

**FILED: May 30, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

ASKIA BROWN,  
Defendant-Appellant.

Multnomah County Circuit Court  
080833622

A144344

John A. Wittmayer, Judge.

Argued and submitted on March 22, 2012.

Kristin A. Carveth, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Matthew J. Lysne, Assistant Attorney-in-Charge, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

WOLLHEIM, J.

Reversed and remanded.

1                   WOLLHEIM, J.

2                   A jury found defendant guilty of two counts of second-degree sexual abuse  
3 and four counts of third-degree sexual abuse of two victims. On appeal, defendant  
4 contends that the trial court erred in admitting medical diagnoses that one of the victims  
5 was sexually abused and the other was "highly concerning for sexual abuse." Under  
6 *State v. Southard*, 347 Or 127, 218 P3d 104 (2009), we agree that the trial court erred in  
7 admitting the diagnoses. Defendant also contends that the trial court erred in admitting  
8 two exhibits as extrinsic evidence on a collateral issue, which were offered for the  
9 purpose of attacking defendant's credibility. Because we conclude the court erred in  
10 admitting the evidence of the diagnoses, we need not consider defendant's second  
11 contention. We reverse and remand.

12                   Because defendant was convicted, we summarize the facts in the light most  
13 favorable to the state. *State v. Vidal*, 245 Or App 511, 513, 263 P3d 364 (2011), *rev den*,  
14 351 Or 761 (2012). Defendant was a high school track and personal fitness coach.  
15 Fourteen-year-old M ran cross country and track for her high school. She began training  
16 privately with defendant in 2008, meeting with him two or three times a week at his  
17 studio. At the end of each workout, defendant would give M a massage using massage  
18 oil. Defendant told her that the massage "helped loosen up the muscles."

19                   On August 22, 2008, as defendant was giving M a massage, he put his hand  
20 inside her underwear and touched the inside of her labia several times. M did not tell  
21 defendant to stop because she trusted him and thought he was giving her a sports

1 massage. Then defendant hit M on her buttocks and said, "You're done." After M got  
2 up, defendant put his arm around her and said, "You are a bad girl." He asked her if she  
3 liked it and M said, "No." Defendant then asked her why she did not tell him to stop.

4           Defendant and M walked out of the studio together and he said, "This has  
5 never happened before. I can't believe this happened. I'm so sorry. It'll never happen  
6 again." Defendant followed M as she began to walk away and asked her if she was going  
7 to tell anyone. M said she was going to tell her mother. Defendant asked if he could  
8 speak to M's mother and she said no. Defendant started to cry and told M not to tell  
9 anyone because it would "ruin" him.

10           M went directly to her father's office and met with a police officer there. M  
11 was evaluated at CARES, a child abuse assessment center. The same day, a doctor took a  
12 swab from M's labia to collect DNA and test for the presence of massage oil. On August  
13 27, 2008, CARES diagnosed M as having been sexually abused. In a report written on  
14 March 20, 2009--approximately seven months after the CARES diagnosis--a forensic  
15 serologist stated that the DNA collected from M's labia matched defendant's male  
16 chromosome. The likelihood of that male chromosome occurring is one in 7,000.

17           Fifteen-year-old E ran cross country and track for her high school;  
18 defendant was E's coach. E also had private training sessions with defendant at his  
19 studio. Defendant would give E massages after training sessions, using massage oil.

20           In late June 2008, defendant gave E a massage that made her  
21 uncomfortable. E was lying on her stomach, and defendant was massaging her legs.

1 Then defendant put his hand inside E's underwear and massaged her buttocks. Defendant  
2 moved his hand and rubbed E's labia for one to two minutes. Afterward, defendant said  
3 not to tell anyone and that it was a "personal massage." E complied and, at that time, did  
4 not tell anyone what had happened.

5 E later learned about the incident with defendant and M because it was on  
6 the news. E was upset and felt like she should have done something to prevent it from  
7 happening to others. E told her school counselor that defendant had touched her  
8 inappropriately, and the counselor called the police. CARES interviewed E, but she  
9 declined to have a physical exam. CARES diagnosed E as "highly concerning for sexual  
10 abuse."

11 Defendant was charged with one count of second-degree sexual abuse and  
12 two counts of third-degree sexual abuse against M. He was also charged with one count  
13 of second-degree sexual abuse and two counts of third-degree sexual abuse against E, and  
14 two counts of third-degree sexual abuse against a third victim, K.<sup>1</sup>

15 At trial, M and E testified about their experiences with defendant. Both the  
16 state and defendant called experts to testify about the DNA evidence. Defendant testified  
17 in his own defense. Defendant acknowledged that he had given M a sports massage after  
18 her training session on August 22, 2008, using massage oil. Defendant said that he had  
19 massaged her groin, buttocks, and upper inner thigh. He acknowledged touching M near

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<sup>1</sup> The jury acquitted defendant on the two counts concerning K. Our disposition of this appeal does not affect that acquittal.

1 her vagina, but denied making contact with any portion of her vagina. Defendant said  
2 that, after the massage, M told him she felt uncomfortable. He said he asked if he could  
3 speak to her mother, and M said no. Defendant also denied touching E in her vaginal  
4 area.

5           The jury found defendant guilty of Counts 1 through 3, related to M, and  
6 Counts 6 through 8, related to E.

7           On appeal, defendant relies on *Southard*, 347 Or 127, to assert that the trial  
8 court erred in admitting the diagnoses from CARES that M was sexually abused and that  
9 E was "highly concerning for sexual abuse."<sup>2</sup> In *Southard*, the Supreme Court held that,  
10 because there is a risk that the jury will not make its own credibility determination, "but  
11 will instead defer to the expert's implicit conclusion that the victim's reports of abuse are  
12 credible," a diagnosis of sexual abuse is not admissible under OEC 403 in the absence of  
13 physical evidence of abuse. *Id.* at 141-42; *see also State v. Merrimon*, 234 Or App 515,  
14 520-21, 228 P3d 666 (2010) (the same risk occurs with a diagnosis of "highly concerning  
15 of sexual abuse").

16           Because there is no physical evidence of sexual abuse of E, the state  
17 concedes that the proper remedy is to reverse and remand defendant's convictions with  
18 respect to E. We agree and therefore reverse and remand Counts 6 through 8.

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<sup>2</sup>           The trial occurred in August and September 2009. The Supreme Court decided *Southard* on October 1, 2009. Although this case was decided before the court issued its opinion in *Southard*, the parties contend--and we agree--that this assignment of error is preserved on appeal.

1           As for M, the state concedes that the trial court erred in admitting the  
2 diagnosis but argues that the error is harmless. That is, given the other facts--the DNA  
3 evidence and M's testimony--the state argues that there is little likelihood that the jury's  
4 consideration of the sexual abuse diagnosis had any influence on the jury's determination  
5 that defendant was guilty of sexual abuse.<sup>3</sup> We disagree.

6           An error is harmless if there is little likelihood that it affected the verdict.  
7 *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). As the Supreme Court stated in  
8 *Southard*, 347 Or at 140-41, "The fact that the diagnosis came from a credentialed expert,  
9 surrounded with the hallmarks of the scientific method, created a substantial risk that the  
10 jury 'may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or  
11 validity of the evidence[.]'" (Quoting *State v. Brown*, 297 Or 404, 439, 687 P2d 751  
12 (1984).) *See also State v. Davilia*, 239 Or App 468, 476-78, 244 P3d 855 (2010) (When  
13 there is a diagnosis of sexual abuse with no physical evidence, the court cannot conclude  
14 the erroneously admitted evidence was unlikely to have affected the finder of fact's  
15 verdict.). Here, the expert's diagnosis of sexual abuse, which was not based on any  
16 physical evidence of sexual abuse, created that risk. Even though there was other  
17 evidence of sexual abuse, we cannot say that there is little likelihood that the diagnosis  
18 affected the verdict. Defendant took the stand in his own defense, offered explanations of  
19 his conduct and the presence of DNA, and was convicted by a 10-2 vote. Given the

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<sup>3</sup> The state does not argue that the DNA evidence--which was not a basis for the diagnosis--would affect the OEC 403 analysis; as noted, the state concedes that it was error to admit the evidence.

1 nature of the errors and the record as a whole, we cannot say that it was harmless error.

2 Defendant contends that the trial court erred in admitting two exhibits--

3 defendant's college transcript and his application for employment at Riverplace Athletic

4 Club--because the exhibits were extrinsic evidence on a collateral issue, offered for the

5 purpose of attacking defendant's credibility, which is impermissible under OEC 608(2).

6 The state responds that defendant's educational background was not a collateral issue

7 because defendant claimed he was an expert in sports massage and that he was merely

8 performing sports massages during the instances of alleged sexual abuse. Because we

9 reverse and remand all counts on which defendant was convicted, we need not and do not

10 consider defendant's argument.

11 Reversed and remanded.