

FILED: September 21, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

DAVID GEORGE VIDAL,
Defendant-Appellant.

Clackamas County Circuit Court
CR0801614

A142579

Jeffrey S. Jones, Judge.

Argued and submitted on July 28, 2011.

David O. Ferry, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Jennifer S. Lloyd, Assistant Attorney General, argued the cause for respondent. On the brief was John R. Kroger, Attorney General, Jerome Lidz, Solicitor General, and Kristen G. Williams, Assistant Attorney General.

Before Haselton, Presiding Judge, and Brewer, Chief Judge, and Armstrong, Judge.*

BREWER, C. J.

Affirmed.

*Brewer, C. J., *vice* Sercombe, J.

1 BREWER, C. J.

2 Defendant was convicted on two counts of first-degree rape, three counts of
3 first-degree unlawful sexual penetration, and one count each of first-degree sodomy and
4 first-degree sexual abuse. ORS 163.375; ORS 163.411; ORS 163.405; ORS 163.427.

5 The victim of the crimes was a neighbor child who was approximately eight years old
6 when the crimes occurred. On appeal, defendant raises numerous challenges to his
7 convictions and sentences. We reject without discussion each of defendant's arguments
8 except his argument that the trial court committed plain error by admitting into evidence
9 expert medical testimony concerning a diagnosis of child sexual abuse. As explained
10 below, because we conclude that any error in that respect is not apparent on the face of
11 the record, we affirm.

12 Because defendant was convicted, we summarize the pertinent facts in the
13 light most favorable to the state. [*State v. Gibson*](#), 338 Or 560, 562, 113 P3d 423, *cert*
14 *den*, 546 US 1044 (2005). The victim, MH, regularly came to defendant's apartment to
15 play with defendant's son when both children were approximately eight years old.
16 Defendant and the victim's family became friends, and the victim was permitted to spend
17 the night at defendant's apartment when his son was there. On several different
18 occasions, defendant sexually assaulted the victim. The victim told her mother about the
19 assaults, and the victim subsequently was interviewed and physically examined at The
20 Children's Center, a private nonprofit organization that specializes in the assessment of
21 child sexual abuse.

1 In her interview at The Children's Center, MH described the sexual abuse in
2 a manner consistent with her later testimony at trial. After the interview was conducted,
3 O'Dell, a pediatric nurse practitioner employed by The Children's Center, examined the
4 victim. She observed several irregularities in MH's hymen. In particular, she observed
5 decreased hymenal tissue and what she described as "angularities" at several locations on
6 the posterior of the hymen. O'Dell testified that a person can be born with such
7 irregularities on the anterior part of the hymen, but that irregularities on the posterior of
8 the hymen can indicate a penetrative injury caused by abuse or assault. Regarding the
9 irregularities in MH's hymen, O'Dell stated that "just looking at it by itself, yes, it would
10 be significant to me." When asked if that type of finding "is indicative of penetration,"
11 O'Dell responded, "Yeah. It's suggestive of it, yes." She then explained that other types
12 of injuries to a child's genital region, such as an injury caused by falling on a bicycle,
13 would "not normally" cause an injury to the posterior region of a child's hymen. O'Dell
14 explained that the physical findings were "significant" because the victim's hymenal
15 irregularities could have been caused by a penetrating injury. She testified that she made
16 a diagnosis of child sexual abuse based on four factors: the history given to the
17 Children's Center, the "physical examination findings," the existence of factors that may
18 increase the risk of abuse, and MH's "clear, detailed statements." On cross-examination,
19 O'Dell was asked if the irregularities in MH's hymen "could be a variation of normal" or
20 "could be something besides abuse," and she responded, "Yes."

21 Defendant did not object to O'Dell's testimony concerning her diagnosis.

1 On appeal, he asserts that the admission into evidence of O'Dell's diagnosis constituted
2 plain error, citing [State v. Southard](#), 347 Or 128, 218 P3d 104 (2009).¹

3 In *Southard*, the issue was whether expert medical testimony diagnosing a
4 child with sexual abuse was admissible into evidence "in the absence of any physical
5 evidence of abuse." *Id.* at 142. The alleged sexual offenses in *Southard* concerned oral
6 sodomy; the medical examination of the victim "did not reveal any physical evidence of
7 sexual abuse." *Id.* at 130-31. The physician who examined the child nonetheless
8 diagnosed sexual abuse "after consulting with the social worker who had interviewed the
9 boy[.]" *Id.* at 132. As an initial matter, the court concluded that the medical diagnosis of
10 sexual abuse was scientifically valid evidence, in light of the various factors set out in
11 *State v. Brown*, 297 Or 404, 687 P2d 751 (1984). *Southard*, 347 Or at 133-39.

12 The court in *Southard* then turned to the question whether the evidence
13 should nonetheless have been excluded as unduly prejudicial under OEC 403. The court
14 determined that the medical diagnosis in that case did not tell the jury anything that it was
15 not capable of determining for itself, because "the criteria that the staff used to decide
16 whether to credit the boy's testimony are essentially the same criteria that we expect
17 juries to use every day in courts across this state to decide whether witnesses are
18 credible." *Id.* at 140. On balance, the court assessed the risk of prejudice as great,
19 because "the diagnosis came from a credentialed expert, surrounded with the hallmarks of
20 the scientific method[.]" *Id.* The court concluded:

¹ The trial in this case occurred before *Southard* was decided.

1 "Our holding today is narrow. The only question on review is
2 whether a diagnosis of 'sexual abuse'--*i.e.*, a statement from an expert that,
3 in the expert's opinion, the child was sexually abused--is admissible in the
4 absence of any physical evidence of abuse. We hold that where, as here,
5 that diagnosis does not tell the jury anything that it could not have
6 determined on its own, the diagnosis is not admissible under OEC 403."

7 *Id.* at 142.

8 Defendant relies on *Southard* and our subsequent decision in [State v.](#)
9 [Lovern](#), 234 Or App 502, 228 P3d 688 (2010), for the proposition that the admission of
10 the medical diagnosis in the present case constituted plain error that obviates the
11 necessity of preservation of the error before the trial court. *See State v. Brown*, 310 Or
12 347, 355, 800 P2d 259 (1990) (an error is apparent on the face of the record if the error is
13 one of law, the legal point is not reasonably in dispute, and the court need not go outside
14 the record or choose between competing inferences to find it). In this case, we conclude
15 that the legal point *is* reasonably in dispute, and, accordingly, we do not treat the
16 unpreserved claim of error as error apparent on the face of the record. ORAP 5.45(1).

17 As noted, *Southard* itself announced a rule that concerned an expert
18 medical diagnosis of sexual abuse "in the absence of any physical evidence of abuse,"
19 and it narrowly limited its holding to those circumstances. 347 Or at 142. The present
20 case does not fall within the court's narrow holding. O'Dell testified that her physical
21 findings concerning MH's hymen were "significant." Indeed, she listed those findings as
22 one of the four factors that contributed to her diagnosis of sexual abuse. Defendant
23 remonstrates that our decision in *Lovern*, in which we held that admission of a medical
24 diagnosis of sexual abuse qualified as "plain error" under *Southard*, supports his position.

1 As explained below, we conclude that *Lovern* is materially distinguishable.

2 In *Lovern*, the defendant was convicted of multiple counts of first-degree
3 sexual abuse, based on allegations that he had touched his 12-year-old daughter's vagina,
4 breasts, and buttocks. *Id.* at 504. The victim was evaluated at a child-abuse assessment
5 center, and a medical examination was conducted. The examining physician testified that
6 the child's hymen was "non-specifically abnormal," explaining that there were notches in
7 a part of the hymen, and that it "wasn't perfectly normal but it wasn't specifically
8 abnormal that I know for sure there's been an injury there." *Id.* at 505. She described the
9 condition as "unusual" but "not so specific that it indicates that there was clearly an injury
10 there before." *Id.* Although the physician indicated that her diagnosis included
11 consideration of the physical examination, we noted:

12 "[T]here is no relationship between the 'unusual appearance' of the
13 complainant's hymen and the type of sexual abuse charged in this case;
14 accordingly, [the physician's] general reference to the complainant's
15 anal/genital examination cannot be understood to indicate reliance on that
16 abnormality as corroborating the abuse alleged here."

17 *Id.* at 506 n 2; *see also id.* at 511 n 6 ("Given the nature of the charged conduct, which
18 did not involve penetration of the complainant's vagina, the results of the physical
19 examination did not corroborate the alleged abuse.")

20 We concluded that there was "no material legal distinction between the
21 admissibility of the expert's diagnosis of sexual abuse in *Southard* and the admission of
22 the diagnosis in this case." *Id.* at 510-11. We noted that the expert herself had stated that
23 she could not "really tell one way or the other" from the physical examination whether an

1 injury had occurred. *Id.* at 511. We concluded:

2 "In sum, as in *Southard*, the physician's diagnosis of sexual abuse in
3 this case was based *solely* on the complainant's statements and history,
4 without any physical evidence corroborative of the charged sexual abuse."

5 *Id.* (emphasis added).

6 Defendant asserts that the challenged evidence in this case is comparable to
7 the evidence at issue in *Lovern*, noting that both involved evidence of notches in the
8 victims' hymens. We disagree. *Lovern* does not stand for the proposition that notches in
9 a child's hymen can never be sufficiently corroborative of sexual abuse to cause a
10 diagnosis to fall outside the "narrow" rule of law announced in *Southard*. As noted, the
11 alleged abuse at issue in *Lovern* was not the sort that would lead to penetrative injuries.
12 The child in that case was 12 years old, and the expert certainly underplayed--if not
13 rejected outright--any significance of the appearance of the child's hymen in making the
14 diagnosis of sexual abuse. Here, by contrast, the child victim was younger, and the
15 expert, O'Dell, testified in great detail about the irregularities in the child's hymen and,
16 indeed, she provided photographic evidence showing the exact nature of the irregularities
17 that were significant to her diagnosis. She indicated that her findings were consistent
18 with a penetrative injury to the vagina; as noted, the charged abuse in this case involved
19 allegations of penetration of the victim's vagina. Moreover, and in marked contrast to the
20 evidence at issue in *Lovern*, in this case, O'Dell testified that "just looking at [the hymen]
21 *by itself*, yes, it would be significant to me." (Emphasis added.) Although O'Dell
22 acknowledged on cross-examination that the irregularities *could have* been "a variation of

1 normal" or caused by "something besides abuse," that caveat does not make this case
2 comparable to *Southard* or *Lovern*, which, as noted, involved *no* "physical evidence
3 corroborative of the charged sexual abuse." *Id.* at 511.

4 In sum, *Southard* left open the question of whether OEC 403 would require
5 exclusion of medical testimony of child sexual abuse where physical evidence supports
6 an expert's opinion. *Lovern*, likewise, left that question unanswered. We conclude that
7 the legal point at issue here *is* "reasonably in dispute," *Brown*, 310 Or at 355, and thus no
8 error is apparent on the face of the record.

9 Affirmed.