

FILED: February 29, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

STEPHEN EDWARD COX, SR.,
Defendant-Appellant.

Lake County Circuit Court
070041CR

A141564

Lane W. Simpson, Judge.

Argued and submitted on July 28, 2011.

Jedediah Peterson, Deputy Public Defender, argued the cause for appellant. With him on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services. Stephen Edward Cox, Sr. filed the supplemental brief *pro se*.

Leigh A. Salmon, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Sercombe, Judge.

ARMSTRONG, J.

Reversed and remanded.

1 ARMSTRONG, J.

2 Defendant appeals a judgment of conviction for three counts of first-degree
3 sodomy, ORS 163.405, five counts of first-degree sexual abuse, ORS 163.427, three
4 counts of first-degree rape, ORS 163.375, one count of second-degree rape, ORS
5 163.365, two counts of first-degree unlawful sexual penetration, ORS 163.411, and one
6 count of second-degree sodomy, ORS 163.395. The two complainants, E and K, were
7 defendant's wife's grandchildren, who were living with defendant and his wife when
8 defendant allegedly committed the crimes. Because it is dispositive in this case, we
9 address only one of defendant's assignments of error--*viz.*, that the trial court committed
10 plain error in admitting an expert's diagnosis that one of the complainants, K, had been
11 sexually abused, because the diagnosis was not based on any physical evidence of abuse.
12 In that assignment, defendant contends that, because the erroneously admitted diagnosis
13 affected the jury's decision to convict him on the charges involving E, who had not been
14 diagnosed as having been sexually abused, all of defendant's convictions, not just those
15 involving K, should be reversed. We agree with defendant, exercise our discretion to
16 correct the court's plain error, and, accordingly, reverse and remand.

17 We take the facts from the pertinent portions of the record. As a result of E
18 and K's mother's inability to adequately care for them, E--who was about five years old at
19 the time--and K--who was about three years old--began living with their maternal
20 grandmother and defendant. E and K testified at trial that, shortly thereafter, defendant
21 began sexually abusing each of them.

22 According to E, defendant's alleged abuse of her began with him touching

1 her breasts and vagina and forcing her to touch his penis and later escalated to him
2 forcing her to perform oral sex on him weekly; the incidents of alleged abuse occurred
3 both in the home and outside of it, including in defendant's truck while he was hauling
4 garbage for his garbage-disposal business. E testified that, on one occasion in particular,
5 defendant brought E into a shop building that defendant had recently built, set her on a
6 bucket, and forced her to perform oral sex on him and that, because defendant had failed
7 to adequately lock the shop's door, K walked in and saw defendant with his pants down
8 and E kneeling in front of him, which the children's grandmother later explained to K was
9 merely defendant showing E a spider bite on his leg.¹ According to E's testimony,
10 defendant eventually began engaging in sexual intercourse with her once or twice a week
11 when she was about 10 years old.

12 E also testified that, throughout the years that defendant had abused her, he
13 sought to prevent her from disclosing his actions by buying her various gifts, including a
14 horse, and by threatening to kill the children's grandmother and K if E told anyone about
15 the abuse. Despite those threats, E eventually disclosed the alleged abuse in 2005 when
16 she was 18 years old; however, she never talked with K about the alleged abuse that she
17 had suffered.

18 Defendant's alleged abuse of K began in a similar fashion according to K's
19 testimony; defendant began touching K's penis when K was about five years old.

¹ K also testified that he had observed defendant calling E "baby girl" and slapping her on her bottom, and had overheard defendant and E talking about him having impregnated her.

1 Eventually, according to K, defendant forced him to perform oral sex on defendant
2 "hundreds of times" in defendant's shop and in defendant's truck while he was hauling
3 garbage. The alleged abuse persisted until K was 12 years old, and, according to K,
4 throughout that time, defendant threatened to kill the children's grandmother if K ever
5 disclosed the abuse.

6 After K learned from police investigations that E had disclosed being
7 abused by defendant and, notwithstanding that disclosure, defendant had not killed their
8 grandmother, K, who was then roughly 16 years old, disclosed defendant's alleged abuse
9 of him about a month after E's disclosure in 2005. Shortly thereafter, Lustig-Butts, a
10 medical examiner at Klamath Lake CARES--a child-abuse assessment center--conducted
11 a physical evaluation of K to determine if he had been physically or sexually abused by
12 defendant. Despite a lack of physical findings indicating that K had been abused, Lustig-
13 Butts nonetheless diagnosed "with reasonable medical certainty that [K] had been the
14 victim of child sexual abuse" based on K's history and the disclosures that K had made to
15 a forensic child interviewer about the abuse.

16 The state charged defendant with five counts of first-degree rape, two
17 counts of first-degree unlawful sexual penetration, one count of first-degree sodomy, and
18 one count of first-degree sexual abuse involving E; it charged defendant with three counts
19 of first-degree sodomy and four counts of first-degree sexual abuse involving K. The
20 pivotal issue at trial was the credibility of E and K--a point that the prosecutor
21 highlighted in his closing argument:

1 "To this day these kids are still messed up; they are still screwed up
2 by what happened to them. And it is all the Defendant's fault * * *. These
3 kids told CARES--you [watched] the video--they came in here * * * and
4 they looked you in the eye and they told you. Either they are telling the
5 truth or the Defendant is telling the truth. You have to decide which of
6 those it is.

7 "He is saying, 'I am not ever alone with kids--maybe twice in my
8 life.['] They are saying, 'This man repeatedly sexually abused me.' * * *
9 [Defendant has] to have you believe that they are lying; that they decided
10 together * * * to make up this lie and they just had a really, really bad time
11 of it because they cannot tell you the specifics * * *. No. It is exactly what
12 the experts told me; repeated child abuse."

13 Following the trial, a jury convicted defendant on all of the counts save one--*viz.*, a first-
14 degree rape count involving E.

15 On appeal, defendant argues that, although he did not object at trial to the
16 admission of Lustig-Butts's testimony regarding her diagnosis of K as having been
17 sexually abused, the court nevertheless committed plain error under [*State v. Southard*](#),
18 347 Or 127, 218 P3d 104 (2009), in admitting that testimony and, therefore, his
19 convictions should be reversed. In response, the state contends that, even if the
20 admission of the diagnosis was plain error, the erroneously admitted diagnosis only
21 affected defendant's convictions involving K--not those involving E--and, therefore, the
22 convictions involving E should be affirmed. As explained below, defendant has the
23 better of the argument.

24 We begin with the convictions involving K. In *Southard*--decided about
25 eight months after defendant's trial--the Oregon Supreme Court held that a diagnosis of
26 sexual abuse without physical evidence of abuse is generally inadmissible under OEC
27 403 because the prejudice to a defendant resulting from the admission substantially

1 outweighs the probative value of the diagnosis. 347 Or at 142. The admission of Lustig-
2 Butts's diagnosis squarely violates that holding, and, because the diagnosis directly
3 related to the credibility of K--and thereby likely affected the jury's decision to convict
4 defendant for the crimes involving K--we exercise our discretion under *Ailes v. Portland*
5 *Meadows, Inc.*, 312 Or 376, 382 & n 6, 823 P2d 956 (1991), to correct the court's error in
6 admitting it. See, e.g., [State v. Lovern](#), 234 Or App 502, 512-14, 228 P3d 688 (2010)
7 (rejecting state's argument that the defendant made a tactical decision not to object to
8 admission of diagnosis of sexual abuse without physical evidence of abuse and exercising
9 *Ailes* discretion to remedy trial court's plain error in admitting the diagnosis); [State v.](#)
10 [Merrimon](#), 234 Or App 515, 522, 228 P3d 666 (2010) (same). Accordingly, we reverse
11 and remand the convictions involving K.

12 We turn to the remaining issue, *viz.*, whether the erroneous admission of
13 K's diagnosis requires reversal of defendant's convictions involving E. Absent physical
14 findings of abuse, an expert's diagnosis of child sexual abuse is inevitably the product of
15 the expert's assessment of the credibility of the child and the child's story. [State v. Lupoli](#),
16 348 Or 346, 362, 234 P3d 117 (2010); see also [State v. Kelly](#), 244 Or App 105, 111, 260
17 P3d 551 (2011) ("[E]ven where an expert does not explicitly vouch for the child victim's
18 credibility, a diagnosis of sexual abuse made in the absence of physical evidence
19 constitutes impermissible vouching."). Therefore, in keeping with the general principle
20 that a trial witness may not testify about the credibility of another trial witness, *State v.*
21 *Keller*, 315 Or 273, 284-85, 844 P2d 195 (1993), the effect of an expert's assessment of
22 credibility resulting from a diagnosis of sexual abuse is not limited to the child being

1 diagnosed. See [State v. Freitas](#), 243 Or App 231, 238, 259 P3d 46 (2011) (stating that
2 reversal of convictions involving two victims in *Southard*, despite the fact that the
3 erroneously admitted diagnosis of sexual abuse involved only one of the victims, was
4 proper because "the risk of prejudice that was of concern in *Southard*--that the diagnosis
5 may have caused the jury to inappropriately defer to the expert's implicit conclusion that
6 [one victim's] reports of abuse were credible--inhered in the jury's disposition of the
7 charges relating to both victims in that case"). Accordingly, the critical inquiry with
8 regard to defendant's convictions involving E is whether Lustig-Butts's erroneously
9 admitted diagnosis--and her implicit expert opinion underlying that diagnosis that K's
10 report of abuse was credible--also constituted impermissible vouching for E's testimony
11 about her alleged abuse, such that the diagnosis likely caused the jury to inappropriately
12 defer to Lustig-Butts's credibility determination in deciding whether defendant was guilty
13 of the charges involving E. Put differently, because--as we concluded above--K's
14 diagnosis likely affected the jury's conclusion about the credibility of K's testimony
15 concerning his abuse, did that conclusion have the ancillary consequence of affecting the
16 jury's determination of whether E's testimony about her abuse was also credible?

17 Here, for at least three reasons, K's credibility was inextricably tied to E's
18 credibility and, thereby, likely served an important role in the jury's determination of the
19 truthfulness of E's testimony.² First, K testified to a pattern of abuse that mimicked in a
20 number of respects the abuse to which E had testified: (1) the alleged abuse of both

² As mentioned above, the case against defendant reduced to a "swearing match" that hinged on the jury's determination of the credibility of the victims' testimony.

1 happened around the same time when the victims were similar ages; (2) the alleged abuse
2 occurred in similar locations, including defendant's shop and in defendant's truck while
3 he was hauling garbage; (3) the alleged abuse progressively escalated from defendant
4 touching their respective genital areas on numerous occasions to each victim eventually
5 performing oral sex on defendant--a typical "grooming" pattern of abuse; and (4)
6 defendant allegedly made threats to both of the victims that he would kill their
7 grandmother if they disclosed his actions.³ Second, the prosecutor's comments during his
8 closing argument purposely joined K and E's credibility into a single consideration for the
9 jury and strongly suggested that Lustig-Butts's diagnosis showed that both victims were
10 telling the truth:

11 "Either *they* are telling the truth or the Defendant is telling the truth. You
12 have to decide which of those it is.

13 " * * * [Defendant has] to have you believe that *they* are lying; that
14 *they* decided together * * * to make up this lie and *they* just had a really,
15 really bad time of it because *they* cannot tell you the specifics * * *. No. *It*
16 *is exactly what the experts told me; repeated child abuse.*"

17 (Emphasis added.) Finally, and most importantly, K's testimony cross-corroborated
18 various aspects of E's testimony regarding her abuse; he recounted at trial one of the
19 incidents during which E was allegedly abused by defendant--*viz.*, when K walked in on

³ The consistency of the testimony of K and E takes on additional weight as a consideration favoring our conclusion that the erroneously admitted diagnosis likely affected the jury's decision to convict defendant for the crimes involving E, because E reported her alleged abuse a month before K reported his and E testified that she had never talked to K about her alleged abuse. Therefore, it is even more likely that the jury would consider the credibility of K's testimony as being indicative of the credibility of E's testimony.

1 E performing oral sex on defendant in his shop--and testified that he had witnessed
2 defendant calling E "baby girl" and slapping her bottom.

3 For those reasons, we conclude that the erroneously admitted diagnosis
4 impermissibly prejudiced the jury's assessment of the credibility of both K and E--a
5 conclusion that does not conflict with our recent decision in *Freitas*. In *Freitas*, the
6 defendant was convicted by a jury of numerous sexual crimes that he had committed
7 against his daughters, B and C. 243 Or App at 233. On appeal, he argued that the trial
8 court had committed plain error in admitting the testimony of a CARES doctor
9 diagnosing B as having been sexually abused by the defendant, because the doctor had
10 not found any physical evidence of abuse. We agreed that the admission of that
11 testimony was erroneous under *Southard* and exercised our *Ailes* discretion to correct the
12 trial court's plain error in admitting it. As a result, we reversed the convictions regarding
13 the crimes committed against B.

14 However, because the crimes involving B and C had been tried together, we
15 then had to address whether the erroneous admission of the diagnosis about B also
16 required the reversal of the defendant's convictions for crimes committed against C--who
17 had not been evaluated for sexual abuse. *Id.* at 234. Focusing on whether the
18 erroneously admitted diagnosis affected the jury's decision to convict the defendant for
19 the latter crimes, we concluded that the error did not require reversal of the convictions
20 involving C because

21 "the state relied on C's own in-depth and emotional testimony, other
22 testimony that corroborated C's allegations, and [expert] testimony
23 explaining why it is common for children like C to delay disclosure of, or

1 to even initially deny but later disclose, childhood sexual abuse. In other
2 words, the state's case as it related to C would not have been different had
3 the inadmissible evidence been excluded."

4 *Id.* at 237 (footnote omitted). Importantly, we further noted that, because B's disclosures
5 to the CARES staff during her evaluation did not include any reference to C and neither
6 B nor C testified about any knowledge of the abuse of the other--and, in fact, B was not
7 aware that C had been abused until C disclosed the abuse roughly seven years after B's
8 disclosure--the CARES doctor's vouching for B's credibility resulting from the erroneous
9 admission of B's diagnosis did not present "a substantial risk that the jury was prejudiced
10 by that testimony in evaluating the credibility of *both* B and C." *Id.* at 238 (emphasis in
11 original).

12 The circumstances presented in this case are materially distinguishable
13 from those in *Freitas*. Importantly, in contrast to *Freitas*, K testified about the alleged
14 abuse that E had suffered when he recounted the incident during which he had walked
15 into the shop when E was performing oral sex on defendant; the alleged abuse of K and E
16 occurred for a number of years while both were living with defendant and displayed a
17 number of material similarities, including the locations in which the alleged abuse
18 occurred; and the prosecutor argued that the credibility of K and E were inextricably
19 linked.

20 Therefore, the erroneously admitted diagnosis in this case presented a
21 substantial risk that the jury was prejudiced in evaluating the credibility of both K and E,
22 and, accordingly, we exercise our discretion to correct the court's plain error as it pertains
23 to all of defendant's convictions.

1

Reversed and remanded.