

FILED: October 17, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Appellant,

v.

DAVID LEO WHITE, JR.,
Defendant-Respondent.

Deschutes County Circuit Court
08FE1173MS

A146936

Michael C. Sullivan, Judge.

Argued and submitted on September 21, 2011.

Jeff J. Payne, Assistant Attorney General, argued the cause for appellant. On the brief were John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Linda Wicks, Assistant Attorney General.

Valerie Wright argued the cause and filed the brief for respondent.

Before Ortega, Presiding Judge, and Brewer, Judge, and Sercombe, Judge.*

SERCOMBE, J.

Reversed and remanded.

*Brewer, J., *vice* Rosenblum, S. J.

1 SERCOMBE, J.

2 Defendant is charged with three counts of first-degree unlawful sexual
3 penetration, ORS 163.411; four counts of first-degree rape, ORS 163.375; five counts of
4 first-degree sexual abuse, ORS 163.427; one count of first-degree criminal mistreatment,
5 ORS 163.205; one count of unlawful use of a weapon, ORS 166.220; and one count of
6 strangulation, ORS 163.187. The state appeals a pretrial order that excluded expert
7 testimony regarding the phenomenon of "delayed reporting"¹ of abuse on the basis that it
8 was not relevant. Specifically, the trial court ruled that, because defendant did not intend
9 to use the complainant's five-year delay in reporting the alleged abuse to impeach her
10 credibility, expert testimony regarding "delayed reporting" was not relevant to any fact at
11 issue in the case. The state argues that the expert testimony is relevant to explain
12 possible reasons for the delay and to counter a possible inference that the complainant's
13 delay in reporting the alleged abuse means that it did not occur. On review for errors of
14 law, *State v. Faunce*, 251 Or App 58, 72, 282 P3d 960 (2012), we reverse and remand.

15 The relevant procedural facts are undisputed. In August 2008, the
16 complainant reported that defendant had sexually abused her on numerous occasions
17 between November 20, 1998, and November 20, 2003. On that basis, defendant was
18 charged with the aforementioned crimes.

¹ As previously noted by the Supreme Court, "delayed reporting" is the "label used by professionals in the field to describe a situation in which a sexually abused child does not report an abusive event immediately but, instead, reports it some time later." *State v. Perry*, 347 Or 110, 112 n 1, 218 P3d 95 (2009).

1 Prior to trial, defendant moved *in limine* to exclude expert testimony
2 regarding "delayed reporting." At a hearing on that motion, the state's expert, Storey,
3 testified regarding her intended testimony at trial. The prosecutor elicited testimony to
4 qualify Storey as an expert and to establish that the evidence concerning "delayed
5 reporting" was valid scientific evidence. Storey then testified that there is a public
6 misconception that "children will tell if [abuse] is happening to them." She explained
7 that, in fact, "in a majority of cases[,] children * * * delay in reporting * * * abuse" and
8 that, in one study, the rate of "delayed reporting" was "as high as 76 percent." Storey
9 noted that there are many reasons why a child may delay reporting sexual abuse:

10 "[T]he relationship between an * * * alleged offender and alleged victim,
11 fear of consequences for themselves, for their family, for the offender,
12 sometimes they're concerned about the wellbeing of the alleged offender.
13 They look at harm to themselves, harm to--you know, maybe threat of harm
14 to some other family members, embarrassment, shame, guilt."

15 Storey emphasized, however, that a child's delay in reporting alleged abuse is "not
16 diagnostic of abuse at all." Also at that hearing, the parties stipulated that the
17 complainant would testify at trial that she delayed reporting the alleged abuse because
18 she was afraid of defendant.

19 Defendant argued that Storey's testimony regarding "delayed reporting"
20 was not relevant because, although defendant's theory of the case was that the
21 complainant fabricated the abuse, he did not intend to argue at trial that the jury should
22 consider the delay as evidence of that fabrication. After noting that "defendant will not
23 argue the theory that the [complainant's] delayed reporting affirmatively indicated that

1 her report was a fabrication," the court ruled that Storey's testimony was "not relevant to
2 the case as outlined by the defense." However, the court further ruled that, "[i]f the
3 defense raises the issue of delayed reporting in his case, the [s]tate will be allowed to put
4 on evidence of delayed reporting during [its] rebuttal."

5 On appeal, the state contends that the court erred in ruling that the
6 testimony was not relevant unless defendant "rais[ed] the issue of delayed reporting in his
7 case." Specifically, the state argues, as it did below, that the evidence is relevant to
8 explain possible reasons for the delay and to counter a possible inference that the
9 complainant's delay in reporting the alleged abuse means that it did not occur. In the
10 state's view, under *State v. Zybach*, 308 Or 96, 775 P2d 318 (1989), and [State v.](#)
11 [Galloway](#), 161 Or App 536, 984 P2d 934 (1999), *rev den*, 330 Or 331 (2000), the
12 complainant's five-year delay in reporting is an inherent weakness in the state's case that
13 it is entitled to address in its case-in-chief.

14 Defendant responds that, under *State v. Perry*, 347 Or 110, 218 P3d 95
15 (2009), expert testimony concerning "delayed reporting" is relevant only where a
16 defendant argues that the complainant fabricated the abuse *and* that the delay itself is
17 evidence of that fabrication.² We conclude that the expert testimony is independently

² Additionally, defendant contends that the expert testimony is duplicative given the complainant's intended testimony regarding the reasons for the delay and that, accordingly, that evidence does not assist the trier of fact under OEC 702. *See* OEC 702 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."). We reject that argument without discussion.

1 relevant to help explain why the complainant delayed reporting the abuse and to counter a
2 possible inference by the jury that the delay is indicative of fabrication.

3 To be admissible, scientific evidence must be relevant under OEC 401.
4 *State v. Evans*, 236 Or App 467, 470, 236 P3d 848 (2010), *rev den*, 350 Or 230 (2011).
5 That rule provides that relevant evidence is "evidence having any tendency to make the
6 existence of any fact that is of consequence to the determination of the action more
7 probable or less probable than it would be without the evidence." If evidence is logically
8 relevant under OEC 401, a trial court has no discretion to treat it as irrelevant. [State v.](#)
9 [Titus](#), 328 Or 475, 481, 982 P2d 1133 (1999).

10 In *Zybach*, the state sought to introduce evidence of encounters between the
11 victim and the defendant to explain why the victim waited nine months to report that the
12 defendant had raped her. 308 Or at 99. The trial court admitted the evidence as relevant,
13 and this court reversed, characterizing the evidence as rehabilitation of the victim's
14 testimony before any impeachment had occurred. *Id.* at 100. On review, the Supreme
15 Court affirmed the trial court, holding that the evidence was "relevant to show why the
16 child had not reported the original sexual assault" and that it was "admissible in the state's
17 case-in-chief under its obligation to prove the charge beyond a reasonable doubt." *Id.*
18 The court reasoned that

Defendant does not contend that the evidence was inadmissible because it was not scientifically valid under the analysis described in *State v. O'Key*, 321 Or 285, 899 P2d 663 (1995), or because it was unfairly prejudicial under OEC 403.

1 "[t]he state was in no position to withhold from the court or the jury that
2 there had been a nine-month delay in reporting this crime. In order to
3 develop credibility with the court and, particularly, the jury, it was
4 permissible for the state to bring out 'up front' the delayed reporting. To
5 require the state to mask or withhold this information until brought out by
6 the defense on cross-examination would have subjected the state to charges
7 and arguments that the state was withholding valuable information from the
8 jury that was only brought out by the defense. It would be unrealistic to
9 require the state to restrict its case-in-chief to the testimony of the child as
10 to what occurred [at the time of the alleged crime] and to make it wait until
11 after the predictable cross-examination about the delay before being
12 allowed to explain the reasons for the delayed reporting."

13 *Id.* at 100-01.

14 Similarly, in *Galloway*, we relied on *Zybach* in concluding that evidence of
15 statements made by the defendant's wife to the victim was independently relevant to
16 explain why the victim delayed reporting the full details of sexual abuse. 161 Or App at
17 542. In that case, the trial court ruled that the statements were not relevant to the state's
18 case-in-chief but that they would be relevant in rebuttal if the defendant impeached the
19 victim on the basis of the inconsistency in the victim's reporting. *Id.* at 540. We reversed
20 the trial court, explaining that,

21 "[a]s *Zybach* recognizes, a party carrying the burden of proof is
22 entitled to address, as part of its affirmative case, inherent weaknesses in its
23 proof that might make its case less believable. That is not a matter of
24 'rehabilitating' a witness; it is a matter of explaining the circumstances fully
25 so that the trier of fact is not left with uncertainties that might otherwise
26 detract from the strength of the party's case. *Zybach* makes clear that
27 evidence serving that purpose is relevant and, if not inadmissible for other
28 reasons, may be placed before the trier of fact during the party's affirmative
29 case. Moreover, the court observed that, to the extent that such inherent
30 weaknesses in a party's affirmative case also may expose the evidence to
31 attack by the opposing party, the party offering the evidence need not wait
32 until rebuttal to anticipate the attack[.]"

33 *Id.* at 540-41 (footnote omitted). We noted that, sometimes, evidentiary weaknesses are

1 more damaging to a party when they are not brought out by the opposing party but,
2 instead, are left unanswered:

3 "[B]ecause it is sometimes more effective to plant seeds of doubt than to let
4 them germinate, opposing counsel may reserve comment on those
5 weaknesses until closing argument, at which point no response or
6 explanation is possible. That potential scenario underscores that the issue is
7 not one of rehabilitation in response to impeachment, but instead has to do
8 with the quality and thoroughness of the direct proof. Moreover, it is worth
9 observing that even when an opposing party does not seize on such
10 weaknesses, jurors may still identify them and, in the course of their
11 deliberations, may conclude that without an explanation of circumstances
12 that raise questions in the jurors' minds, the party's burden of proof is not
13 satisfied. Leaving jurors to wonder about such matters is, of course,
14 particularly risky where, as in criminal cases, the burden of proof is beyond
15 a reasonable doubt."

16 *Id.* at 541 n 3.

17 In this case, the trial court ruled that the expert testimony regarding
18 "delayed reporting" was not relevant to the state's case-in-chief but, rather, was only
19 relevant as rebuttal evidence should defendant impeach the complainant's credibility by
20 referencing the delay. The trial court erred in doing so. The evidence at issue--expert
21 testimony establishing the fact that a majority of children delay reporting sexual abuse
22 and noting common reasons for delay--is relevant to help explain why the complainant
23 may have delayed reporting the abuse and to counter a possible inference by the jury that
24 the delay is indicative of fabrication. *Zybach* and *Galloway* make clear that a
25 complainant's delay in reporting alleged abuse is an inherent weakness in the state's case
26 and that the state is entitled to address that weakness in its case-in-chief. *See also State v.*
27 *Panduro*, 224 Or App 180, 197 P3d 1111 (2008) (evidence of the defendant's interactions

1 with the victim was relevant to explain delayed reporting of abuse and was admissible in
2 the state's case-in-chief).

3 As noted, defendant argues that this case is not controlled by *Zybach* and
4 *Galloway* but is, instead, controlled by *Perry*. Defendant contends that *Perry* stands for
5 the proposition that expert testimony regarding "delayed reporting" is relevant *only* in
6 circumstances where the defendant has indicated an intention to argue that the delay is
7 evidence of fabrication. We disagree.

8 In *Perry*, a child reported several months after the crimes allegedly
9 occurred that the defendant had sexually abused her. 347 Or at 112. Prior to trial, the
10 defendant moved *in limine* to exclude expert testimony regarding "delayed reporting."
11 *Id.* at 113. At a hearing on that motion, the expert testified that "delayed reporting"
12 "was 'common' and 'well understood,' and that there was a body of literature
13 dealing with the issue. [The expert] also testified that a * * * study of
14 delayed reporting, although not peer reviewed, was consistent with the
15 'national experience' as reported in the literature--*i.e.*, that, in cases of
16 children with 'abnormal [physical] exams,' there was a delay in reporting in
17 a majority of those cases."

18 *Id.* at 114 (footnote omitted). The defendant argued, among other things, that the expert's
19 testimony was irrelevant, *id.*, but the trial court rejected that objection and denied the
20 motion. *Id.* at 115. On review, the Supreme Court noted that the defendant "had signaled
21 his intention to defend on the theory that the victim was fabricating and that her delay in
22 reporting was evidence of that fabrication." *Id.* at 122. The court held that the expert's
23 testimony

1 "that similar delayed reporting often is seen in verified cases of child sexual
2 abuse tended to counter that inference. The testimony was relevant in that
3 respect at least, *i.e.*, it had some 'tendency to make the existence of [a] fact
4 that is of consequence to the determination of the action more probable or
5 less probable.'"

6 *Id.* at 118 (quoting OEC 401) (brackets in *Perry*). Later, the court reiterated that, "[i]f
7 [the] defendant was attempting to make something of the victim's delay in reporting (and
8 he was), then the state was entitled to meet that argument." *Id.* at 118-19.

9 Defendant reads *Perry* too broadly. The court in *Perry* did not hold that
10 expert testimony regarding "delayed reporting" is relevant *only* in cases where a
11 defendant indicates that he intends to use the delay to impeach the victim's credibility.
12 Rather, the court held that the expert's testimony in that case was relevant *at least* to meet
13 the defendant's intended argument that the victim's delay in reporting the abuse indicated
14 that she had fabricated the abuse. In other words, the court in *Perry* did not assess the
15 relevance of expert testimony regarding "delayed reporting" where a defendant does not
16 intend to call attention to the delay but, nonetheless, it remains an inherent weakness in
17 the state's case. Accordingly, *Perry* does not preclude our conclusion here: The expert
18 testimony concerning "delayed reporting" is independently relevant to help explain why
19 the complainant delayed reporting the abuse and to counter a possible inference by the
20 jury that the delay is indicative of fabrication. The trial court erred in excluding the
21 evidence as irrelevant.

22 Reversed and remanded.