



Recent Case Law on Expert Testimonial Diagnosis of Child Sexual Abuse in the Absence of Physical Evidence

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In several recent cases, the Oregon Court of Appeals and Oregon Supreme Court have ruled against the admissibility of expert testimonial diagnosis of sexual abuse, absent any corroborating physical evidence.

In *State v. Lovern*, 234 Or App 502, 228 P3d 688 (March 31, 2010)¹, defendant challenged his conviction on 16 counts of sexual abuse in the first degree against his minor daughter, arguing in part that the trial court erred in admitting a medical doctor's diagnosis that the complainant had been sexually abused. The Court found this issue dispositive and did not reach Lovern's other ground for appeal.

The complainant, who was 12 years old when she disclosed the alleged sexual abuse, was examined by a doctor. The complainant later recanted her allegations, but over Lovern's objection, the trial court admitted the doctor's diagnosis – based solely on the complainant's earlier statements and history – that she had been sexually abused. On appeal, Lovern argued that the doctor's testimony should have been excluded under *State v. Southard*, 347 Or 127 (2009), because its prejudicial effect was substantially outweighed by its limited probative value. The Court of Appeals agreed, finding that admission of the testimony was plain error under ORAP 5.45(1), and that under *Ailes v. Portland Meadows, Inc.*, 312 Or 276 (1991), it was appropriate for the Court to exercise its discretion to correct the error.

The Court noted that the admissibility of an expert diagnosis of sexual abuse in the absence of any physical evidence of abuse is a question of law, and that the correct resolution of that legal question was not reasonably in dispute. The trial court judgment was reversed and the case was remanded.

In *State v. Merrimon*, 234 Or App 515, 228 P3d 666 (March 31, 2010)², defendant appealed his conviction of one count each of sexual abuse in the first degree and endangering the welfare of a minor, arguing that the trial court erred in admitting a medical expert's diagnosis of "highly concerning of sexual abuse," where that diagnosis was rendered in the absence of any confirming physical evidence.

Following disclosures, Merrimon's then-14-year-old daughter was evaluated by a pediatric nurse practitioner. Over Merrimon's objection, the nurse practitioner testified at trial as to her diagnosis of the complainant as "highly concerning of sexual abuse," despite the absence of any physical evidence to that effect. The testimony was based on a police officer's report of his interview with the complainant, a school counselor's report to a child abuse hotline, and the complainant's interview at CARES Northwest, a child abuse assessment center.

The Court disagreed with the state's argument that this case could be distinguished from *Lovern* due to the fact that here the diagnosis was "highly concerning" rather than definitive for child sexual abuse, and that as a result, the error was not sufficiently grave to warrant correction. The Court reasoned that a diagnosis of "highly concerning of sexual abuse" without confirming physical evidence is of marginal probative value, and that in the instant case there was a substantial risk that the jury had not made its own credibility determination, deferring instead to the nurse practitioner's diagnosis. The Court also noted that the interests of justice militated conclusively in favor of it exercising its discretion to correct the "plain error" of the trial court's erroneous admission of the testimony, due to the gravity of that error. The trial court judgment was reversed and the case was remanded.

In *State v. Clay*, 235 Or App 26, 230 P3d 72 (April 21, 2010)³, Stephen Anthony Clay appealed his conviction of two counts of sexual abuse in the first degree, challenging the trial court's admission of a pediatric nurse practitioner's expert diagnosis, rendered absent any physical evidence of abuse, that the complainant had been sexually abused.

Following disclosure, one alleged victim was interviewed at CARES Northwest, but no physical examination took place. Based on the CARES evaluation, a pediatric nurse diagnosed the complainant as having been sexually abused.

Clay objected to testimony as to the nurse's diagnosis at trial, arguing that it did not constitute scientific evidence under *State v. Brown*, 297 Or 404, 687 P2d 751 (1984), because CARES had not performed any physical examination of the complainant, and the diagnosis was therefore not predicated on established protocol. The trial court overruled defendant's objection and allowed the nurse practitioner's testimony.

Holding the trial court's admission of the sexual abuse diagnosis testimony to be plain error, the Court of Appeals exercised its discretion under *Ailes v. Portland Meadows, Inc.* to remedy that error. Citing *State v. Southard*, the Court noted that the jury's assessment of the complainant's credibility was critical, and that because there were no disinterested eyewitnesses to, or any physical corroboration of, the alleged abuse, the admission of the testimony created a substantial risk that the jury would improperly defer to the nurse practitioner's conclusion. The Court reversed defendant's convictions and remanded the case.

In *State v. Lupoli*, ___ Or ___, ___ P3d ___ (June 4, 2010)⁴, defendant appealed, with respect to four children, several convictions for first-degree sexual abuse and one conviction for attempted first-degree sexual abuse. At trial, the state presented testimony of health care professionals who had evaluated the children, each of whom testified that in his or her opinion, the children whom they had evaluated had been sexually abused. No corroborating physical evidence of sexual abuse had been found with regard to any of the alleged victims.

Lupoli made several objections to health care professionals' testimony on the ground that it amounted to improper vouching by one witness for the credibility of another, but the trial court overruled all but one those objections. Lupoli also moved for a judgment of acquittal on one of the charges, arguing that there was insufficient evidence to support a conviction, but the trial court denied the motion. The Court of

Appeals affirmed Lupoli's convictions without opinion in *State v. Lupoli*, 219 Or App 655, 185 P3d 571 (2008), and Lupoli subsequently appealed to the Oregon Supreme Court.

While Lupoli objected to admission of the health care professionals' diagnoses of sexual abuse at trial, he did not base those objections on the logic of *State v. Southard*. Rather than arguing that the health care professionals' diagnoses themselves were inadmissible, Lupoli argued instead that the testimony explaining how they arrived at their diagnoses was inadmissible. Specifically, Lupoli argued that the health care professionals' testimony amounted to impermissible comments by one witness on the credibility of another, because the expert witnesses had grounded their diagnoses on an understanding of characteristics of truthfulness in children and consideration of how the children they had evaluated had exhibited such characteristics. Citing *State v. Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983), the Court stated, "This court has long held that one witness may not give an opinion on whether he or she believes another witness is telling the truth." The Court later went on to state,

"[A]ll of the reasons for preventing one witness from vouching for another witness' credibility at trial apply with equal or greater force when the nonwitness is an unavailable complainant. In that circumstance, the defendant does not have the ability to confront the complainant or to impeach the accusations against him or her. Permitting a trial witness to vouch for the credibility of the complainant in such a situation would interfere with the ability of the trier of fact to determine the truth of the allegations, and would be highly unfair to the defendant."

Holding that the trial court erred in admitting the testimony of the health care professionals as to three of the children, the Court found that Lupoli's convictions for first-degree sexual abuse concerning those victims must be reversed, and that the case should be remanded for a new trial.

The Court then went on to consider Lupoli's motion for judgment of acquittal on the charge concerning the fourth child. Holding that a rational jury could not have found beyond a reasonable doubt that Lupoli committed the crime of attempted first-degree

sexual abuse, that the trial court erred in failing to grant Lupoli's motion for judgment of acquittal on that count, and that the Court of Appeals erred in affirming that conviction, the Oregon Supreme Court reversed Lupoli's conviction for attempted first-degree sexual abuse with regard to the fourth child.

¹ See: <http://www.publications.ojd.state.or.us/A137247.htm>

² See: <http://www.publications.ojd.state.or.us/A139106.htm>

³ See: <http://www.publications.ojd.state.or.us/A136583.htm>

⁴ See: <http://www.publications.ojd.state.or.us/S056477.htm>