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6 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY

8
9 STATE OF OREGON,

10 Plaintiff,

11 -VS-

12 JOHN DOE,

13 Defendant

CASE No.

MOTION IN LIMINE TO EXCLUDE
"EXPERT" OPINION ON CHILD SEXUAL
ABUSE AND SEXUAL OFFENDER ISSUES

14
15 COMES NOW the Defendant, JOHN DOE, by and through his undersigned attorney,
16 and hereby moves the Court for an Order instructing the District Attorney, his representatives,
17 and his witnesses to refrain absolutely from making any reference whatsoever in person, by
18 counsel or through witnesses or exhibits, to testimony or any other evidence concerning the
19 following:

- 20 (1) The "child sexual abuse" diagnosis, syndrome or profile, or behavioral
21 characteristics of child sexual abuse victims in general, including but not limited
22 to the following: how child sexual abuse victims typically respond during
23 interviews, medical examinations, therapy sessions, or as eye-witnesses to the
24 crime; and typical behaviors or reactions of children who have been sexually
25 abused, in other settings such as at home, at school, at play;
- (2) Opinions that the alleged victims displayed behavior or made statements about
the alleged sexual abuse in a way that is typical of children who have been

1 sexually abused, or otherwise demonstrated characteristics consistent with
2 those found in child sexual abuse victims;

3 (3) Opinions that the alleged victims were not coached into claiming the abuse
4 occurred, or were not coached into claiming that Mr. Defendant was the
5 perpetrator;

6 (4) Opinions that the alleged victims have not fantasized or fabricated the
7 allegations or misidentified the perpetrator;

8 (5) Opinions that the alleged victims, in describing the alleged crimes, are
9 describing something which did in fact happen to them;

10 (6) Opinions that the alleged victims' delay in reporting the alleged sexual abuse
11 by Mr. Defendant is consistent with having been sexually abused or otherwise
12 characteristic of child sex abuse victims;

13 (7) A medical diagnosis, "diagnostic findings" or opinion that the victims were
14 sexually abused or possibly sexually abused, regardless of whether the
15 medical diagnosis, findings or opinion identifies Mr. Defendant as the
16 perpetrator;

17 (8) The "sexual offender profile", or behavioral characteristics of sexual offenders,
18 or typical behaviors of sexual offenders, including but not limited to conduct
19 described as "grooming," and denial when confronted with accusations of
20 abuse;

21 (9) Opinions that Mr. Defendant displayed behaviors or engaged in conduct that is
22 consistent with behavioral characteristics of sexual offenders or typical
23 behaviors of sexual offenders; and

24 (10) Any other direct or indirect comment on the credibility of the alleged victims as
25 witnesses or hearsay declarants.

The defense so moves upon the grounds and for the reasons that this evidence is inadmissible (1) because it is not relevant, OEC 401 & 402; (2) because it is unreliable and

1 speculative, OEC 403; (3) because it constitutes the use of specific instances of conduct of a
2 witness or hearsay declarant for the purpose of supporting the credibility of the witness, OEC
3 608(2);(4) because it constitutes an impermissible comment on the credibility of a witness; (5)
4 because it is improper character evidence, OEC 404 & 405; (5) because it is not proper
5 opinion evidence under OEC 701 & 702, (6) because it goes to matters of which the witnesses
6 lack personal knowledge, in violation of OEC 602; or, alternatively (7) that the prejudicial effect
7 of such evidence outweighs any probative value, and said evidence would tend to confuse the
8 issues and mislead the jury, and that ordinary objection in the course of trial, even if sustained
9 with corrective instructions to the jury, would not remove the unduly prejudicial impact of this
10 evidence, in violation of OEC 403 and the Fourteenth Amendment to the United States
11 Constitution.

12 This motion is made in good faith and not for the purpose of delay. It is supported by
13 the points and authorities that follow, and such other points and authorities as may be
14 developed at oral argument on this motion. The defense specifically reserves the right to
15 request an evidentiary hearing should one be needed to resolve this motion pretrial.

16 MOVED this _____ day of _____, 2004

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19 _____
TERRI WOOD OSB #88332
Attorney for Defendant

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22 POINTS AND AUTHORITIES

23 **1. Summary of Arguments**

24 This motion seeks to preclude the State from using "expert" witnesses as "human
25 polygraphs" to directly or indirectly bolster the credibility of the alleged victims. In this case,
such witnesses could include medical doctors, social workers, school counselors, mental

1 health professionals, other health care professionals, and law enforcement officers. The
2 discovery provided to date includes reports by a medical doctor at CARES Northwest,
3 containing "diagnostic findings" of child sexual abuse as to both alleged victims, based solely
4 on these children's claims of sexual abuse.

5 This case is a classic credibility contest, with the only witnesses to the alleged crimes
6 being the alleged victims. There is no corroborating physical evidence and no confession nor
7 admissions by Mr. Defendant. Thus, the credibility of the alleged victims is critical to the
8 outcome of the case.

9 The objectionable evidence is not relevant under the "relevancy" test set forth in *State*
10 *v. Brown*, 297 Or 404 (1984) and *State v. O'Key*, 321 OR 285 (1995); see, *State v.*
11 *Marrington*, 335 Or 555 (2003) and *State v. Lawson*, 127 Or App 392 (1994); see also *Kumho*
12 *Tire Company, LTD v. Carmichael*, 119 SCt 1167 (1999)(federal court's "gatekeeping"
13 function, requiring inquiry into the relevance and reliability of an expert witness's principle or
14 technique, applies not only to "scientific" testimony, but to all expert testimony); *State v.*
15 *Sanchez-Cruz*, 177 Or App 332, 337 n.4 (2001)("It is by no means clear, however, that courts
16 are not to exercise a gatekeeping role with respect to *all* expert testimony.")(emphasis
17 original).

18 The objectionable evidence is unreliable. There is no profile of a child sex abuse
19 victim that distinguishes such children from non-abused children or from children with other
20 kinds of problems. There is no profile, or set of characteristics, of a sex offender that reliably
21 indicates a person who displays one or more of the characteristics is likely to be a sex
22 offender. *State v. Hansen*, 304 Or 169, 176 (1987). In the absence of physical evidence of
23 abuse, as is the case here, there is no known reliable method, through physiological or
24 psychological testing, of determining whether an alleged victim is fabricating or fantasizing a
25 sexual experience, or has in fact had a particular experience.

The burden is on the State to prove to the Court by a preponderance that the
contested matters are admissible. OEC 104.

1 The objectionable evidence relies on specific instances of conduct by the alleged
2 victims to support the credibility of the witness, by way of an opinion that such conduct is
3 "typical" of child sexual abuse victims, in violation of OEC 608(2). Additionally, the Supreme
4 Court has held that expert testimony along these lines, including a "diagnostic impression of
5 sex abuse" in a case with a normal physical exam, constituted an impermissible comment on
6 the credibility of a sex abuse victim. *State v. Keller*, 315 Or 273 (1993). Thus, even if the
7 State could lay a *Brown* foundation, the opinion evidence would be inadmissible.

8 Even if the evidence has relevancy and is not viewed as commenting on the alleged
9 victims' credibility, it should be excluded under OEC 403 or the Due Process Clause of the
10 Fourteenth Amendment to the United States Constitution. See *State v. Hansen, supra*. This
11 rule requires trial courts to evaluate the degree to which the trier of fact may be overly
12 impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the evidence,
13 thereby leading the trier of fact to abdicate its role of critical assessment. See, *State v. Brown,*
14 *supra*.

15 Finally, introduction of such evidence at trial could descend into a time-consuming and
16 confusing battle of experts. *Id.* If the State is allowed to present expert testimony on this
17 issue, Due Process requires that the defense be allowed to present experts holding the
18 opposite view.

19 **2. Relevancy**

20 "Relevant evidence" means evidence having any tendency to make the existence of
21 any fact that is of consequence to the determination of the action more probable or less
22 probable than it would be without the evidence. OEC 401.

23 In *State v. Milbradt*, 305 Or 621 (1988), the Supreme Court said that evidence of "how
24 normal children usually react to sexual abuse," or "sex abuse syndrome," required a *Brown*
25 foundation before it was admissible:

1 In *State v. Middleton* , this court allowed in testimony concerning
2 normal reactions to abuse but did so before we decided *State v.*
3 *Brown*. We have set out in great detail in *Brown*, 297 Or at 409-
4 18, the necessary foundation that must be laid for the introduction
of scientific evidence. Without repeating what we said there, we
direct the attention of anyone who is offering a form of scientific
evidence to the procedures for admission set forth in *Brown*.

* * * *

5 We suggest that in future cases involving "syndrome" testimony
6 full foundations be established, if indeed it can be shown that the
7 so-called "typical" reactions can be demonstrated to be either
typical or reliable. 305 Or at 631.

8 *Brown* defined "[t]he term 'scientific' as we use it in this opinion [as] evidence that
9 draws its convincing force from some principle of science, mathematics and the like.
10 Typically, but not necessarily, scientific evidence is presented by an expert witness who can
11 explain data or tests results" 297 Or at 407. *O'Key* extends the definition of scientific
12 evidence to "proffered expert scientific testimony that a court finds possesses significantly
13 increased potential to influence the trier of fact as 'scientific assertions'." 321 Or at 293. In
14 other words, the court must look to whether jurors are likely to perceive the evidence as being
"scientific," regardless of whether scientists would categorize the evidence as such.

15 Most recently, in *State v. Marrington, supra*, the Supreme Court held that testimony by
16 a psychologist that delayed reporting is a typical characteristic of sexually abused children
17 was inadmissible in the absence of a *Brown* foundation:

18 [T]his court has made it clear that expert testimony concerning
19 matters within the sphere of the behavioral sciences possesses
20 the increased potential to influence the trier of fact as scientific
21 assertions, just as expert testimony dealing with the "hard"
22 sciences does. . . . An expert like Shouse, who has a background
23 in behavioral sciences and who claims that her knowledge is
24 based on studies, research, and the literature in the field,
25 announces to the factfinder that the basis of her testimony is
"scientific," *i.e.*, is grounded on conclusions that have been
reached through application of a scientific method to collected
data. Because that is how the factfinder would understand it, a
court has a duty to ensure that such information possesses the
necessary indices of scientific validity. As the proponent of
Shouse's testimony regarding delayed reporting as a predominant
feature of child sexual abuse, the state had the obligation to show
that that asserted rule of behavior was scientifically valid under the

1 standards established in *Brown* and *O'Key*. The trial court erred in
2 not requiring the state to make that showing. 355 Or at ____.

3 The Court of Appeals has provided additional guidance on what constitutes evidence
4 subject to a *Brown* foundation. In *State v. Lawson*, 127 Or App 392 (1994), a case where the
5 defense sought to introduce expert testimony that the defendant did not match a "sex offender
6 profile," the court explained:

7 Whether it is labeled a "syndrome" or a "profile," the type of
8 evidence . . . involves comparing an individual's behavior with the
9 behavior of others in similar circumstances who have been
10 studied in the past. This comparison evidence purports to draw its
11 convincing force from scientific principles. 127 Or App at 395
12 (emphasis supplied).

13 In *State v. Hansen*, *supra*, the Supreme Court reversed a conviction where a police
14 detective was permitted to testify regarding techniques used by sex offenders to "groom" child
15 victims, observing:

16 The state has not argued that the testimony to which defendant
17 objected was admissible on any other ground than to explain the
18 student's initial denial. The only other possible ground would be as
19 evidence that defendant had sexual relations with the student. But
20 the relevance of the testimony for this purpose is practically nil.
21 Detective Robson testified to what might be described as a "profile"
22 of a nonviolent child abuser who is unrelated to the child: physical
23 and psychological "testing" of the child, giving gifts, showing
24 affection, praising, making the child feel comfortable in the abuser's
25 presence, etc. That child abusers use these techniques has no
bearing on whether a person who does these things is a child
abuser. For example, it is probably accurate to say that the vast
majority of persons who abuse children sexually are male. This
says little, if anything, however, about whether a particular male
defendant has sexually abused a child. See *State v. Petrich*, 101
[Wash.2d 566, 683 P.2d 173, 180 \(1984\)](#) (potential for prejudice
outweighed probative value of expert testimony that 85-90% of
child molesters know their victims, where defendant was alleged
victim's grandfather); see also [McCord, Expert Psychological
Testimony about Child Complainants in Sexual Abuse
Prosecutions, 77 J Crim L & Criminology 1, 17 n 105 \(1986\)](#) (citing
cases).

26 Thus, the evidence at issue herein requires the State to meet the *Brown-O'Key*
27 foundation as a predicate to its admissibility. The defense moves the Court to make that
28 determination pretrial, before the prosecution comments on that evidence during voir dire or

1 opening statement. *Brown* requires the court to analyze the probative value of the evidence,
2 which requires that the evidence be "reasonably reliable," and to weigh the probative value
3 and the helpfulness of the evidence to the jury under OEC 702, against the prejudicial effect of
4 the evidence. The factors the court is to consider in making this analysis are set forth at 297
5 Or at 417-418, and at 321 Or at 306. These factors were summarized by the court in
6 *Sanchez-Cruz, supra*:

7 In *Brown*, the court set out a list of seven factors that courts are to
8 consider in assessing the reliability of scientific evidence. Those
9 factors are:

- 10 (1) The technique's general acceptance in the field;
11 (2) The expert's qualifications and stature;
12 (3) The use which has been made of the technique;
13 (4) The potential rate of error;
14 (5) The existence of specialized literature;
15 (6) The novelty of the invention; and
16 (7) The extent to which the technique relies on the subjective
17 interpretation of the expert.'

18 *Brown*, 297 Or. at 417, 687 P.2d 751. The court explained that
19 '[t]he existence or nonexistence of these factors may all enter into
20 the court's final decision on admissibility of the novel scientific
21 evidence, but need not necessarily do so. What is important is not
22 lockstep affirmative findings as to each factor, but analysis of each
23 factor by the court in reaching its decision on the probative value
24 of the evidence under OEC 401 and OEC 702.' *Id.* at 417-18, 687
25 P.2d 751 (footnotes omitted.) As the court further explained in
O'Key, 'scientific' evidence, to be admissible, must be supported
by a showing that the evidence is based upon scientifically valid
principles, *i.e.*, 'sound scientific reasoning or methodology.' 321
Or. at 302, 899 P.2d 663. In conducting this inquiry, we focus on
the methodology followed, not on the conclusions reached. 177 Or
App at 341-42.

20 3. Credibility

21 Oregon courts have repeatedly held that a trial witness cannot give an opinion on the
22 credibility of another trial witness. *State v. Keller*, 315 Or 273, 284-85 (1993)(pediatrician's
23 opinion); *State v. Odoms*, 313 Or 76, 82 (1992); *State v. Milbradt*, 305 Or 621, 629-30
24 (1988)(psychotherapist opinion); *State v. Middleton*, 294 Or 427, 438 (1983). *Middleton* held
25 that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness
is telling the truth." 294 Or at 438. *Keller* adds:

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2 [T]his rule applies whether the witness is testifying about the
3 credibility of the other witness in relation to the latter's testimony at
4 trial or is testifying about the credibility of the other witness in
5 relation to statements made by the latter on some other occasion
6 or for some reason unrelated to the current litigation. 315 Or at
7 285 (citation omitted).

8 Furthermore, the rule broadly applies to direct and indirect comments on witness credibility.
9 *Milbradt*, 305 Or at 630 (opinions that a person is not deceptive, could not lie without being
10 tripped up, was very trusting and vulnerable and so would not betray a friend—the
11 defendant—were comments on witness credibility).

12 The objectionable testimony in *Milbradt* came from a psychologist who interviewed the
13 alleged victims in a sex abuse case, who were adults but severely mentally retarded. He
14 testified for the State that he found no evidence of deception and that what they reported
15 about the sex abuse represented their experience. 305 Or at 625. The Supreme Court
16 quoted at length from the trial testimony, and it is instructive to scrutinize what the Court found
17 to be reversible error:

18 Q. (By Prosecutor) Doctor, you have indicated that part of your
19 training as a psychologist is to be a trained observer, is that
20 correct?

21 A. That is correct.

22 Q. Have you in your training and education as a psychologist
23 found there to be certain indicators of deception?

24 A. Certainly

25 Q. Were you able to arrive at opinions or observations in that
regard with respect to [one of the victims]?

A. Yes, I was.

Q. And what was that based on?

A. Based on her demeanor, on how she answered questions, the
content of her answers. I could go into her spontaneity, among
other things. She was spontaneous with freshness in answering
the questions.

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Q. To what extent did you see evidence, or indicators of deception?

A. I did not. She seemed to take every question and answer it as she was, answer spontaneously on the moment with no indication of hesitation, or figuring out what the best answer might be. You know, she would just blurt things out, which is unpremeditated response. So, kind of a very fresh and spontaneous approach to me.

* * * *

A. Again, I find her condition of her mental defect as directly related to rendering her unsophisticated to either plan a systematic or motivated deception, or carry it through. She was so spontaneous if she, this is my opinion, if she lied, that she would trip herself up five minutes later, you know. 305 Or at 626-27.

The trial judge in *Milbradt* gave a long cautionary instruction to the jury, making, among other points, that "the answer given by the witness related to the capacity of either one of these victims of manufacturing a story. . . . You people are the one who have to make the determination of whether or not either one of these victims have fabricated a story with respect to defendant," 305 Or at 627. The Supreme Court held that the testimony should have been disallowed altogether.

Unless the function of the jury is to find the truth, its role is devoid of substance. Often the jury can meet this obligation only be determining the credibility of witnesses. The jury system with all its imperfections, has served society well. It has not been demonstrated that the art of psychiatry has yet developed into a science so exact as to warrant such a basis intrusion into the jury process. 305 Or at 629 n.3 (citation omitted).

In *Keller*, the Supreme Court found objectionable as a comment on credibility, testimony by pediatrician Dr. Jan Bays of her diagnostic impression that the child was sexually abused, that there was no evidence of leading or coaching or fantasizing during the child's interview, and that the child had given a clear history of sexual touching which had happened to her own body. 315 Or at 278-79, 285. Dr. Bays also testified about the types of behavioral

1 evidence on which she normally relied to determine whether a child had been coached: A
2 "rote" style of recitation by a child, a child's ability to supply "peripheral" details of the alleged
3 incident, a child's tendency to correct the interviewer about the facts, and various emotional
4 responses by a child, concluding that in this case the victim's interview showed she was
5 "remembering what happened." Each of those statements amounts to testimony that the child
6 was credible. *Id.*

7 Defense counsel in *Keller* objected to the testimony both on grounds of it being a
8 comment on credibility and because of lack of foundation under *Brown*, as required by
9 *Milbradt*. 315 Or at 279-82. The Supreme Court did not reach the *Brown* issue. Thus, it is
10 clear that even if the contested testimony met the *Brown* test, it would be inadmissible. *Cf.*,
11 *State v. Sanchez-Cruz, supra*, 177 Or App at 334 n.2 (finding State had met *Brown* foundation
12 for admission of doctor's diagnosis of "child sex abuse" but noting defendant had not argued
13 on appeal the doctor's diagnosis constituted an impermissible comment on the credibility of
14 the victim); *see, Snowden v. Singletary*, 135 F3d 732 (11th Cir. 1998), *cert den.*, 119 S.Ct. 405
15 (1998)(constitutional error for state judge to allow expert to testify that 99.5% of children tell
16 the truth about sexual abuse; improper for witness to testify about credibility of other
17 witnesses).

18 **4. Prejudice**

19 Oregon Rule of Evidence 403 provides that:

20 "Although relevant, evidence may be excluded if its probative value is
21 substantially outweighed by the danger of unfair prejudice, confusion of
22 the issues, or misleading the jury, or by considerations of undue delay
23 or needless presentation of cumulative evidence."

24 In *State v. Brown, supra*, the Court found that "under proper conditions polygraph
25 evidence may possess some probative value and may, in some case, be helpful to the trier of
fact." 297 Or at 438. The Court then turned to the OEC 403 analysis, upon which ground it
held the evidence to be inadmissible. The *Brown* court itself drew an analogy between

1 polygraph evidence and the "psychological" type evidence at issue here, and so proves more
2 instructive than the majority of 403 cases which deal with other crimes or bad acts:

3 The nature of the polygraph examination is closer to a psychiatric
4 evaluation than to objective scientific analysis such as fingerprints and
5 ballistics. The polygraph technique is heavily dependent on the
6 subjective evaluation of the expert both in the administration of the test
7 and in reaching the result. 297 Or at 438.

8 OEC 403 "requires trial courts . . . to evaluate the degree to which the trier of fact may
9 be overly impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the
10 evidence, thereby leading the trier of fact to abdicate its role of critical assessment." 297 Or at
11 439.

12 Testimony from professionals that the alleged victims acted in ways consistent with a
13 sexual abuse victim may "assume a posture of mystic infallibility in the eyes of a jury," *Brown*,
14 *supra*, 297 Or at 440. This is particularly so when the professional, who has impressive
15 academic credentials and/or clinical experience, tells the jury he or she has had contact with
16 "hundreds" of sexual abuse victims, or specializes in sex abuse cases or in interviewing
17 sexual abuse victims.

18 The *Brown* Court also looked at the "time-consuming and confusing battle of [the]
19 experts," under its 403 analysis, 297 Or at 441, and concluded, "[a]lthough not in any sense
20 determinative, these concerns are relevant to the issue whether evidence of questionable
21 value is outweighed by 'consideration of undue delay' as set forth in OEC 403." There is no
22 consensus of the experts on the characteristics or behaviors of sexual abuse victims or sex
23 offenders; the battlefield lies waiting.

24 **5. Medical diagnosis or diagnostic findings of child sexual abuse.**

25 In *State v. Trager*, 158 Or App 399 (1999), the Court of Appeals held that a medical
diagnosis of child sex abuse by a CARES physician was not "scientific evidence" subject to a
Brown foundation. In *State v. Sanchez-Cruz*, 177 Or App 332 (2000), the Court of Appeals

1 held the opposite, and found that the State had met the foundational requirement by a CARES
2 physician giving similar testimony. *State v. Marrington, supra*, should remove any doubt that a
3 physician’s diagnosis, findings or medical opinions must survive a threshold reliability
4 determination by the trial judge.

5 Mr. Defendant case is distinguishable from *Sanchez-Cruz* in at least two regards. First,
6 the defense in *Sanchez-Cruz* did not contend, as Mr. Defendant does, that this evidence is
7 inadmissible because it constitutes an opinion on the credibility of the alleged victims. See 177
8 Or App at 334. Second—and perhaps why *Sanchez-Cruz* did not raise the credibility issue—is
9 that the doctor’s diagnosis of child sex abuse was supported by abnormal physical findings
10 consistent with penile penetration. In the case at bar, there were no abnormal physical
11 findings for either alleged victims. Rather, the diagnosis as to each alleged victim rests entirely
12 on the child’s statements prior to, during and after the physical examination. The reports state
13 the diagnosis was based on the “clear, detailed disclosures The disclosures included
14 details regarding the locations of where the touching occurred, who was present, and
15 descriptions of how it felt *that are consistent with statements made by a child who has been*
16 *sexually abused.*” Doctor’s report on Shanice Barber, p. 5 (emphasis supplied).

17
18 **6. Expert testimony about “grooming.”**

19 In *State v. Stafford*, 157 Or App 445 (1998)(*en banc*), the Court of Appeals held that
20 testimony concerning “grooming” behavior by child sex offenders, by a clinical psychologist
21 who specialized in treating sex offenders, was not “scientific” evidence” requiring a *Brown*
22 foundation. The defense submits that *Stafford’s* holding is no longer good law, in light of *State*
23 *v. Marrington, supra*, which held that a psychologist’s expert testimony concerning delayed
24 reporting by child sexual abuse victims was scientific evidence. The experts’ opinions in both
25 cases were based upon their clinical experience, as well as their professional education and
training in their respective fields.

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