IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JOHNATHAN RICHARD BLACK,
Defendant-Appellant.

Washington County Circuit Court
C140510CR; A158879

D. Charles Bailey, Jr., Judge.

Argued and submitted January 30, 2017.

Morgen E. Daniels, 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.

Jamie K. Contreras, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

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

SHORR, J.

Affirmed.

SHORR, J.

Defendant appeals a judgment of conviction for multiple sex offenses involving minors, asserting seven assignments of error. We reject defendant's third through seventh assignments of error without further written discussion. We write only to address defendant's first two assignments of error.

In his first assignment, defendant asserts that the trial court erred in prohibiting his expert witness from testifying that a detective's interviews with child witnesses in this case did not meet certain established protocols for interviews of children who have reported sexual abuse. The trial court allowed the expert to testify in general about the protocols and best practices for such interviews, but prohibited the expert from testifying as to whether he believed that certain protocols that particularly touch on issues of credibility were violated in the interviews in this case. The trial court concluded that defendant's proposed expert testimony assessing the interviews under certain protocols was an improper comment on the credibility of another witness and was therefore inadmissible. As discussed in more detail below, we conclude that the trial court did not err in reaching that conclusion and, accordingly, reject defendant's first assignment of error.

In his second assignment, defendant contends that the trial court erred when it prohibited defendant from calling two surrebuttal witnesses who would have testified about a state rebuttal witness's character for truthfulness. We reject this assignment of error because defendant failed to make an offer of proof to the trial court to establish a foundation that his surrebuttal witnesses could testify to the state rebuttal witness's character for truthfulness. Without such an offer of proof, we cannot tell if the trial court erred in excluding defendant's surrebuttal witnesses or if any purported error was prejudicial. As a result, we affirm.

A discussion of the facts underlying the charges, apart from the limited discussion below, is not relevant to the legal issues of this case. Defendant was charged with sexual offenses arising from his conduct with various minors. At trial, defendant sought to call an expert witness,

Dr. Johnson, a psychologist with experience working with children. Specifically, defendant told the court that he intended to ask Johnson about certain established protocols for interviewing child witnesses, in general, and the ways in which the interviews with certain child witnesses, "GP" and "JN," in this case fell short of what those protocols prescribe. Defendant explained that Johnson's testimony would discuss

> "[t]he absence of exploration of alternative theories or secondary gain in the interview of [GP] relative to [JN].
>
> "The fact that the methodology used by Detective Massey involved not only leading questions, but suggestive questions, and to some degree, what an emotionally coercive question is.
>
> "He will not be offering testimony on any bottom lines. He will not be opining on the credibility of any witness or any victim or the defendant. He will not be talking about the results of any psychosexual evaluation."

The state argued in response that, while it did not oppose Johnson's testimony on the general background principles of how interviews of child witnesses should be conducted, the court should prohibit Johnson from testifying as to his analysis of the actual interviews. The state asserted that testimony about whether the detective's interviews with certain child witnesses in this case met the protocols amounted to a comment on the credibility of those child witnesses, which is prohibited by *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010), and other decisions of this court and the Supreme Court.

The trial court agreed, explaining:

> "I agree with you that Dr. Johnson can absolutely come in here and talk about interviews and how interviews should be conducted and—and suggestibility and what can be suggested, you know, leading questions ***. I'm with you on that.
>
> "He's just not going to get in to talk about any of the specific interviews in this particular case, because that's—that's just too close to comment on the credibility.
>
> "*****

> "In other words, you're going to be able to talk with him about what the science says as far as suggestibility goes, and stuff like that. You're absolutely going to be able to talk with him about what is suggestive and what isn't suggestive and how important it is to ask non-leading questions and—and all those kind of things in a generic sense.
>
> "*****
>
> "In other words, it's not fact-specific in any way to any of the interviews that were done in this particular case here.
>
> "Because when you get there—it has nothing to do with whether—I could care less if he says that Detective Massey did one of the worst interviews I've ever seen possible in the case here.
>
> "It's the flip side of that is in so doing then, he's suggesting there that the credibility of the witness who made those statements has been affected and is not credible. And, therefore, it's commenting on the credibility of a witness."

In other words, the trial court indicated that it would permit general testimony about leading, suggestive, and emotionally coercive questions. But the court concluded that the expert's proposed testimony that the particular interviews of the child victims contained leading, suggestive, and emotionally coercive questions would amount to improper "commenting on the credibility of [the child] witness[es]."

Defendant ultimately called Johnson, who testified at length about his experience conducting interviews with child sexual abuse victims and the applicable protocols for such interviews, such as avoiding leading, suggestive, and emotionally coercive questions and exploring whether the child was subject to influence. However, consistent with the court's ruling, Johnson did not testify about whether the interviews in this case complied with those interview protocols.

As noted, defendant argues that the trial court erred when it concluded that defendant's expert could not testify that the particular interviews of children in this case did not comply with proper child abuse interview protocols because the interviews included leading, suggestive, and emotionally coercive questions. Defendant asserts that the

testimony was relevant under OEC 401 and admissible as expert witness evidence under OEC 702. The state contends that the trial court did not err when it concluded that the application of those particular protocols to the interviews were tantamount to commenting on the credibility of the child witnesses in those interviews.

Both parties maintain that the standard of review for a trial court's decision to exclude expert witness testimony is for abuse of discretion. While that may be true in certain contexts regarding expert testimony, a trial court does not have discretion to admit improper vouching or credibility testimony, whether offered by an expert or lay witness. *See State v. Criswell*, 282 Or App 146, 156, 386 P3d 58 (2016) (stating that "[w]e review for legal error whether the trial court admitted impermissible vouching evidence"); *see also State v. Jesse*, 360 Or 584, 599, 385 P3d 1063 (2016) (explaining that, where the decision to admit expert testimony leads to a single correct answer, we review the trial court's ruling for legal error).

Therefore, the first substantive issue before us is whether the trial court committed legal error when it concluded that, while defendant's expert Johnson could testify generally to the appropriate criteria for conducting a proper child sexual abuse interview and discuss issues such as "suggestibility" and avoiding leading and emotionally coercive questions, Johnson could not discuss whether the particular child interviews in this case met those criteria because such an application was tantamount "to a comment on credibility" of those child witnesses.

We turn to a discussion of the relevant law. The Supreme Court has "long held that one witness may not comment on the credibility of another witness." *State v. Chandler*, 360 Or 323, 330, 380 P3d 932 (2016). That prohibition applies both to "direct comments on the credibility of another witness, as well as to statements that are 'tantamount' to stating that another witness is credible." *Id.* at 331 (quoting *State v. Beauvais*, 357 Or 524, 543, 354 P3d 680 (2015)). As we understand the record, the trial court excluded the disputed expert testimony not because the proffered testimony included "direct comments on the credibility

of another witness," but rather because it was "tantamount" to commenting on the credibility of witnesses such that it risked the expert intruding into the jury's independent evaluation of those witnesses' credibility.

The Supreme Court noted in *Beauvais* that it had not previously "explained what is meant by a statement that is 'tantamount' to stating that another witness is truthful." 357 Or at 543. It then did so in *Beauvais* through an examination of the similarities and distinctions among three cases: *State v. Keller*, 315 Or 273, 844 P2d 195 (1993); *State v. Milbradt*, 305 Or 621, 756 P2d 620 (1988); and *State v. Middleton*, 294 Or 427, 657 P2d 1215 (1983). In *Keller*, the court held that expert testimony that "there was no evidence of leading or coaching or fantasizing" during a child interview was an impermissible comment on credibility. 315 Or at 285 (internal brackets omitted). In *Milbradt*, the court held that expert testimony that a witness was "not deceptive," was incapable of lying without getting "tripped up," and would not betray a friend was also impermissible testimony that was "tantamount" to stating that a witness was telling the truth. 305 Or at 629-30. The Supreme Court in *Beauvais* concluded that the expert testimony in *Keller* and *Milbradt* was merely a "commonly understood way[] of signaling [the expert's] belief that a witness is telling the truth," and that such statements were "tantamount" to commenting on another witness's credibility. *Beauvais*, 357 Or at 543.

Beauvais then distinguished *Keller* and *Milbradt* from the "contrasting example" in *Middleton*. *Id.* at 543-44. In *Middleton*, two experts testified why a child rape victim, who was the complaining witness in the case, may have on several occasions changed her report regarding whether her father had raped her. 294 Or at 432-33. The expert testimony stated that such a change in reporting was "typical behavior" and "very much in keeping with children who have complained of sex molestation at home." *Id.* at 432 n 5, 433. In *Middleton*, the Supreme Court concluded that such testimony, which shed light on the child's "superficially bizarre behavior" by further explaining why it is typical for child victims to recant in such situations, was not within a factfinder's ordinary experience and assisted the jury in

making its own credibility determination such that it was not an impermissible comment on credibility. *Id*. at 436.

In explaining how the expert testimony in *Keller* and *Milbradt* was improper and the testimony in *Middleton* was not, the Supreme Court identified in *Beauvais* two factors that helped delineate the distinction. First, as noted, the court looks to whether the testimony is simply a "commonly understood way[] of signaling a declarant's belief that a witness is telling the truth" or, instead, is relevant for a reason other than indicating that a witness may or may not be telling the truth. *Beauvais*, 357 Or at 543. Second, the court considers, as in *Middleton*, whether the testimony is "sufficiently beyond the ordinary experience of a lay finder of fact" such that the expert testimony would help the jury make its own informed decision in evaluating a witness's credibility. *Id.* at 545. The key inquiry here is whether the testimony "assist[s]—not undermine[s]—the jury's own assessment of witness credibility." *Id.* In answering that inquiry, the Supreme Court in *Beauvais* considered the "primary effect" of the statement, as well as how "remote" the statement was from "the inference[]" that the witness was not credible. *Id.* at 544.

Prior to *Beauvais*, we had similarly explained the fine distinction between when an expert is or is not allowed to testify on what we called "the penultimate question." *State v. Remme*, 173 Or App 546, 562, 23 P3d 374 (2001) (internal quotation marks omitted). We stated:

> "The line, albeit fine, is principled. Both *Middleton* and *Milbradt*/*Keller* preclude an expert from explicitly stating that he or she believes that the witness/complainant is truthful. That is, they agree that that 'ultimate' question cannot be answered. Where they differ is in their treatment of the 'penultimate' question—*i.e.*, the expression of an opinion as to whether the specific complainant's account comports with more general phenomena or dynamics bearing on credibility. *Middleton* allows the expert to 'connect that dot'; *Milbradt* and *Keller* do not."

Id. (footnote omitted).

Applying those principles here, we conclude that the trial court was correct in not permitting defendant's expert

witness to "connect the dots" for the jury by providing the answer to the "penultimate question." Here, there is no dispute that defendant's expert was not testifying on the ultimate question—whether the child witnesses were telling the truth. But defendant's expert was intending to testify to the penultimate question—whether the state's child-interview standards were so problematic that the *application* of those standards to the particular interviews ultimately would lead the children to untruthful answers.

More precisely, we conclude that the trial court did not err when it ruled that defendant could not, through questioning of his expert, suggest to the jury that the child witnesses were not telling the truth because the state interviews of the child witnesses included leading, suggestive, and emotionally coercive questions and failed to explore alternative theories or determine whether the children were answering questions to obtain "secondary gain." The expert's responses to those questions would, "on the whole," be tantamount to providing the expert's view on whether the child witnesses were likely telling the truth in their interviews. *See Lupoli*, 348 Or at 362 (concluding that the expert's testimony was inadmissible because "on the whole" it constituted vouching).

We conclude that the proposed expert testimony was a "commonly understood way[] of signaling [the expert's] belief [regarding whether] a witness is telling the truth" and was not relevant for an independent reason. *Beauvais*, 357 Or at 543. We also conclude that defendant's expert testimony would not provide information that was "sufficiently beyond the ordinary experience of a lay finder of fact" such that the expert testimony served an additional purpose in helping the jury make an informed decision about credibility. *Id*. at 545. Rather, defendant merely hoped to have his expert testify about *how* the particular interviews did not apply the appropriate standards to protect against untruths. Those were conclusions that the jury could adequately draw on its own without further witness assistance. Indeed, the trial court did not prohibit defendant's expert from testifying as to what are the best standards for obtaining accurate information in a child sexual abuse interview, and the jury, armed with those standards, was free to connect the dots on

its own if it concluded that the interviews in this case fell short and did not lead to reliable answers. *See State v. Dye*, 286 Or App 626, 640, 401 P3d 243 (2017) (holding that an expert's generalized testimony in a child sexual abuse case about false memories and the factors relevant to their creation were admissible and did not supplant the jury's credibility determination regarding the child witness). Instead, the trial court prohibited defendant's expert from testifying more directly about how the application of certain of those standards fell short. In that manner, defendant's expert would be directly suggesting to the jury that the interviews did not lead to truthful answers by the child witnesses and complainants.[1] The trial court did not err when it prohibited defendant's witness from directly "connecting that dot" for the jury in a manner that was tantamount to an expert witness's comment on the credibility of other witnesses.

In his second assignment of error, defendant contends that the trial court abused its discretion when it refused to allow defendant to call surrebuttal witnesses who would have testified about a state rebuttal witness's character for truthfulness. The state, as part of its rebuttal case, called a witness named Lonien who testified that defendant had talked about sexual contact with one of defendant's son's male friends. Lonien also testified that defendant had shown Lonien cell phone photographs of undressed young men, including one picture of defendant touching a person's penis. Defendant requested that the trial court allow him

[1] We recognize that the Supreme Court has concluded that, where there is supporting evidence of physical abuse, experts on child sexual abuse may testify as to certain "evaluative criteria," such as "consistency of core details," consistency with prior statements, and "spontaneity" that the expert used *to support a diagnosis of sexual abuse*. *See, e.g.*, *Beauvais*, 357 Or at 546-47. That does not mean, however, that a child sexual abuse expert can testify to the application of certain factors in a manner that comments on the credibility of the witness or complainant. *See Criswell*, 282 Or App at 158 (stating that "an expert witness may describe characteristics typical of an abuse victim and then apply that understanding to the case at hand, so long as that testimony does not rely on an assessment of the victim's credibility" (internal brackets and quotation marks omitted)). For instance, the Supreme Court has stated that "the general circumstances that point to a child's suggestibility or the possibility that [a] child has been coached" are not impermissible comments on the credibility of a witness "on their own." *Beauvais*, 357 Or at 541-42. However, an expert's statements that witnesses "had not been coached" and "were not deceptive" are improper comments of credibility. *Id.* at 543 (internal quotation marks omitted).

to call two witnesses on surrebuttal who would have testified as to Lonien's character for truthfulness. The trial court, stating that it was exercising its discretion to deny surrebuttal witnesses, denied the request because, among other reasons, defendant had testified in his case that he had never spoken with Lonien about "fooling around with" one of his son's friends, so defendant could have challenged Lonien's credibility through other witnesses earlier in the case and that Lonien's credibility was a collateral matter so the court would not allow "back and forth" witnesses about it. Defendant did not make a formal offer of proof through witnesses. However, his attorney informed the court that defendant wanted to call "two witnesses on surrebuttal to address the very narrow area of Lonien's character for truthfulness."

We conclude that defendant's offer of proof to the trial court is not sufficient to allow us to determine whether the trial court erred in excluding the evidence or, if it did err, whether that error was harmful. A character witness may testify to a person's reputation for truthfulness under OEC 608(1) only if there is a foundation established for the character witness's knowledge. *State v. Paniagua*, 268 Or App 284, 290, 341 P3d 906 (2014). The proponent of the testimony must show that the character witness had "sufficient acquaintance with the reputation of the person in the relevant community or sufficient personal contact with the individual to have formed a personal opinion." *Id.* (internal quotation marks omitted). Defendant did not provide, either through evidence or the argument of his attorney, any information to the trial court that laid a foundation for how defendant's proposed surrebuttal witnesses had a basis to testify that Lonien had a character for untruthfulness. Without such an offer, we cannot tell whether the trial court erred in refusing to admit the evidence or, if there was any such error, whether that error was prejudicial. *See State v. Bowen*, 340 Or 487, 500, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007) (stating that an offer of proof is ordinarily required "[t]o assure that appellate courts are able to determine whether a trial court erred in excluding evidence and whether that error was likely to have affected the trial's result").

In sum, on defendant's first assignment of error, we conclude that the trial court did not err when it refused to allow defendant's expert witness to testify that a detective's interview with the child witnesses in this case violated certain interview protocols because, according to the expert, the detective's questions were leading, suggestive, and emotionally coercive and the detective failed to explore alternative theories or determine whether the child was answering questions to obtain "secondary gain." The trial court did not err in concluding that such testimony was, on the whole, tantamount to a comment on the child witnesses' credibility. On defendant's second assignment of error, we conclude that defendant's offer of proof did not lay a sufficient foundation for us to tell whether the trial court erred in excluding defendant's proposed surrebuttal witnesses or whether any such purported error was harmful.

Affirmed.