IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RUSS ANGUS WOODBURY,
Defendant-Appellant.

Umatilla County Circuit Court
CR140953; A159205

Lynn W. Hampton, Judge.

Submitted January 31, 2017.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Rond Chananudech, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Christopher A. Perdue, Assistant Attorney General, filed the brief for respondent.

Before DeHoog, Presiding Judge, and Egan, Judge, and Aoyagi, Judge.

DEHOOG, P. J.

Reversed and remanded.

DEHOOG, P. J.

Defendant appeals from a judgment of conviction entered after a jury found him guilty on one count of driving under the influence of intoxicants (DUII). ORS 813.010 (2009), *amended by* Or Laws 2017, ch 21, § 80.[1] Defendant assigns error to the trial court's ruling that limited the testimony of a defense expert witness—a registered nurse—about defendant's traumatic brain injury (TBI). Defendant's theory at trial was that the trooper that arrested him for DUII misinterpreted defendant's TBI symptoms as signs of intoxication. We agree with defendant that the trial court erred by not allowing his expert to testify that, based on her experience, defendant's behavior on a field sobriety test (FST) video was consistent with her observations of patients she has worked with who have TBI. Further, the error was not harmless. We reverse and remand.

Because the jury found defendant guilty, we view the evidence presented at trial in the light most favorable to the state. *State v. Park*, 140 Or App 507, 509, 916 P2d 334, *rev den*, 323 Or 690 (1996). In assessing whether an erroneous evidentiary ruling was harmless, however, we describe and review all pertinent parts of the record. *State v. Eckert*, 220 Or App 274, 276, 185 P3d 564, *rev den*, 345 Or 175 (2008).

After receiving a complaint of poor driving, Trooper Routt of the Oregon State Police pulled over a truck matching the complainant's description. As Routt approached the truck, defendant stuck his head out of the window and began talking to the trooper. Routt noticed that defendant had a twitch on his cheek and sweat on his face, which Routt found odd because the temperature was a moderate 70 degrees and it was later in the evening. Routt described defendant's reflexes as exaggerated. Defendant was also wearing sunglasses, despite the fact that the sun had set

[1] ORS 813.010 provided, in relevant part:

"(1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

"*****

"(b) Is under the influence of intoxicating liquor, a controlled substance or an inhalant[.]"

approximately 20 minutes earlier.[2] When the trooper asked, defendant denied taking any medication or drugs, drinking any alcohol, or having any medical conditions or serious physical injuries.

Routt noted that defendant's speech was slurred, his demeanor was restless, he moved constantly, and he seemed irritable, anxious, and disoriented. Defendant's pupil size appeared normal, but his upper eyelids were droopy. After the trooper pointed out those observations to defendant, defendant told the trooper that he had suffered a head injury many years before.

Routt asked defendant to perform voluntary FSTs, and defendant agreed. On the horizontal gaze nystagmus test, defendant showed no signs of impairment. On the walk and turn test, defendant stepped out of the starting position, missed stepping heel to toe, raised his arms for balance, and turned incorrectly, which Routt testified suggested impairment. Similarly, on the one-leg stand test, defendant demonstrated an inability to follow instructions, swayed from side to side, and raised his arms more than six inches from the side of his body. Routt then asked defendant to perform a modified attention test designed to test a person's internal clock. What defendant estimated to be 30 seconds was actually 28, which was "very close," according to the trooper. During the test, however, Routt noticed defendant's rigid muscle tone and tremors throughout defendant's body. The trooper arrested defendant for DUII. The interactions between the trooper and defendant, including defendant's performance on the FSTs, were video recorded and played for the jury at trial.

After arresting defendant, Routt searched defendant's car. He found a marijuana pipe. When the trooper asked defendant about the pipe, defendant stated that he had smoked marijuana at about 8:00 a.m. that day. Defendant later took a breath test that indicated that there was no alcohol in his system. Defendant declined to provide a urine sample. Routt believed that defendant was under

[2] Defendant told the trooper that he was wearing the sunglasses because they were also prescription glasses.

the influence of a controlled substance and impaired to a perceptible degree.

The state charged defendant with two counts: DUII and reckless driving. At the close of the state's case, defendant moved for a judgment of acquittal on both counts. The trial court granted defendant's motion as to the reckless driving count. The jury found defendant guilty of DUII.

Defendant's theory at trial was that the symptoms Routt had attributed to impairment were actually symptoms and behaviors that resulted from defendant's TBI. To that end, defendant's mother testified that defendant suffered a TBI in 1984 after being thrown off of a horse. According to his mother, defendant is less happy and has experienced anxiety since the accident. After the accident, defendant could not walk or talk for several weeks and his left side was paralyzed. Defendant's mother testified that he has many lingering problems from the accident, including balance issues, a distinct gait, tiring easily, fluctuating moods, depression, impulsivity, and trouble with outbursts. According to his mother, defendant's behavior in the FST video was consistent with the behavior that she would normally see him display when he is upset.

In further support of his theory, defendant sought to have a witness, Bevan, testify as an expert about his TBI. Bevan is a registered nurse and worked for a residential care facility. She studied nursing in Pendleton, and worked as a charge nurse and director of nursing before becoming a regional nurse. Bevan testified that she "frequently" works with people with disabilities. In an offer of proof, defense counsel stated that Bevan's testimony would be

> "that she has reviewed the medical records, that his—she's also watched the videotape; that his behavior in the videotape is consistent with that of a person who has suffered traumatic brain injury, and that his other behavior, the lisp or the slur, whatever you want to call it, is consistent with his medical records, consistent with his disability, and that his difficulty in balancing is also consistent with his disability as found by the doctors in his medical records."

The state objected to Bevan's testimony, arguing that she had no specialized training or experience relating to TBI. The

trial court permitted Bevan to testify, but limited her testimony consistent with the state's objection. The court ruled that Bevan could testify about the meaning of phrases in defendant's medical records, which dated from 1984 to 1985. In other words, Bevan could testify as to what symptoms defendant experienced at that time, but she could not testify about what the "anticipated symptoms" of a TBI patient would be, because she was not an expert in TBI. Further, the court ruled that Bevan could not compare defendant's demeanor and symptoms on the video with those of a typical TBI patient or offer a medical opinion based on that comparison.

Bevan testified that defendant's medical records from 1984 to 1985 showed that he had suffered a closed head injury, or TBI, due to a horse accident. At that time, the brain injury caused problems with defendant's ability to balance. The injury also affected defendant's gait, creating a foot slap on his right side; that is, defendant dragged his right foot because he did not have the ability to pick it up and bring it down without making exaggerated movements. The records further indicated that defendant had slight difficulty maintaining his balance when he attempted to turn quickly. According to Bevan's review of the records, defendant's injury also caused a slight droop on one side of his face, together with slurred speech and "cognitive and perceptive abnormalities."

Defendant testified that, although he had suffered his head injury many years before, head injuries "never go away." According to defendant, he performed the FSTs to the best of his ability. Defendant also testified that he had refused to provide a urine sample because one of the troopers had told him that he would be staying in jail regardless of his cooperation. At trial, defendant stated that he did not smoke marijuana on the day that Routt pulled him over.

On appeal, defendant first argues that the trial court erred by not admitting Bevan's testimony under OEC 701, which renders lay opinion testimony admissible. Defendant did not, however, seek to admit Bevan's testimony under OEC 701 at trial. His argument at trial was focused solely on whether Bevan could testify as an expert under

OEC 702. It is well settled in our jurisprudence that an issue ordinarily must first be presented in the trial court before it may be raised and considered on appeal. *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008); ORAP 5.45(1). That requirement gives the trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether; it also ensures fairness to the opposing party by permitting the party an opportunity to respond to the contention. *Peeples*, 345 Or at 219. Because defendant did not seek to admit Bevan's testimony as lay opinion testimony under OEC 701, he failed to preserve any argument that it was admissible on that ground, and we do not consider that argument on appeal.

Defendant next argues, as he did at trial, that the trial court erred by not admitting Bevan's testimony under OEC 702, which provides for the admissibility of expert testimony. OEC 702 provides:

> "If 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."

Similar to its argument at trial, the state argues on appeal that the trial court properly declined to recognize Bevan as an expert because she lacked the specialized training and experience to diagnose or predict defendant's behavioral problems as a result of his head injury. We review for errors of law the question "whether a trial court properly applied OEC 702 to decide whether an expert is qualified to give testimony *relative to a particular topic*." *State v. Rogers*, 330 Or 282, 315, 4 P3d 1261 (2000) (emphasis in original). OEC 702 requires an assessment of the particular qualifications of a witness. *Id.* at 316. A witness is not required to have a particular educational or professional degree to be an expert. *Id.* Rather, "[t]o be an expert, a person 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." *State v. Althof*, 273 Or App 342, 345, 359 P3d 399 (2015), *rev den*, 358 Or 550 (2016) (quoting OEC 702).

For the reasons that follow, we conclude that the trial court erred. That is, under OEC 702, Bevan's experiences as a nurse working with TBI patients qualified her to testify as an expert regarding defendant's behavior and its similarity to the behaviors of TBI patients in general.

Bevan testified that she has cared for or supervised the care of approximately 20 patients with TBI over her 10 years as a nurse. She further testified that, in her work, she frequently encounters people who have disabilities and that she specifically works with people who have TBI. Her work includes training unlicensed and less educated individuals to care for patients who exhibit the types of disabilities typical for those with TBI. Based on her experiences with "numerous" TBI patients, Bevan has observed that they tend to be spontaneous and erratic and have difficulty controlling their behavior, emotions, and physical movements. Although Bevan did not testify to having received any specialized training or education related to TBI, she did describe her experience working in a facility where she regularly observes people with TBI.

We conclude that those experiences qualified Bevan to testify whether defendant's behavior in the FST video was consistent with the behavior she has observed in TBI patients over her career. As noted, under OEC 702, an expert may be qualified by "knowledge, skill, experience, training *or* education." (Emphasis added.) Therefore, the fact that Bevan has not received training or education specific to TBI does not mean that she is not an expert on particular topics relating to TBI. Rather, Bevan's knowledge and experience working with patients with TBI qualified her as an expert on the behavior such individuals exhibit. That is, her regular interaction with TBI patients gave her "specialized knowledge" regarding their symptoms and mannerisms. *See* OEC 702. And, given that those are matters beyond the common experience of lay jurors, Bevan's testimony would assist the jury "to understand the evidence or to determine a fact in issue," *i.e.*, whether the symptoms that defendant exhibited on the FST recording were characteristic of TBI patients as defendant and his mother claimed. Accordingly, the trial court erred by not allowing Bevan to testify that, based on her experience with people with TBI, defendant's

behavior on the FST video was consistent with the behavior of someone with TBI.

Having concluded that the trial court erred, we must next determine the appropriate disposition. Not every evidentiary error requires reversal. Rather, we will not reverse if an error is harmless, that is, if "there was little likelihood that the error affected the jury's verdict." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). In that inquiry, we consider the nature of the error and the context in which it occurred. *Id.* at 32-33. We also consider whether the finder of fact would have regarded the evidence as duplicative, cumulative, or unhelpful. *Id.* at 33. In this case, we cannot conclude that the error in limiting Bevan's testimony was harmless because the excluded testimony went to the heart of defendant's case and was qualitatively different from the other evidence presented.

First, in examining the error's context, we note that this was a criminal trial in which defendant had no burden of proof. Rather, the state had the burden of proving defendant's guilt beyond a reasonable doubt. Defendant's objective in offering Bevan's testimony was to persuade the jury that the arguably strongest evidence of his guilt—the recording of the FSTs—was not worthy of the weight attributed to it by the state, leaving reasonable doubt as to his guilt. That purpose for the excluded evidence weighs against a finding of harmlessness. *See id.* at 33 (discussing harmlessness in context of criminal trials).

Second, although defendant presented other evidence relating to his TBI, Bevan's testimony would not have been merely cumulative, because her proffered statements were qualitatively different from that evidence. *See id.* at 34 (discussing qualitatively different evidence as not cumulative). For example, defendant's mother testified that his behavior on the FST video was consistent with what she normally observes when he is upset, and the jury could have inferred from that testimony that the behavior resulted from his TBI, not from intoxication. But, not only is defendant's mother not an expert as to TBI patients in general, she also is *defendant's mother*. Thus, unlike Bevan, she was highly susceptible to impeachment for bias. As a result,

Bevan's excluded testimony was qualitatively different from the testimony of defendant's mother. The same is true as to defendant's testimony on his own behalf.

Finally, Bevan's excluded testimony went directly to the heart of defendant's theory of the case. *See id.* (discussing harmlessness when evidence is central to defense theory). Defendant's theory at trial was that the symptoms and behaviors that the trooper attributed to impairment were actually the result of defendant's disability. Bevan's testimony would have directly supported that theory. Although Bevan was allowed to testify that defendant had certain symptoms in 1984 and 1985, her excluded testimony would have permitted the jury to infer that his symptoms on the night of his arrest, 30 years later, remained attributable to TBI. Under those circumstances, we cannot say that there was little likelihood that the erroneous exclusion of Bevan's testimony affected the jury's verdict. Because the error was therefore not harmless, we reverse and remand.

Reversed and remanded.