IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JOSEPH EDGLEY WALSH,
Defendant-Appellant.

Washington County Circuit Court
C131347CR; A158193

Rick Knapp, Judge.

Argued and submitted April 26, 2016.

Erica Herb, 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 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.

ARMSTRONG, P. J.

Affirmed.

ARMSTRONG, P. J.

Defendant appeals a judgment of conviction for 19 counts of various sexual crimes, raising 19 assignments of error. We reject all but four assignments without written discussion. In assignments two, three, four, and five, defendant contends that the trial court erred by failing to dismiss four sexual offenses because the venue for them was improper. The state responds that defendant's argument on appeal has materially changed from the argument that he made below and, thus, is not preserved. We agree with the state and, accordingly, affirm.

We recount only those facts relevant to venue, and, because defendant was convicted by a jury, we state those facts in the light most favorable to the state. *See, e.g.*, *State v. Davis*, 248 Or App 263, 265, 273 P3d 251 (2012), *rev den*, 354 Or 656 (2013). Defendant was charged, among other things, with crimes related to a photograph that defendant had taken of his sexual abuse of a child, which had occurred between June and September 2009. During that time, the victim, who was 10 years old, spent time with defendant in a limited number of locations, including at the victim's home in Vancouver, Washington; at defendant's home in Washington County; and on a camping and road trip to Crook County, including locations between the victim's home in Vancouver and Crook County. When first interviewed by Child Abuse Response and Evaluation Services (CARES), the victim recounted that defendant had sexually abused him at the victim's Vancouver home and on the camping trip. When he was interviewed by the police a few years later, the victim remembered that defendant had also abused him at defendant's home in Washington County.

At some point, defendant took a photograph of his hand touching the victim's penis. Based on that photograph, the state charged defendant with four sexual offenses: first-degree sexual abuse, ORS 163.427; using a child in display of sexually explicit conduct, ORS 163.670; first-degree encouraging child sexual abuse, ORS 163.684; and unlawful contact with a child, ORS 163.479. The photograph had no identifying features by which to determine where it was taken. It had been taken with a cellphone camera, but the

electronic version of the photograph did not include a GPS location embedded in the file, and the background of the photograph did not depict anything that could be used to determine where it was taken. Further, the victim did not remember defendant taking the photograph.

In the trial court, the state contended that venue was proper in Washington County under ORS 131.325 for the four crimes related to the photograph. ORS 131.325 provides, as relevant, "[i]f an offense is committed within the state and it cannot readily be determined within which county the commission took place, *** trial may be held in the county in which the defendant resides." The state contended that venue was proper in Washington County, where defendant resides, because the photograph was taken in Oregon but the county in which defendant had taken the photograph could not readily be determined—*viz*., the photograph could have been taken in Washington County or on the camping trip, including in any of the Oregon counties located between Vancouver, Washington, and Crook County.

Defendant moved to dismiss the four counts related to the photograph, contending that venue under ORS 131.325 was improper because the photograph could readily be ascertained to have been taken in Crook County. He argued in his written motion that "ORS 131.325 does not envision finding venue for crimes that happened in other states. That said, according to Officer Dressler, he has readily identified the other county involved as Crook County, the location of the mentioned camping trip." Further, defendant argued that the victim's CARES evaluation had concluded that "it is likely the abuse and photos occurred during the camping trip in [Crook County]." At the hearing on his motion, defendant made arguments that were consistent with those that he had made in his written motion:

> "It was likely that the photograph had occurred here in Vancouver or in the [Crook County] campground. *That would give Oregon authorities the jurisdiction and the venue in Crook County.* The statute, of course, doesn't encompass Vancouver.
>
> "*It would have to be a county in Oregon*, and then the defendant is residing in Washington County. Were it just

> [the victim's first allegation in 2009], I think it's very clear that had abuse occurred in Oregon, it would have been readily ascertained that it had happened in Crook County.
>
> "[The detective] then testified that in 2013, he spoke to the [victim] again, and the [victim] says that it was—there was also contact in the *** residence in Washington County.
>
> "*****
>
> "It's highly unlikely that this would have occurred while driving. So the question is: Did it occur at the [Crook County] campground or did it occur in [Washington County]?
>
> "*****
>
> "Therefore *** it must have been taken either at the Vancouver home, which would give the authorities here in Washington County no jurisdiction, or in Crook County. *And I think it's readily ascertained through just a simple process of elimination that it happened in Crook County.*
>
> "Therefore, Judge, I don't believe that Washington County has jurisdiction over this case."

(Emphases added.) The trial court denied defendant's motion, concluding that the county where the photograph was taken could not readily be determined and, because defendant's residence was in Washington County, venue was proper in Washington County under ORS 131.325 for the four counts related to the photograph.

Defendant challenges on appeal the trial court's denial of his motion to dismiss for improper venue the four counts related to the photograph. He contends that the trial court erred because the state failed to establish that the photograph was taken in Oregon, which ORS 131.325 required the state to establish for ORS 131.325 to apply and permit venue to be established in Washington County. He asserts that that is so because the location of the photograph is not readily ascertainable, and, hence, the location could have been the victim's home in Vancouver, Washington. Thus, he argues, venue in Washington County under ORS 131.325 was improper. The state responds that that argument was not preserved. We agree with the state.

Generally, we will not consider an argument on appeal that has not been raised in the trial court. *State v. Walker*, 350 Or 540, 548, 258 P3d 1228 (2011). "Preservation gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008). "Although there is some degree of liberality to the preservation requirement, the requirement is not meant to be a cursory search for some common thread, however remote, between an issue on appeal and a position that was advanced at trial." *State v. Blasingame*, 267 Or App 686, 691, 341 P3d 182 (2014), *rev den*, 357 Or 299 (2015) (internal quotation marks omitted). "Instead, when determining if an issue has been adequately preserved for review, the appropriate focus is whether a party has given opponents and the trial court enough information to be able to understand the contention and to fairly respond to it." *Id.* (internal quotation marks omitted).

Because the argument that defendant advances on appeal conflicts with the argument that he made below, we conclude that defendant did not preserve the argument that he now makes. Instead of arguing—as he did below—that the location where the photograph was taken *is* readily ascertained to have been in Crook County, Oregon, he now argues that the location where the photograph was taken *is not* readily ascertainable and, because the photograph could have been taken in Vancouver, Washington, ORS 131.325 cannot be used to establish venue in Washington County. Defendant did not make that argument below in support of his venue motion.[1]

We recognize that defendant did say at the hearing on the venue motion that the photograph "must have been taken either at the Vancouver home, which would give the authorities here in Washington County no jurisdiction, or in Crook County." However, defendant made clear to the court

[1] We note that defendant moved at trial for a judgment of acquittal on the charges related to the photograph on the ground that the state had failed to prove that the photograph had been taken in Oregon and that Oregon therefore lacked jurisdiction over those crimes. Defendant has not assigned error on appeal to the court's denial of that motion.

that he was *not* making the argument that he now makes on appeal, stating: "And I think *it's readily ascertained through just a simple process of elimination that it happened in Crook County.*" (Emphasis added.) Defendant's reference to the possibility that the abuse could have occurred in the victim's Vancouver home was to make clear that the Vancouver home should *not* play a role in determining venue under ORS 131.325 because there would be no jurisdiction in Oregon over any offense that had occurred there, and, thus, the only possible location for venue for the offenses related to the photograph was Crook County. In contrast, defendant now argues that the photograph could have been taken in any of the locations in which defendant and the victim were together in 2009, including the Vancouver home, and thus venue could not properly be established in Washington County under ORS 131.325. That argument is in direct conflict with the argument that defendant made below in support of his venue motion. Accordingly, defendant failed to preserve his argument with respect to his assignments of error two, three, four, and five, and we therefore reject those assignments.

Affirmed.