature the polygraph purports to measure truthfulness and deception, the very essence of the jury’s role.”

This court therefore continued to adhere to the principle that testimony, even scientific testimony, concerning the credibility of a witness is inadmissible.

In sum, this court has never held that expert testimony concerning the credibility of a witness is admissible. To the contrary, this court has held that expert testimony about the science of truth telling is inadmissible when admitted for the purpose of evaluating the credibility of a witness.

B. The expert testimony in this case was inadmissible because it is expert testimony concerning the credibility of another witness.

At trial, Carol Zancanella, the KIDS Center interviewer who interviewed JC, testified at length about how KIDS Center interviewers are trained and what

they are taught to look for when they interview a child to determine whether the child has been sexually abused. She stated that interviewers are trained to look for certain attributes of truth in the child's account:

“[ZANCANELLA]: One of the things that I look for early on is the child's ability to give me information in a narrative form. And that - - and spontaneously. So that means, for instance, that I ask them a question and it's not just a kind of question where they're going to say 'yes' or 'no' to me, or where I'm offering a suggestion of what the answer might be.

“So to be able to ask a question like, 'Tell me about that,' and they can then come back and tell me the story about whatever it was that happened. *So I'm looking for their ability to do that, because I know that if they can spontaneously produce this from what's called recall memory, that I'm going to get more details and I'm going to get more accurate information.* That's - - the research has shown that.

“In the kinds of information that a child gives us, I look for, you know, consistency, in the core details, anyway. Sort of the who, what, where it happened. The older the child is, the more details they're going to be able to - - to fill in, generally. Younger children often just give really basic kinds of details. But if they can give some - - if they're consistent. You know, we were looking in this case, of instance, you know, what was said to - - in the police interview, what was said in the interview at the hospital, and did that match what she was now saying to us as well, too. Were those core details consistent?

“[PROSECUTOR]: And what other things do you look for, as far as their - - maybe their body language or things they use to explain what happened?

“[ZANCANELLA]: Uh-huh. A lot of times with kids they will actually point and use their body as a reference, telling us, you know, where they were touched, if they were touched. And that's useful information, too.

“[PROSECUTOR]: And regarding details, are there certain types of details that are better than others? Like sensory things or - I don’t know what else.

“*****

“[ZANCANELLA]: Yeah. Generally, you know, if it - - I guess to begin with, the research has shown that it’s - - there’s a very low percentage of making stories up. But if a child were to make up a story, for instance, they’re not likely to have - - be able to provide very many details. So, yes, we’re looking for things like can they add in other kinds of information. You know, how something felt or what it looked like. Things that you don’t tend to be able to make up in your imagination. *Things that tell us that there’s some additional validity the more that they can provide those kinds of sensory details to.*”

(Tr 737-39) (emphasis added).

Paula Glesne was the KIDS Center interviewer who interviewed KS.

When Glesne testified, the prosecutor informed Glesne that a couple of former KIDS Center employees (Zancanella and Hartley) had already testified. (Tr 842). The prosecutor asked Glesne about the same attributes that Zancanella had testified were attributes of truthful statements, and whether those attributes were present in KS’s statements. Glesne testified that those attributes of truth were present:

“[PROSECUTOR]: Okay. And so when you interviewed [KS], were there things that stood out or observations that were significant to you as she was telling - - or talking to you? And I guess to be more specific, I’m talking about like behavior, consistencies in stories, sensory details, things like that.

“[GLESNE]: [KS], in connection with the disclosures she provided at the KIDS Center, provided information that the core

details of the information she provided were consistent with what she had provided to - - previously, according to the reports we had reviewed from the sexual assault nurse examiner and the Redmond Police Department. They were also consistent with what had been provided by another child that had been interviewed previously at the KIDS Center.

“[KS] used both words, her body, a drawing, to describe what had happened to her in relating the disclosure that she made at the KIDS Center.”

(Tr 841-42).

Michelle Kyriakos testified as to the importance of a child’s ability to communicate “sensory motor details” about the abuse and how KS’s ability to do so contributed to her diagnosis of sexual abuse. She commented that if a child is able to describe a specific sensation, then it is “always likely” that the child has actually experienced that sensation:

“[KYRIAKOS]: “[KS] communicated about having a stinging sensation. *So her comment was about stinging, which was important to me, because when we get those kind of sensory motor details, it’s - - it weighs into our decision-making, because it’s - - it’s always likely the kids will describe a specific sensation if they’ve actually experienced themselves. So the - - her describing stinging was important to me.*

“[PROSECUTOR]: And is that standard, or I guess a criteria that you subjectively hold as important or valuable, or has that been as a result of your training and studies?

“[KYRIAKOS]: Well, the sensory detail is something that I learned through my training that that’s important when a kid’s able to describe a sensation.

“[PROSECUTOR]: Okay. So at the end of the examination were you able to come with a medical - - reasonable medical certainty a diagnosis of whether there was child sexual abuse?”

“[KYRIAKOS]: Yes, I was.

“[PROSECUTOR]: Okay. And what was that diagnosis?”

“[KYRIAKOS]: My opinion was that she had been sexually abused.”

(Tr 864-65) (emphasis added).

Finally, in Kyriakos’s report she concluded that KS had been abused and explained that her conclusion was based on what KS had told her and a credibility assessment of KS’s account. Specifically, Kyriakos noted that KS’s account was consistent in its core details, her initial disclosure was spontaneous, and her account contained sensory details that would likely be known only if KS had actually experienced the sensation. State’s Exhibit #11, ER-1.

Here, the state offered expert testimony by KIDS Center employees about attributes of statements that show a child is providing “more accurate” or “valid” information. Then the experts testified that KS’s account of her abuse contained those attributes of truth. In doing so, the experts were informing the jury that it should believe KS because her account and the way in which she conveyed her account contained attributes of truth.

That testimony is similar to the testimony in *Keller*, where this court held that expert testimony that there was no evidence of leading or coaching in the

witness's statement was an improper comment on the credibility of the witness. *Keller*, 315 Or at 285. And it is indistinguishable from the testimony in *Milbradt*, where this court held that a psychologist's testimony about indicators of deception, followed by testimony that the witness did not exhibit those indicators of deception, was an improper comment on the credibility of the witness. *Milbradt*, 305 Or at 626-30. Here, the expert testimony about the attributes of truthful statements, accompanied by testimony that the complaining witness's statements contained those attributes of truth, was likewise an impermissible comment on the credibility of another witness, and the testimony should have been excluded.

C. Expert testimony about the attributes of a truthful statement, followed by testimony that another witness's statement contained those attributes of truth, is inadmissible even if offered to explain an admissible sexual-abuse diagnosis.

Although it is true that, "[o]rdinarily an expert witness may explain the basis for the expert's diagnosis, as long as the diagnosis itself is also admissible," that is not the case if the basis for the expert's opinion is itself inadmissible. *Lupoli*, 348 Or at 361. OEC 703 states:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

That rule allows experts to base their opinions on inadmissible evidence. But it does not sanction bringing inadmissible evidence before the jury whenever such evidence qualifies as the basis for expert opinion under OEC 703. Laird C. Kirkpatrick, *Oregon Evidence* § 703.03[4], 674 (6th ed 2013); *McCathern v. Toyota Motor Corp*, 332 Or 59, 70, 23 P3d 320 (2001) (“OEC 703 does not render otherwise inadmissible evidence admissible merely because it was the basis for the expert’s opinion.”).

In other words, if experts in the field diagnosing child sexual abuse, following national protocols, routinely rely upon a determination of whether a complaining witness is credible to support a diagnosis of child sexual abuse, an expert may rely on that determination in making a diagnosis. But that expert’s credibility determination does not become admissible merely because the expert used it as the basis of his or her expert opinion. The expert’s credibility determination is still inadmissible under the *Middleton* line of case law discussed above.

Moreover, the reasons for excluding such evidence become more pronounced in such a situation, because the credibility determination is coming from an expert, and therefore the jury is more likely to defer to that expert’s opinion of the witness’s credibility.

As suggested in dicta in *Lupoli*, depending on the context, an expert may testify as to a whole host of subsidiary principles of social science in explaining

the basis of an admissible diagnosis child sexual abuse. 348 Or at 362. For example, if the proper foundation is laid, an expert can testify as to whether the child's statements were age-appropriate, whether the child's behavior was consistent with having been abused, as well as what the child said, how she said it, and what her demeanor was. But the expert is not to act as a human lie detector by informing the jury about scientifically recognized attributes of truthful statements accompanied by testimony that the witness's account contained those attributes. Such testimony is tantamount to a comment on the credibility of a witness, intrudes upon the jury's role in evaluating the credibility of witnesses, and like the polygraph evidence in *Brown*, is inadmissible under OEC 403. The trial court erred in allowing it.

D. The error was not harmless.

In *Keller*, the Supreme Court found the erroneous admission of testimony by a medical doctor that commented on the credibility of a child-sexual-abuse victim to be harmful:

“[The witness] is a medical doctor with extensive professional experience in the area of child sexual abuse, and she testified in an authoritative and detailed manner about that subject. Her comment on the child's credibility was part of that testimony and presumably was persuasive to the trier of fact. Considered in the context of the record as a whole, the issue of the child's credibility was critical to the outcome of this case.”

Keller, 315 Or at 286.

Here, experts in interviewing and evaluating the statements of children explained the attributes of truthful statements and testified that KS's statements contained those attributes of truth. KS's credibility was critical to this case, which resulted in a 10-2 verdict. This court cannot say that the erroneously admitted testimony had little likelihood of affecting the verdict.

CONCLUSION

For the above reasons, defendant respectfully requests this court reverse the decision of the Court of Appeals, and remand the case to the circuit court for further proceedings.

Respectfully submitted,

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

Brief length

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 7,963 words.

Type size

I 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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 30, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

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