

FILED: June 27, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

CHARLES JOHN JOSEPH HOLLYWOOD,
Defendant-Appellant.

Washington County Circuit Court
C082970CR

A143885

D. Charles Bailey, Jr., Judge.

Argued and submitted on June 08, 2011.

Anne Fujita Munsey, Senior 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 General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

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

BREWER, P. J.

Reversed and remanded.

*Haselton, C. J., *vice* Gillette, S. J.

1 BREWER, P. J.

2 Following a jury trial, defendant was convicted of one count of first-degree
3 rape and two counts of first-degree sexual abuse of a child, S. D. On appeal, defendant
4 contends that it was plain error, under *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010),
5 for the trial court to have admitted a diagnosing nurse-practitioner's testimony, with
6 respect to S. D., that "there is no lying going on about what she is telling us in this
7 evaluation."¹ We agree, and we exercise our discretion to correct the error. We reverse
8 and remand.

9 We set out only those facts that are necessary to address the parties'
10 arguments. Defendant was a friend of S. D.'s family. Over a period of time when she
11 was nine years old, S. D. disclosed to various relatives that defendant had sexually
12 abused her. S. D.'s mother took her to a hospital emergency room for a medical
13 examination, which led to her further evaluation by several health care professionals,
14 including representatives of CARES, a child abuse assessment center. None of the
15 examinations disclosed any physical evidence of sexual abuse. Among the CARES
16 evaluators was Reilly, a pediatric nurse-practitioner. Reilly did not perform a medical
17 examination, but she did interview S. D., who told Reilly that "[defendant] was touching
18 me in the wrong places." Reilly learned that S. D. was taking medication for ADHD; was

¹ In additional assignments of error, defendant challenges as plain error the trial court's admission of two expert medical diagnoses of child sexual abuse and related testimony, as well as the court's exclusion of certain impeachment evidence. In view of our disposition of defendant's first assignment of error, we decline to address his remaining challenges.

1 on an individual education plan in school; was delayed in reading, writing, and math; and
2 was in speech therapy. Reilly explained that S. D. had difficulty with timing in sequence
3 in recounting the abuse but that "doesn't mean she's lying about something, she's just not
4 capable of framing it in that context." Reilly then testified to her diagnosis that S. D. had
5 been sexually abused.

6 At this point, we briefly digress to set the stage for the testimony that
7 followed. Before trial, defendant had filed a motion *in limine* to permit him to impeach
8 S. D. and a CARES investigator with evidence that the Department of Human Services
9 (DHS) had become involved with the family when S. D. and her sister told school staff
10 that their father had thrown them against the wall and that the girls had later admitted that
11 they had fabricated that story. Defendant argued in support of the motion that, if the
12 CARES investigator were allowed to give a diagnosis in this case, "which we don't think
13 she'd be allowed to do * * * we should be able to cross-examine her concerning the basis
14 of that diagnosis." The trial court ruled that, if the state adduced evidence of a sexual
15 abuse diagnosis from a CARES professional, then defendant would be allowed to cross-
16 examine the witness regarding the alleged previous recantation. The court reserved any
17 ruling on whether defendant otherwise would be entitled to adduce evidence concerning
18 the recantation.

19 Pursuant to the trial court's pretrial ruling on defendant's motion *in limine*,
20 after eliciting the sexual abuse diagnosis, the prosecutor asked Reilly "how" or "why," in
21 light of the alleged recantation, she nevertheless had made such a diagnosis in this case.

1 Reilly explained that children often recant allegations of abuse for various reasons. She
2 concluded:

3 "But, in this case, what we know about [S.D.], she does not have a problem
4 with lying; in fact, she's not taking back anything that she said to us, to
5 [another examining physician], or to her mother about abuse by
6 [defendant]. She's very consistent in those core details.

7 "So, there is no lying going on about what she's telling us in this
8 evaluation."

9 Defendant's counsel did not object to the foregoing testimony, and the trial court did not
10 strike it.

11 An error is plain if it is a legal error that is obvious or not reasonably in
12 dispute and the court need not go outside the record or select among competing
13 inferences to discern it. *State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990). If we
14 conclude that an asserted error is plain, we must determine whether to exercise our
15 discretion to address the error. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823
16 P2d 956 (1991). Under Oregon law, "a witness, expert or otherwise, may not give an
17 opinion on whether he believes a witness is telling the truth." *State v. Middleton*, 294 Or
18 427, 438, 657 P2d 1215 (1983); *see State v. Milbradt*, 305 Or 621, 629-30, 756 P2d 620
19 (1988) ("[t]he assessment of credibility is for the trier of fact" and an "opinion that a
20 person is not deceptive, could not lie without being tripped up, and would not betray a
21 friend" is tantamount to an opinion on credibility and inadmissible); *see also State v.*
22 *Keller*, 315 Or 273, 285, 844 P2d 195 (1993) ("[A] witness may not testify about the
23 credibility of another witness."). "Applying that principle is a straightforward matter

1 when one witness states directly that he or she believes another witness, or that the other
2 witness is honest or truthful. However, statements that fall short of such overt vouching
3 also may be impermissible." *Lupoli*, 348 Or at 357; *see also State v. Ferguson*, 247 Or
4 App 747, 271 P3d 150 (2012) (witness's statement that he would not have called the
5 police if he had not believed complaining witness was an impermissible comment on
6 credibility).

7 The state argues that the trial court did not plainly err in failing *sua sponte*
8 to strike Reilly's quoted testimony. First, the state argues that the prosecutor had not
9 invited Reilly's challenged testimony in response to her general "how" or "why" question
10 and that the trial court had no duty *sua sponte* to strike such unsolicited testimony after it
11 was given. Second, the state argues that the challenged testimony was "not so much a
12 comment on S. D.'s credibility as it was an explanation as to why S. D.'s prior recantation
13 did not contradict Reilly's diagnosis." It follows, the state reasons, that the trial court did
14 not err in failing to strike it in the absence of an objection or motion to strike.

15 We disagree with those arguments. First, the prosecutor's open-ended
16 question about why Reilly's sexual abuse diagnosis was not affected by S. D.'s
17 recantation of physical abuse by her father risked--indeed it logically countenanced--
18 precisely the type of explanation that Reilly gave in response. In the end, Reilly's
19 diagnosis hinged on her perception of S. D.'s credibility, and it was foreseeable that, in
20 response to the prosecutor's question, she would return to that foundation for her opinion.
21 Nor is the plainness of the error affected by the fact that the challenged testimony was not

1 explicitly elicited by the prosecutor's question. *See Milbradt*, 305 Or at 630 ("We suggest
2 in the future that if counsel attempts to elicit [testimony commenting on the credibility of
3 a witness] the trial judge, *sua sponte*, should summarily cut off the inquiry before a jury
4 is contaminated by it."); *State v. McQuisten*, 97 Or App 517, 520, 776 P2d 1304 (1989)
5 ("[T]he trial court had a duty, *sua sponte*, not to allow testimony which commented on a
6 witness' credibility.") Finally, the state's contrary argument notwithstanding, it is difficult
7 to envision a more explicit comment on the credibility of a witness than Reilly's
8 challenged testimony in this case. Although Reilly's testimony was aimed at bolstering
9 her own diagnosis that, despite S. D.'s recantation of a different accusation, S. D. had
10 been sexually abused, that testimony entirely hinged on Reilly's view of S. D.'s
11 credibility, and the jury could not have inferred otherwise.

12 The state next asserts that the admission of that testimony does not qualify
13 for plain error review because the court would have to choose between competing
14 inferences--"one of which is that defendant made a conscious decision not to object" to
15 the testimony--to decide the issue. *See State v. Gornick*, 340 Or 160, 169-70, 130 P3d
16 780 (2006) (where the record raises an inference that a defendant may have chosen not to
17 object for strategic reasons, there is no plain error). According to the state, defendant
18 may have acquiesced in the admission of the challenged testimony in order to secure
19 admission of the evidence that S. D. had previously recanted the allegation of physical
20 abuse that she had made against her father. With respect, we disagree. It is true that a
21 foundation for admission of the recantation evidence was Reilly's testimony concerning

1 her diagnosis of sexual abuse. However, it is clear from the record that defendant
2 asserted that the recantation evidence was independently admissible to impeach S. D. and
3 that he asserted that it was conditionally relevant to impeach a diagnosis of sexual abuse
4 by a CARES evaluator. Stated differently, defendant did not want the CARES evaluators
5 to testify to such a diagnosis but, if the court allowed such testimony, then defendant
6 wanted to impeach it with the recantation evidence. Thus, as respects the opinion
7 testimony of the CARES witnesses, defendant's reliance on the recantation was purely
8 defensive. Moreover, even if the diagnosis were admitted, no arguable additional
9 strategic advantage could have accrued to defendant from the admission of Reilly's direct
10 comment on S. D.'s credibility. In short, the error was a legal error that is obvious, and
11 this court need not go outside the record or select among competing inferences to discern
12 it; therefore it is plain.

13 The question remains whether we should exercise our discretion to correct
14 it. In determining whether to exercise our discretion to correct such an error, we
15 consider, among other things,

16 "the competing interests of the parties; the nature of the case; the gravity of
17 the error; the ends of justice in the particular case; how the error came to
18 the court's attention; and whether the policies behind the general rule
19 requiring preservation of error have been served in the case in another
20 way[.]"

21 *Ailes*, 312 Or at 382 n 6. The state argues that any harm in admitting the evidence was
22 minimal in view of its perception that defendant needed Reilly to testify as she did in
23 order to secure the admission of S. D.'s previous recantation. As explained, that

1 argument is misplaced. Moreover, the harm in this case was significant; because there
2 was no physical evidence of sexual abuse, the credibility of S. D.'s allegations was at the
3 heart of the state's case. Accordingly, we exercise our discretion to correct the error.

4 Reversed and remanded.