

FILED: October 12, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RICHARD PICKETT,
Defendant-Appellant.

Jefferson County Circuit Court
08FE0144

A143116

Gary Lee Williams, Judge.

Submitted on August 31, 2011.

Peter Gartlan, Chief Defender, and Kristin A. Carveth, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Christina M. Hutchins, Senior Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Rosenblum, Senior Judge.

ORTEGA, P. J.

Affirmed.

1 ORTEGA, P. J.

2 Following a trial to the court, defendant was convicted of five counts of
3 first-degree sodomy, ORS 163.405; ten counts of first-degree sexual abuse, ORS
4 163.427; nine counts of first-degree encouraging child sexual abuse, ORS 163.684; nine
5 counts of second-degree encouraging child sexual abuse, ORS 163.686; and two counts
6 of using a child in a display of sexually explicit conduct, ORS 163.670. He appeals those
7 convictions, contending that the trial court erred in admitting, in the absence of any
8 physical signs of abuse, a medical expert's diagnosis that the victim had been sexually
9 abused. See [State v. Southard](#), 347 Or 127, 218 P3d 104 (2009).

10 Although defendant acknowledges that, before the trial court, he did not
11 challenge the admission of the diagnosis, he contends that the admission of that evidence
12 was plain error under *Southard*.¹ See [State v. Clay](#), 235 Or App 26, 30, 230 P3d 72
13 (2010) (following *Southard*, a trial court's admission of a medical expert's diagnosis of
14 sexual abuse in the absence of physical evidence constitutes plain error); see also [State v.](#)
15 [Potts](#), 242 Or App 352, 353, 255 P3d 614 (2011) (same). We agree with defendant that
16 admission of the diagnosis in this case was plain error.

17 The state nonetheless asserts that "the overwhelming evidence of
18 defendant's guilt, including his own admissions, make it highly unlikely that [the]
19 diagnosis" affected the verdict. We agree that the admission of the diagnosis did not

¹ Under ORAP 5.45(1), "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court * * *, provided that the appellate court may consider an error of law apparent on the record."

1 likely affect the court's verdict in this case and, accordingly, we decline to affirmatively
2 exercise our discretion to correct the error. *See Ailes v. Portland Meadows, Inc.*, 312 Or
3 376, 382, 823 P2d 956 (1991) (the appellate court must exercise its discretion to consider
4 or not consider plain error, "and if the court chooses to consider the error, the court must
5 articulate its reasons for doing so"); [*State v. Childs*](#), 243 Or App 129, 131-32, 259 P3d 77,
6 *rev den*, 350 Or 573 (2011) (declining to exercise discretion to correct plain error in
7 admitting a sexual abuse diagnosis where the error did not likely affect the court's
8 verdict); *see also Ailes*, 312 Or at 382 n 6 (in deciding whether to exercise discretion,
9 court may consider, among other things "the gravity of the error" and "the ends of justice
10 in the particular case").

11 As was the case in *Childs*, this case did not amount to merely a "swearing
12 match" between the victim, who was 18 years old at the time of trial, and defendant. 243
13 Or App at 131-32. Instead, here, defendant, who was the victim's stepfather, admitted to
14 sexually abusing the victim. In a recorded interview with police, which was admitted
15 into evidence at trial, defendant extensively detailed the sexual acts that he had engaged
16 in with the victim. By defendant's own account, the sexual contacts had begun when the
17 victim was about eight years old and had continued regularly--about twice a month while
18 the victim's mother was at work--until she was approximately 14 or 15 years old. He
19 discussed the locations where the sexual contacts generally occurred and stated that the
20 victim would perform sexual acts on him rather than doing chores. That evidence was
21 uncontroverted at trial and was consistent with the victim's testimony regarding the
22 abuse.

1 In addition to defendant's own statements, photographic evidence also
2 substantiated the abuse. Specifically, several sexually explicit photographs of the victim
3 were admitted at trial and corroborated her account. The court noted that defendant's
4 own statements supported the verdict and described the evidence in the case as
5 "overwhelming." Given the circumstances presented here, we are convinced that the
6 admission of the diagnosis did not likely affect the court's verdict.

7 In light of that determination, we conclude that it would not be appropriate
8 for us to affirmatively exercise our discretion to correct the error in admitting the
9 diagnosis of sexual abuse.

10 Affirmed.