IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
ARMANDO DELEON,
aka Armando W. Deleon,
Defendant-Appellant.

Multnomah County Circuit Court
14CR27463; A160126

Kathleen M. Dailey, Judge.

Argued and submitted January 18, 2017.

Zachary J. Stern argued the cause for appellant. With him on the brief was Ferder Casebeer French & Thompson, LLP.

Carson L. Whitehead, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before DeVore, Presiding Judge, and Garrett, Judge, and Duncan, Judge pro tempore.

PER CURIAM

Affirmed.

PER CURIAM

Defendant appeals the trial court's judgment convicting him of two counts of first-degree sexual abuse against his daughter, M. On appeal, defendant raises two assignments of error, and we write only to address his first, in which he asserts that the trial court plainly erred in failing to strike, *sua sponte*, the testimony of a witness as an impermissible comment on M's credibility; we reject defendant's second assignment of error without discussion. For the reasons explained below, we conclude that the trial court did not plainly err and, therefore, we affirm.

In his first assignment of error, defendant challenges the trial court's failure to strike testimony by M's mother, Martinez, that, at the conclusion of the conversation in which M told Martinez that defendant had abused her, M asked Martinez whether she believed her and Martinez responded "of course" she did. Defendant contends that Martinez's testimony violated the prohibition against one witness commenting on the credibility of another. Defendant did not object to the testimony, but asserts that the trial court's failure to strike it constitutes plain error and that we should exercise our discretion to correct the error. The state responds that the trial court did not err, much less plainly err, because Martinez's testimony "was not a comment by Martinez that she, in fact, believed [M's] disclosure of abuse. Rather, Martinez provided a narrative for how the disclosure occurred and described her interactions with her daughter."

When determining whether a trial court plainly erred in failing to strike, *sua sponte*, testimony as an impermissible comment on the credibility of a witness, we focus on "whether it was beyond dispute that the court had a duty to prevent that testimony." *State v. Vage*, 278 Or App 771, 776, 379 P3d 645, *rev den*, 360 Or 697 (2016). Whether admission of Martinez's out-of-court statement to M was error depends on the purpose for which it was offered. *See State v. Chandler*, 360 Or 323, 334, 380 P3d 932 (2016) ("[A]n out-of-court statement about the credibility of a witness *** is subject to the categorical prohibition against vouching evidence only if the statement is offered for the truth of the credibility

opinion that it expresses."). Here, it is not obvious that the challenged testimony was offered for the truth of Martinez's statement to M. Therefore, the trial court did not plainly err in failing to strike it.

Affirmed.