

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

STATE OF OREGON,  
*Plaintiff-Respondent,*

*v.*

JOEL RIVERA-ORTIZ,  
*Defendant-Appellant.*

Hood River County Circuit Court  
120213CT; A157427

John A. Olson, Judge.

Argued and submitted January 27, 2016.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Peenesh H. Shah, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

EGAN, J.

Affirmed.

**EGAN, J.**

Defendant appeals a judgment of conviction for reckless driving, ORS 811.140,<sup>1</sup> arising from a traffic collision. In his first two assignments, defendant assigns error to the trial court's denial of his motions *in limine* to exclude a police officer's opinion testimony explaining how the accident occurred and the general rate of speed at which defendant was traveling on impact. Defendant argues that both portions of testimony should have been excluded because the police officer was not a qualified accident reconstruction expert and because the testimony constituted scientific evidence for which the state failed to lay the proper foundation. He also assigns error to the trial court's denial of his motion for judgment of acquittal. We affirm.

We review for legal error whether the trial court properly applied OEC 702 to determine that an expert was qualified to give testimony about a particular topic. [\*State v. Rogers\*](#), 330 Or 282, 315, 4 P3d 1261 (2000). We also review for legal error whether evidence is "scientific," and, if so, whether it is admissible. [\*State v. Sampson\*](#), 167 Or App 489, 495, 6 P3d 543, *rev den*, 331 Or 361 (2000). Finally, we review the denial of a motion for judgment of acquittal for legal error, viewing the evidence in the light most favorable to the state to determine whether any rational trier of fact could have found the elements of the crimes beyond a reasonable doubt. [\*State v. Luers\*](#), 211 Or App 34, 53, 153 P3d 688, [\*adh'd to as modified on recons\*](#), 213 Or App 389, 160 P3d 1013 (2007). "Because the jury found defendant guilty, we state the facts in the light most favorable to the state." [\*State v. Henley\*](#), 281 Or App 825, 826, 386 P3d 126 (2016), *rev allowed*, 360 Or 752 (2017).

It was getting dark as defendant was driving a 1989 Honda Civic, a two-door hatchback, south on Eastside Road in Hood River. The posted speed limit on that section of Eastside Road was 45 miles per hour. R was driving a

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<sup>1</sup> ORS 811.140 provides, in part:

"(1) A person commits the offense of reckless driving if the person recklessly drives a vehicle upon a highway or other premises described in this section in a manner that endangers the safety of persons or property."

Chevrolet S-10 pickup truck east on Paasch Road with her 12-year-old daughter and her daughter's friend. R stopped at the stop sign of the intersection of Paasch Road and Eastside Road, intending to turn right into the southbound lane of Eastside Road. When R looked to her left to check for traffic, she saw defendant's car, with its headlights on, traveling toward her in the southbound lane. R believed the Honda Civic was a sufficient distance away for her to safely turn right in front of it onto Eastside Road. As she pulled out to turn right, defendant's car hit the front of the driver's side of the truck. The point of impact was a few feet inside of the fog line of the southbound lane. The impact spun the S-10 pickup approximately 270 degrees, and the truck ended up on the west shoulder of Eastside Road, 35 feet southwest of the point of impact. The front of the S-10 pickup was destroyed, leaving the driver's-side front wheel pushed under the truck's carriage. Defendant's Honda Civic rolled side-over-side in the southbound lane and then slid on its roof. It came to rest, upside down, in the same lane of traffic as it had been travelling, 388 feet from the point of impact. The front and both sides of the Honda Civic were damaged. None of the vehicles' occupants were seriously injured.

Sergeant Flem, of the Hood River County Sherriff's Office, arrived at the accident scene after other emergency personnel. He first checked the damage to the S-10 pickup and then the damage to the Honda Civic, observing a trail of scuff marks and vehicle debris that ended at the Honda Civic. Flem directed another officer to take measurements at the scene. From what he saw at the scene of the collision, Flem concluded that the accident occurred when R pulled forward from the stop sign to turn right and the front passenger's side of the Honda Civic hit the front driver's side of the S-10 pickup.

When Flem interviewed defendant later that evening, defendant stated that he had been driving 45 to 50 miles per hour when his car hit the S-10 pickup and that the truck had been turning left when he hit it. Flem did not believe defendant's story because it was not consistent with his observations at the accident scene, and he issued defendant a citation for misdemeanor reckless driving.

Defendant was charged with misdemeanor reckless driving, and he requested a jury trial. The state intended to call Flem to testify at trial about the movement of the vehicles at and around the time of impact and defendant's rate of speed before impact. Before trial, defendant filed a motion *in limine* to exclude testimony by Flem regarding the circumstances of the collision and defendant's rate of speed. Defendant contended that that testimony should be excluded under OEC 702,<sup>2</sup> because it constituted expert scientific evidence about which Flem was not qualified to testify because he was not a qualified accident reconstruction expert. Moreover, defendant argued, the state failed to lay the proper foundation for the admissibility of scientific evidence under *State v. Brown*, 297 Or 404, 687 P2d 751 (1984), and *State v. O'Key*, 321 Or 285, 899 P2d 663 (1995).

The state acknowledged that Flem was not an accident reconstruction expert but contended that, based on Flem's training and experience, he was qualified to testify about the motion of the vehicles during the accident and that defendant was traveling at a "higher rate of speed" at the time of impact. The state further contended that it was not offering Flem's testimony as scientific evidence but, instead, was offering evidence of the conclusions that Flem could properly make with his specialized knowledge, experience, and training.

The trial court allowed the state to make an offer of proof by eliciting testimony from Flem about his specialized training, experience, and knowledge of traffic collisions and about the general conclusions he could make about a traffic collision based on that training, experience, and knowledge. Flem told the court that he had been with the sheriff's office for 27 years and had investigated over 100 traffic accidents. He explained that while he was at the police academy he had attended an eight-hour course on investigating traffic collisions. He also had attended, during his time in the

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<sup>2</sup> Defendant also argued to the trial court, and argues on appeal, that Flem could not offer his opinion as lay testimony under OEC 701 because Flem had no personal knowledge of the distance the vehicles traveled or speed at which defendant was traveling prior to impact. Although the state initially argued that the evidence was alternatively admissible as lay testimony under OEC 701, the trial court admitted all of Flem's testimony as expert testimony under OEC 702. On appeal, we limit our review to the admissibility of the testimony under OEC 702.

sheriff's office, two more eight-to-10-hour training sessions that involved investigating mock crashes, and two four-hour classes on investigating traffic collisions, which were taught by an accident reconstruction specialist.

Flem testified that, from that training, he had learned how to read acceleration marks and deceleration marks, how to tell the difference between skid marks and sideways yaw marks, and how to recognize scuff marks and their causes. Additionally, he explained that he had learned about the debris fields that vehicles leave after impact, from which he could determine the point of impact and each vehicle's movements after impact. Flem also testified that, through his experience and training, he had learned how to determine an approximate range of a vehicle's speed at impact based on the amount of damage to the vehicles and the distances that the vehicles had traveled from the point of impact. Flem told the court that his training and experience had taught him that slow-moving vehicles are more likely to remain close together after impact and that vehicles traveling at higher speeds are more likely to end up with a greater distance between them after impact. He further explained to the court that he considered a "low rate of speed crash" to be one in which the vehicles had been traveling at speed limits found on city streets of between 25 and 45 miles per hour and that he considered a "high rate of speed crash" to be one that occurs when the vehicles had been traveling at highway speeds.

After that offer of proof, the trial court allowed Flem to testify as an expert witness under OEC 702, although the trial court limited Flem's testimony with regard to defendant's rate of speed at impact. The trial court allowed Flem to testify only that, based on his training and experience, the accident involved a "high rate of speed collision." The trial court stated that that testimony would properly limit Flem's testimony in light of his training and experience and that "somebody who has experience investigating crashes and has seen about 100, has seen them at high speeds and low speeds, can testify to the difference in how they look."

At trial, Flem testified about his training and experience and about the following observations and conclusions:

(1) the point of impact occurred just over the fog line in the southbound lane of Eastside Road; (2) the damage to the S-10 pickup, as well as the various marks on the road, indicated that the Honda Civic's front passenger's side had hit the front driver's side of the truck; (3) the force of defendant's vehicle caused the S-10 pickup to spin approximately 270 degrees, leaving no sideway skid marks or yaw marks on the road, "which indicated through [his] training and experience [that], at one point, [the truck's] rear tires had to have become airborne"; (4) after impact, the Honda Civic remained in the southbound lane while it barrel-rolled for 146 feet and then slid on its roof for 242 feet; and (5) because the Honda Civic remained in the southbound lane, and because of the final distance between the two vehicles after the collision, Flem concluded that the Honda Civic was traveling at "a higher rate of speed" when it collided with the truck. Flem was not asked to, nor did he, explain what he meant by a "higher rate of speed."

R's daughter testified that her mother stopped their truck at the intersection of Eastside Road and Paasch Road and looked both ways for cross-traffic. She testified that she saw the lights of defendant's car "really far away" before her mother started turning. A man who lived near the corner of Eastside and Paasch also testified. He told the jury that he was outside his house when he heard defendant drive by at a speed that sounded "faster than normal" and then heard the collision seconds later. At the close of the state's case, defendant moved for a judgment of acquittal on the ground that a reasonable trier of fact could not conclude beyond a reasonable doubt that defendant had been driving recklessly. The trial court denied the motion, and the jury found defendant guilty.

On appeal, defendant renews the arguments that he made to the trial court. Defendant assigns error to the trial court's admission of Flem's testimony about the movement of the vehicles and the speed at which defendant was travelling at impact, arguing that it was inadmissible because Flem was not qualified to make those "scientific assertions." Defendant contends that only a certified accident reconstructionist is qualified to testify to those conclusions and, as a result, Flem's testimony was unhelpful and

possibly misleading to the jury because he could not present evidence that his statements were scientifically valid. The state responds that Flem was qualified by his specialized training and experience to identify and make conclusions from the debris fields, skid marks, yaw marks, and other physical marks and evidence. To address those arguments, we must first determine whether Flem's testimony was scientific testimony and, if so, whether the state laid a proper foundation for its admissibility under *Brown* and *O'Key*. Then we must determine whether Flem was qualified to provide expert opinion testimony, whether scientific or not, under OEC 702.

The admission of expert testimony is controlled by OEC 702. It provides that “[i]f 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.” OEC 702. When the state seeks to admit scientific evidence, it must lay a foundation for its admissibility with consideration of the factors enumerated in *Brown* and *O'Key*. The Oregon Supreme Court has explained that

“[t]he term ‘scientific’ \*\*\* refers to evidence that draws its convincing force from some principle of science, mathematics and the like. Typically, but not necessarily, scientific evidence is presented by an expert witness who can explain data or test results and, if necessary, explain the scientific principles which are said to give the evidence its reliability or accuracy.”

*Brown*, 297 Or at 407-08. The Supreme Court's “definition of ‘scientific’ evidence in *Brown* recognizes that it is difficult to set a more definitive boundary between ‘scientific’ evidence and ‘technical or other specialized knowledge,’ which are the other types of evidence requiring expert proof.” *O'Key*, 321 Or at 290-91. *O'Key* also noted that “[m]ost expert testimony rests at least partly on science,” and “[i]n many areas the scientific underpinning is well established and the criteria set out in Rules 702 and 703 work well.” *Id.* at 291 (internal quotation marks and brackets omitted).

Because evidence perceived by jurors to be scientific possesses an unusually high degree of persuasive power, the courts must ensure that the persuasive appeal is legitimate. *Id.* “Propositions that a court finds possess significantly increased potential to influence the trier of fact as scientific assertions, therefore, should be supported by the appropriate scientific validation.” *Id.* at 292. That approach “ensures that expert testimony does not enjoy the persuasive appeal of science without subjecting its propositions to the verification processes of science.” *Id.* (internal quotation marks and brackets omitted).

A jury may perceive expert testimony as scientific if it rests on a scientific underpinning that is unfamiliar to the jury or if it is phrased in scientific terms. *State v. Beltran-Chavez*, 286 Or App 590, 600, 400 P3d 927 (2017). In *State v. Dulfu*, 282 Or App 209, 215-16, 386 P3d 85 (2016), *rev allowed*, 361 Or 100 (2017), we concluded that the expert’s testimony constituted scientific evidence. We noted that the expert relied on his qualifications as a “licensed psychologist, licensed sex-offender treatment provider, [who had] written or participated in 80 different papers and presentations on the topic of psychology, and [had] attended more than 200 additional advanced psychology trainings.” *Id.* at 215. The expert also “made use of terms such as ‘specialized literature,’ ‘body of literature,’ and ‘psychiatrist’; that is, he used the vocabulary of scientific research.” *Id.* We concluded that the basis for the expert’s testimony was his professional background and experience as a scientist and that the trier of fact would have perceived his testimony to be “scientific” in that it was grounded on conclusions that had been reached through application of a scientific method to collected data. *Id.* at 216.

In contrast, in *Henley*, we concluded that the expert witness’s testimony, in which she testified about certain behaviors that could be considered sexual grooming, did not constitute scientific evidence. 281 Or App at 835. We explained:

“Although she provided the jury with limited testimony about the concept of sexual grooming, she did not offer an explanation as to any psychological bases that may

underlie that concept. [The expert witness] did not reference any studies, research, or literature discussing sexual grooming so as to fortify her explanation. Instead, she testified that, based on what she had learned during her training and experience as a forensic interviewer, which included over 600 interviews of children related to abuse, she was aware of certain behaviors—including giving children massages—that could constitute sexual grooming.”

*Id.* at 834. Consequently, we concluded that her testimony did not constitute evidence that would be perceived as scientific by the jury. *Id.*

Here, we conclude that Flem’s testimony was not evidence that would have been perceived as scientific by the jury. Flem testified that his opinion was based on his training in traffic-collision investigation and his experience investigating more than 100 traffic collisions. Flem did not state that he had had any scientific training or expertise, and he did not rely on any research or specialized body of literature, refer to any scientific principles, or use a vocabulary of scientific terms. His testimony provided an interpretation of his observations from the collision scene itself and from his interviews with the drivers, viewed through the lens of his training and experience. He used no calculations to determine defendant’s speed and testified to no exact rate of speed. Nor did he tell the jury that his opinions were based on calculations or scientific modeling or principles. Instead, Flem testified that he had had some training in determining the movements of vehicles involved in a crash from the marks and debris at the scene, including point of impact, and that his opinions were based on that training and his experience. Furthermore, Flem’s testimony that vehicles travelling faster end up further away from one another was also based on his training and his experience having viewed and investigated over 100 vehicle collisions that took place at a variety of speeds. He did not attempt to support his opinions with any complex calculations that would have had the potential to influence the jury as scientific assertions without the support of appropriate scientific foundation for those opinions. Thus, the state was not required to lay a foundation for admission of Flem’s testimony under *Brown* and *O’Key*.

We also conclude that the trial court did not err in allowing Flem's expert testimony about the movements of the vehicles during the accident or that defendant was driving at "a higher rate of speed" at impact. Under OEC 702, "a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Therefore, OEC 702 requires an assessment of the particular qualifications of the witness to provide the particular testimony. *Rogers*, 330 Or at 316. A witness is not required to possess any particular educational or professional degree. *Id.* To be an expert, a witness simply must have the knowledge, skill, experience, training or education to provide testimony in the form of an opinion or otherwise regarding the particular topic on which the person claims expertise. OEC 702; *Rogers*, 330 Or at 315. The witness's capacity to testify is relative to the topic about which the person is asked to present evidence. *Meyer v. Harvey Aluminum*, 263 Or 487, 489, 501 P2d 795 (1972).

As we noted above, Flem's expert testimony was narrow in scope. He provided his opinion about the general movements of the vehicles after impact and that defendant's car was moving at a "higher rate of speed" when the vehicles collided. Flem's testimony about the movement of the vehicles after impact was based on the physical evidence he observed at the scene and his interviews with the drivers. Flem testified that he had attended an eight-hour training at the police academy, two more full-day practical training courses in traffic collision investigation, which included mock crashes and instruction, and two four-hour instructional classes in which he was taught to read markings and debris to make conclusions about the point of impact and the movements of vehicles during an accident. He also testified that he had investigated over 100 traffic accidents.

Flem's testimony about the point of impact, how the two vehicles were positioned at impact, that defendant's car rolled and then skidded 388 feet, and that R's truck was spun and ended up 35 feet from the point of impact was neither highly technical nor controversial. All of his opinion testimony was either apparent from the physical evidence at the scene or undisputed by defendant and the state. Flem's

training and experience qualified him to testify about the physical evidence and his conclusions from that evidence.

The trial court sufficiently restricted Flem's testimony about defendant's speed at impact to match his training and experience. The trial court permitted Flem to testify only that, in his experience, having seen over 100 traffic accidents involving a range of speeds at impact, vehicles moving faster end up further away from one another after impact and that, because the vehicles in this case ended up roughly 400 feet from one another, he believed that defendant must have been driving at a "higher rate of speed" when the vehicles collided. The trial court did not err in allowing Flem to provide that limited testimony.

Defendant also argues that Flem's testimony was inadmissible because it was not helpful to the jury. *See* OEC 702 (expert evidence is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue"). We disagree. In this case, Flem's testimony about the movement of the vehicles and that the impact occurred when defendant was travelling at a higher rate of speed, as opposed to a lower speed, would have assisted the jury's understanding of the physical and testimonial evidence. It allowed the jury to have a more complete picture of what happened to the vehicles during and after the collision. Flem was able to provide his opinions about where the impact took place and how the vehicles moved after impact, allowing the jury to better understand the physical evidence. In addition, Flem's opinion, based on his training and experience, about defendant's relative speed and the reasons for that opinion, allowed the jury to better understand that the results of the collision that they saw in the photos and heard about in testimony were unlikely to have happened as a result of a lower-speed collision. The trial court did not err in admitting Flem's testimony as an expert witness.

Finally, defendant assigns error to the trial court's denial of his motion for judgment of acquittal. He contends that the evidence presented by the state did not allow for the jury to find beyond a reasonable doubt that defendant drove recklessly. First, defendant argues that the evidence presented by the state did not permit the jury to infer

defendant's speed from the damage to the vehicles and the final distance between the vehicles because that conclusion requires scientific calculations that the jury did not have. Second, defendant argues that, even if the jury could make that inference, speed alone is insufficient to prove reckless driving.

The question in this case, therefore, is whether, viewing the facts in the light most favorable to the state, the state offered sufficient evidence such that a rational trier of fact, accepting reasonable inferences and making reasonable credibility choices, could have found beyond a reasonable doubt that defendant drove "in a manner that endanger[ed] the safety of persons or property." A driver is not reckless simply because the driver violates the general duties of a driver by, for example, speeding. *State v. Clark*, 256 Or App 428, 435, 300 P3d 281 (2013). Rather, to prove recklessness, the state must prove that (1) there was a substantial and unjustifiable risk that a particular result would occur or that a particular circumstance existed; (2) the defendant was aware of that risk; (3) the defendant consciously disregarded the risk; and (4) the act of disregarding the risk constituted a gross deviation from the standard of care that a reasonable person would observe in the situation. ORS 161.085(9). Therefore, a jury must focus on the driver's decision making, not just his or her driving. *Clark*, 256 Or App at 436.

Viewing the evidence in the light most favorable to the state, we conclude that a rational trier of fact could have found the elements of reckless driving beyond a reasonable doubt. The state produced evidence that defendant's car collided with the truck after R saw defendant's car approaching and determined that she had sufficient time to enter the lane; the collision caused major damage to both vehicles; the large S-10 pickup spun approximately 270 degrees and was moved almost 40 feet by the impact; and defendant's car rolled numerous times and slid for a total of nearly 400 feet. From the state's evidence, and without any scientific calculations, a reasonable trier of fact could find that the results of the collision could have occurred only if defendant had consciously chosen to drive at a speed that was so fast as to

constitute a gross deviation from the standard of care that a reasonable driver would have observed in the situation, knowing that driving at that speed created a substantial and unjustifiable risk of injury to persons and damage to objects and disregarding that risk. Consequently, the trial court did not err in denying defendant's motion for judgment of acquittal.

In sum, the trial court did not err in admitting Flem's testimony because his testimony did not present scientific evidence to the jury, he was qualified to present his testimony as limited by the trial court, and the testimony was helpful to the jury. In addition, the court did not err in denying defendant's motion for judgment of acquittal.

Affirmed.