FILED October 9, 2015 02:37 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. BRIAN JAMES CHANDLER, Defendant-Appellant, Petitioner on Review.	Clackamas County Circuit Court No. CR1101757 CA A152098 SC S063096

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Clackamas County
Honorable RONALD D. THOM, Judge

Opinion Filed: February 25, 2015
Authored: Garrett, Judge.
Before: Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.

Continued…

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INTRODUCTION

In *State v. Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983), and in a long line of cases since, this court has repeatedly said that one witness may not comment on whether he or she believes another witness is telling the truth, and that such "vouching" testimony is categorically inadmissible. At issue in this sex abuse case is whether the admission of a videotape containing out-of-court comments made by a police detective while interrogating the defendant violated that categorical prohibition on "vouching." This court has never applied the vouching rule to that kind of evidence, and it should decline defendant's invitation to do so here. There is no basis—in either this court's case law or the rules of evidence—for extending the vouching rule to out-of-court statements that are relevant and admissible for a non-opinion purpose.

There is also no need to extend the rule to such statements. Defendant here could have objected to the statements on the basis of OEC 403 and he could have requested a limiting instruction under OEC 105. If he had done either of those things, the evidentiary record might well be different. He failed to raise those objections, however, and so instead now asks this court to alter the contours of a clear and long-established legal rule to conform to the mistaken objection that he did make. This court should decline that request.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

May a police officer's comments about the credibility of a defendant or other witness—made out of court during an interrogation of the defendant to elicit a response—lawfully be admitted to provide context for the defendant's response or to show the effect of the comment on defendant's state of mind, without violating the categorical prohibition on vouching evidence?

Proposed Rule of Law

Yes. A police officer's out-of-court comment does not violate the prohibition on "vouching" when it is relevant and admitted for a non-opinion purpose. The admissibility of such comments is still subject to the ordinary rules of evidence—including, *e.g*, a request for a limiting instruction under OEC 105, an objection that the evidence is irrelevant under OEC 401, or an objection that its relevance is substantially outweighed by the risk of prejudice under OEC 403—but such comments are not subject to exclusion under the vouching rule.

SUMMARY OF ARGUMENT

The vouching rule is a bright-line, categorical rule that prohibits one witness from opining to the jury about whether another witness is telling the truth. The rule is grounded in the principle that assessing the veracity of witnesses is an essential and exclusive function of the jury, and that one

witness's opinion about the veracity of another serves no legitimate purpose. The evidence at issue here —a detective's out-of-court comments to defendant during an interrogation regarding the veracity of the victims' allegations and of defendant's denials— did not violate that rule because they were relevant and admissible for a valid, non-opinion purpose.

As this court has already recognized, and as other courts around the country have recognized in similar police-interrogation cases— a police officer's out-of-court statement during an interrogation, even if in the form of an explicit comment on the credibility of a witness, can be admitted where it is relevant to show its effect on the defendant or to provide context for the defendant's response. And that is what happened here. The detective's comments were part of an interrogation technique intended to elicit responses from defendant, and they did elicit responses. The comments—even in the form of an otherwise inadmissible comment on credibility—were therefore admissible, as the trial court concluded, to provide context and to show the effect the statements had on defendant.

To be sure, these kinds of comments will not always be admissible and they may be subject to objections under other rules of evidence. Here, defendant could have objected under OEC 403 that the probative value of the statements was substantially outweighed by the risk of undue prejudice, or requested a limiting instruction under OEC 105. But defendant did neither. He

argued only that the evidence was barred by the vouching rule, and that argument is incorrect. The trial court correctly rejected it.

SUMMARY OF MATERIAL FACTS

To provide context for the arguments that follow, the state begins by setting forth the procedural history of this case, including the nature of the evidence that defendant asked the court to redact, as well as the arguments that defendant advanced in the trial court and in the Court of Appeals.

A. A police detective investigating allegations of abuse interviewed defendant and, during that course of that interview, made comments indicating that she believed the victims and did not believe defendant.

This case arose after two children, twelve-year-old and seven-year-old alleged that defendant had sexually abused them. *State v. Chandler*, 269 Or App 388, 389, 344 P3d 543 (2015). Defendant was a close friend of family and, on the day of the alleged abuse, defendant had attended a barbecue with family and then stayed overnight at house. (Tr 835, 840-45). family was also sleeping over at house that night. (Tr 360). Both and later reported to family members that during the night they had awoken to find defendant touching them. *Chandler*, 269 Or App at 389. who was the first to report the incident, told her parents that defendant had touched her under her clothes. *Id.* subsequently reported that on the same evening defendant had sent her text messages saying, "Can you keep a secret?" and "I think your

pretty," (Tr 517), and that later that night she had awoken to find defendant rubbing her thigh near her genital area. *Id.* at 389.

Detective Cynthia Gates began investigating the case. *Id.* at 389-90. As part of her investigation, Gates arranged for father to make pretext phone call to defendant. (Tr 405-408). During that call, which was recorded, father confronted defendant about the allegations, but defendant denied having touched either girl. (Tr 408-24).

Gates asked defendant to come to the police station for an interview. Defendant agreed. At the outset of that interview, Gates asked defendant if he knew why she wanted to talk to him, and defendant said he had "no idea." (Tr 443). Gates explained to defendant what the victims had said occurred. As the interview progressed, Gates made comments suggesting that she believed the victims and that defendant was not being truthful. In one of the exchanges, for example, Gates noted that the younger of the victims, did not even know defendant and had "no reason to lie":

> [GATES:] [B]ut if I have someone saying a completely different story than everyone else—I have a little kid saying you did something, and she's crying and scared, doesn't want to go back to grandma and grandpa's, has no reason to lie about this, has no reason to pin it on you. She doesn't know you.
> " * * * I have a little girl that's saying what she's saying, and I've got a video of it, and it's extremely telling[1] [because] it's heartbreaking. The

[1] Defendant's motion to the trial court quoted Gates as using the word "compelling," but the transcript from the trial, and the Court of Appeals

Footnote continued…

> girl had no history of, you know, lying, making accusations against people that have turned out to be lies.
>
> " * * * * *
>
> [DEFENDANT:] I didn't do any of this. I may have been there that night, but I didn't do any of this.

(Tr 497). At another point in the interview, Gates focused on the fact that at the outset to the interview defendant initially claimed he did not know why police wanted to speak with him. Defendant (who had been apprised of the allegations and the investigation by father during the pretext phone call) admitted that had been a lie.

> "[GATES:] So here's the deal. You really, I think the first thing you told me when you came into the room was a lie. You literally started our conversation with a lie. Was that your intention when you came was just to lie your way through it? * * *
>
> * * * * *
>
> [DEFENDANT:] No respect for you on that. No. I just kind of wanted to *see* what exactly it was about and what you wanted to know beforehand.
>
> [GATES:] Kind of gauge what I knew and what I didn't know? Yeah? So here's how I work. When I talk to people, usually the suspect is the very last person I talk to, [because] I want to know as much about you as I can. I want to know much—as much about that incident, what people saw and what people heard, you know, what you talked to people about since that happened. I want to know everything. I want to know about your past. I want to know what you're doing now. And I want to talk to you, and talk to you like I don't know any of it, and *see* if you're going to lie to me about stuff you don't even have to lie about. And that's exactly

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(…continued)
opinion, quotes Gates as having used the word "telling." *Chandler*, 269 Or App at 390; (Tr 509).

> what you've done. And so some of [the] stuff, I know you've been honest about. And I can *see* you act a certain way when you say something that's truthful, and I *see* you act a different way when you're saying something that I already know is a lie. So it's kind of nice because you're lying, thinking you're helping yourself, but it's showing me what you look like and how your body reacts when you lie.
>
> [DEFENDANT:] The only thing I lied about was when I first walked in the door.

(Tr 509-10). As the interview progressed, Gates continued to press defendant and made several other comments like the ones above suggesting that she believed the victims were telling the truth and that defendant was lying. For example, Gates told defendant,

> "You're telling me to go against logic. Now, if you just told me, 'Yeah, I did it.' This is why and this is who I am,' then maybe I could believe who you are. But right now, you're already lying to me, so why would I believe who you're saying you are? It goes against what you're showing me that you are."

(Tr 519). Defendant continued to deny any wrongdoing. After the interview, police arrested defendant and charged him with three counts of first-degree sex abuse. (Tr 554).

B. In the trial court, defendant argued that the detective's comments during the interview were inadmissible vouching under *Lupoli*

On the eve of trial, defendant filed a written motion asking the court to redact various portions of the videotape that he contended were inadmissible for several reasons. Among other arguments, defendant argued that many of Gates' questions—including the examples quoted above—constituted inadmissible

comments on the credibility or truthfulness of other witnesses.[2] With respect to those portions, defendant argued only that under *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010) and *State v. Milbradt*, 305 Or 621, 756 P2d 620 (1988), Gates' comments were inadmissible because they violated the rule against "vouching testimony."[3] The next day, at the outset of the proceedings, the trial court granted defendant's motion as to two parts of the video that defendant had argued should be excluded on other grounds, but the trial court denied defendant's motion as to those parts that defendant had maintained violated the vouching rule, ruling, in pertinent part:

> "THE COURT: The rest of the thing * * * falls into two categories: * * * number one, * * * this is not * * * where * * * *one witness is testifying, giving his opinion as to another witness's credibility. "It's [a] fair comment when the officer during [her] interrogation says, 'Well, somebody else told me this and somebody else told me that.' And so I don't think that's a violation of the rule and so [she'll] be allowed to do that.
>
> "As far as the officer's making statements that some witnesses said this and some witnesses said that, which is, of course, somewhat hearsay, * * * I think [because] it's * * * taken in the context of the interrogation the intent is to try to get the defendant's response."

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[2] Defendant identified 14 such comments in an appendix to his motion to redact that he claims were improper comments on credibility. (eTCF at 378-403).

[3] *Defendant Motion to Redact Impermissible Portions of Police Interrogation*, eTCF 373-403, 375). The entirety of defendant's argument consists of two paragraphs and set forth in Court of Appeals opinion. 269 Or App at 391.

(Tr 9).

At trial, the audio recording of the pretext phone call and the video recording of the interrogation were played for the jury. Among other witnesses, Detective Gates and both of the victims testified for the state. Defendant testified in his own defense and denied the allegations. (Tr 832-76).

The court dismissed one of the charges, but the other two were submitted to the jury, which returned guilty verdicts on both. (Tr 800; 1044).

C. On appeal, defendant argued that the detective's comments were inadmissible under OEC 403 and *Southard*.

Defendant appealed his convictions, arguing that trial court had erred in denying his motion to redact on the portions of the videotaped interrogation in which Gates suggested that she believed the victims and not defendant. In particular, defendant argued that Gates' statements were inadmissible under OEC 403 because their probative value was substantially outweighed by the danger of unfair prejudice to defendant, relying on this court's decision in *State v. Southard*, 347 Or 127, 218 P3d 104 (2009). *Chandler*, 269 Or App at 393. But the Court of Appeals held that defendant had failed to preserve an OEC 403 argument, explaining that the only argument he had made below was that the comments violated the rule against vouching. *Id.* at 393. The Court of Appeals then noted that, to the extent that defendant's argument on appeal was intended to be the "vouching" argument that he had advanced in the trial court, it was

without merit. *Id.* In that regard, the Court of Appeals explained that the prohibition on "vouching" does not apply to out-of-court statements like the ones that defendant challenged here, citing *State v. Odoms*, 313 Or 76, 829 P2d 690 (1992). *Chandler*, 269 Or App at 394.

ARGUMENT

This court's categorical prohibition on vouching does not and should not apply to a witness's out-of-court comment on credibility if the comment is relevant and admitted for a non-opinion purpose. Instead, the ordinary rules of evidence are sufficient to protect against the risk of prejudice posed by such statements. Here, as explained below, the challenged portions of the videotaped interrogation were relevant and admissible to provide context for defendant's statements, and to show the effect of Gates' comments on defendant's state of mind. They were not subject to the vouching rule.

A. A witness's out-of-court statement commenting on the credibility of another witness does not violate the vouching rule if the statement is admitted for some purpose other than its truth.

1. The vouching rule is a narrow, categorical rule that prohibits one witness from directly opining about whether another witness is telling the truth.

The rule against vouching can be stated simply: "a witness, expert or otherwise, may not give an opinion on whether he [or she] believes a witness is telling the truth." *State v. Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983). *See also State v. Milbradt*, 305 Or 621, 630, 756 P2d 620 (1988); *State v.*

Keller, 315 Or 273, 286, 844 P2d 195 (1993); *State v. Charboneau*, 323 Or 38, 47, 913 P2d 308 (1996); *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010); *State v. Beauvais*, 357 Or 524, 354 P3d 680 (2015). Although the prohibition on vouching is firmly established, it is narrow. The rule does not prevent all testimony or other evidence that implicitly informs the jury of a witness's opinion on the veracity of another witness. It may be (and often is) obvious from the circumstances, for example, that a mother who called police believed her daughter's allegation of abuse, or that an officer who investigated and then arrested a defendant did not believe the defendant's protestations of innocence. *See generally Middleton*, 294 Or at 435 ("Much * * * testimony will tend to show that another witness either is or is not telling the truth. This, by itself, will not render evidence inadmissible."). The only thing that the vouching rule does do is prevent witnesses from *directly* opining to the jury about whether another witness is being truthful. *Id.*

Over the years, this court has applied the vouching rule in various contexts. It not only prohibits a witness from offering an explicit opinion on another witness's veracity (*e.g.*, "I know my daughter is telling the truth") but also prohibits a witness from offering anything that is "tantamount" to an explicit opinion (*e.g.*, "My daughter would not lie about this kind of thing."). *Milbradt*, 305 Or at 630; *Beauvais*, 357 Or at 543. It applies to opinion testimony regarding not only another witness's trial testimony but also prior

statements. *Keller*, 315 Or at 286. And it prohibits giving opinions about not just another witness but also a non-witness complainant. *Lupoli*, 348 Or at 357. Throughout those cases, the rule itself has remained essentially the same straightforward prohibition the court originally announced in *Middleton*: "one witness may not give an opinion on whether he or she believes another witness is telling the truth."

This court has said little about the rule's specific legal origins. When this court first embraced the anti-vouching rule in *Middleton*, it did not attempt to identify a particular basis for the rule in the evidence code, nor has it done so since.[4] However, this court has explained in more general terms that such testimony is impermissible because it "invade[s] the jury's role as the sole judge of the credibility of another witness." *Charboneau*, 323 Or at 47. In other

[4] Although this court has not explicitly held that the vouching rule is grounded in the Oregon Evidence Code, several rules of evidence are consistent with the rule. *See, e.g.*, OEC 608 (credibility of a witness may be attacked or supported by evidence in the form of opinion, but the evidence may refer only to *character* for truthfulness or untruthfulness (emphasis added)); OEC 701 (opinion testimony of lay witness admissible only if it is "[h]elpful to a clear understanding of testimony of the witness or the determination of a fact in issue); OEC 702 (expert opinion testimony only admissible insofar as it "will assist the trier of fact to understand the evidence or to determine a fact in issue"). In *State v. Odoms*, this court indirectly suggested that the rule is grounded in OEC 608. *See id*. ("Opinion evidence of the type prohibited in *Middleton* and its progeny goes beyond the type of impeaching evidence that is permissible at trial under OEC 608 * * * OEC 608 does not permit opinion evidence as to specific instances of conduct to impeach or bolster the credibility of a witness.")

words, vouching testimony is inadmissible because the opinions of one witness about the truthfulness of another serve no legitimate purpose. Assessing the veracity of a witness' testimony is the sole and exclusive province of the jury, and one of the jury's core functions. When witnesses offer their own opinions about whether another witness is telling the truth, those opinions do nothing to assist the jury in reaching its own conclusions about who is being truthful and who is not, and they risk interfering with the jury's determination. *See Milbradt*, 305 Or at 629 ("We have said before, and we will say it again, but this time with emphasis-we really mean it-no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state. The assessment of credibility is for the trier of fact and not for psychotherapists.")

2. Admission of a witness's out-of-court comment on credibility does not violate the vouching rule if the comment is relevant and admissible for some non-opinion purpose.

Although this court has repeatedly applied the vouching rule, it has always done so with respect to *in-court testimony*; this court has never applied the rule to exclude evidence of the kind at issue here: a witness's out-court-statement. Here, as noted above, the Court of Appeals concluded that the vouching rule simply does not apply to out-of -court statements. But this court's case law suggests a rule of law that is not quite so broad. In particular, two of this court's cases—*Odoms* and *Charboneau*—suggest that whether an

out-court-statement is subject to the vouching rule depends on whether it is admissible for some purpose other than its truth.

Odoms, like this case, involved the admissibility of comments on credibility made by a police detective to a defendant during a police interrogation. There, two police detectives questioned the defendant about rape allegations. 313 Or at 78-79. At trial, one of the detectives testified and described the interrogation, and reported that the other detectives had told the defendant that "'we believed that there was something more to all of these allegations than we could put our finger on at that time with his statements to us.'" *Id*. at 80. The detective further described how his partner told the defendant he did not believe that a person would simply make up allegations against another person if there were not something to them. *Id*. The defendant objected to that testimony, arguing that the statements that the detectives made during the interrogation constituted improper comments on the complaining witness's credibility.

This court rejected that argument. Discussing its opinion in *Middleton*, the court explained that "the point of [the vouching rule] was only to preclude the testimony by *one trial witness* about whether *another trial witness* is telling the truth." *Id*. at 82 (emphasis in original). This court noted that "a relevant out-of-court statement, recounted at trial, generally may not be excluded merely because it is phrased in the form of an opinion." *Id*. This court further

explained that applying the vouching rule to an out-of-court statement would make little sense, because "the rule against opinion evidence fosters concrete answers by witnesses, but 'has no sensible application to statements made out of court.'" *Id*. at 83 (citing and quoting *McCormick*, Evidence 146, § 256 (4th ed 1992)).

Charboneau was a murder case in which the issue was the admissibility of a plea agreement of a witness, Smith, who had been an accomplice of the defendant. Smith had agreed to plead guilty and to testify against defendant in exchange for the state recommending a shorter prison term. 323 Or at 41. On cross examination, defendant's counsel elicited the terms of this arrangement from Smith to demonstrate that Smith was disposed to testify favorably for the state. On redirect, the state offered the Smith's plea agreement to rehabilitate Smith by showing that it was explicitly conditioned on Smith testifying truthfully. A portion of the agreement, signed by a deputy district attorney, expressly stated that the State's reason for entering into the agreement was that it believed Smith was telling the truth about his involvement. The defendant objected that this amounted to an impermissible attempt to bolster the credibility of a witness. *Id.* at 43-44.

On review, this court cited several lines of cases, including *Middleton*'s vouching rule. This court acknowledged that rule was not directly applicable, because the case was about the admissibility of a plea agreement and not a

circumstance in which a trial witness gave an opinion as to the Smith's credibility. *Id.* at 47. But the court concluded the circumstances were nonetheless "analogous," noting that the state would certainly have run afoul of the rule if it had called a witness to testify that he believed Smith was telling the truth. The court concluded that "A witness's testimony or an exhibit may not, explicitly and directly, contain an opinion as to a trial witness's credibility." *Id.* at 48.

At first blush, the reasoning of *Odoms* and *Charboneau* appear to be in tension. *Odoms* suggestion that the vouching rule cannot sensibly be applied to out-of-court statements is difficult to square with *Charboneau*'s conclusion that an exhibit may not "contain" an opinion as to a trial witness's credibility. Both cases, in other words, involved the admissibility of evidence that "contained" non-testimonial opinions concerning a trial witness's credibility, but this court reached different conclusions as to the admissibility of the evidence in each case.

The key to harmonizing the two cases is to focus on the *purpose* for which the evidence in the two cases was admitted.The plea agreement in *Charboneau* was offered to rehabilitate the state's witness after his credibility had been challenged on cross-examination. 323 Or at 42. In other words, the evidence was offered for its truth—as an opinion—to bolster the credibility of the state's witness. By contrast, in *Odoms* the comment was admitted not "for the truth of

the judgment or belief it expresses," but for a non-opinion purpose—to provide context for other relevant evidence. *See Odoms*, 313 at 84-85 (Unis, J., concurring) (concluding that the challenged statement was not vouching because it was "offered to show its effect on the hearer's (defendant's) state of mind, *i.e*., how and why defendant changed the story he gave to [the detective]."[5] Under *Charboneau*, in other words, out-of-court evidence that contains an explicit opinion of a witness's credibility and that is admitted for its truth to bolster or impeach a witness is analogous to vouching and is impermissible. *Odoms* stands for the converse principle: An out-of-court statement that happens to be in the form of a comment on credibility but is relevant for some valid purpose other than "the truth of the judgment or belief that it expresses" is not categorically inadmissible but can be admitted for that non-opinion purpose.[6]

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[5] In *Odoms*, as noted above, the majority explained that the opinion rule is simply "a rule of preference for more concrete answers," that would not sensibly be applied to out-of-court statements. That principle, however, seems inapposite when it comes to vouching. Vouching may be a species of opinion testimony, but the vouching rule is not ground merely in a "preference for more concrete answers." It is grounded in something more fundamental, and more important, which is that certain kinds of opinions—namely, those about whether another witness is telling the truth—do not assist the jury and can interfere with one of its core functions.

[6] At various points in his brief, defendant suggests that *Odoms* was "overruled" by this court's decision in *Lupoli*. That is incorrect. *Odoms* emphasized that "the point of *Middleton* was only to preclude testimony *by one*

Footnote continued…

3. The ordinary rules of evidence are sufficient to protect against the risk of prejudice posed by a relevant out-of-court comment on credibility.

Of course, to say that an out-of-court comment on credibility is not subject to categorical exclusion under the vouching rule is not to say that any such comment is therefore admissible. An out-of-court comment on credibility—even if it did not occur under oath and in court, and even it is relevant for some purpose other than its truth—still undeniably carries a risk of unfair prejudice. Depending on the nature of the out-of-court statement—what was said, who said it, and in what context—the risk that an out-of-court-comment about a witness's veracity could interfere with a jury's credibility determination might outweigh the probative value of the evidence. But to protect against that risk, a *categorical* rule of exclusion like the vouching rule would sweep too broadly and would prevent the jury from seeing potentially important evidence. Instead, the ordinary rules of evidence are sufficient to insure that the evidence that reaches the jury will not interfere with its ability to independently asses the credibility of witnesses.

(…continued)
trial witness about whether *another trial witness* is telling the truth." CITE (emphasis added). In *Lupoli*, this court considered a different scenario, and concluded that, in addition to precluding testimony by one trial witness about whether another trial witness is telling the truth, the rule also precludes testimony by a trial witness about whether a *nonwitness complainant* was telling the truth. *Lupoli* thus reaffirmed *Odoms* and expanded the rule slightly; it did not overrule *Odoms.*

As this court recognized in *Odoms*, even if an out-of-court statement is not subject to a vouching objection, such evidence still must be relevant under OEC 401, and it cannot be unduly prejudicial under OEC 403. In addition, if a defendant requests a limiting instruction under OEC 105 instructing the jury not to consider the out-court-statements as evidence, the defendant would be entitled to that instruction.[7] Those rules protect against the possibility that an out-of-court statements will unduly interfere with a jury's credibility determination.

Conversely, a categorical rule of exclusion for all out-of-court comments on credibility, regardless of the legitimate non-opinion purpose for which they are offered, is unnecessary and would prevent the jury from hearing or understanding potentially important evidence, include police interviews like that at issue here. Indeed, it makes little sense to treat out-of-court comments on credibility in the same manner as comments on credibility made in court

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[7] Examples of such limiting instructions are abundant in the case law. *See*, *e.g.*, *Castillo v. McFadden*, 399 F3d 993, 997 (9th Cir 2005)(" The audiotape interview viewed by you during this trial includes statements made to [the defendant] by a police officer. The audiotape was provided for you to hear [the defendant's] statements and his reaction to the police officer's statements. The information in the questions themselves are not evidence and should not be considered by you as evidence. The police officer's statements to [the defendant] are only to be considered by you to determine their effect upon the response made by [the defendant].")

under oath, because the effect on the jury of the two kinds of evidence is likely to be very different.

A comment by a police officer during the course of an interrogation regarding the truthfulness of the defendant, for example, is unlikely to come as a surprise to a juror or carry anything like the significance of in-court opinion testimony made under oath. *See Dubria v. Smith*, 224 F3d 995, 1001 (9th Cir. 2000)(despite officer's comments on credibility videotaped interrogation showed an 'unremarkable interview' with comments placing defendant's answers in context, "much like a prosecutor's questions at trial.")[8] The officer's purpose in making such a comment—as a reasonable juror observing the comments would understand—is fundamentally different in the two contexts. In an interview, the officer "is not trying to convince anyone—not the defendant (who knows whether he or she is telling the truth), other officers, a prosecutor, or the jury—that the defendant was lying" but is instead employing a familiar interrogation technique "aimed at showing the defendant that the

[8] *See also, e.g., Roberts v. State*, 313 Ga App 849, 852, 723 SE2d 73, 75-76 (2012) ("The officer who made the comments about which [defendant] complains later arrested [defendant], so it hardly would have been news to anyone that the officer believed the account of the victim and thought that [defendant] had, in fact, raped the victim. The jury almost certainly would have surmised as much, even if the comments of the officer had not been admitted, and these comments upon the obvious are not, we think, comparable to the specific and detailed commentary that we found inadmissible.")

officer recognizes the holes and contradictions in the defendant's story, thus urging him or her to tell the truth." *Lanham v. Commonwealth*, 171 SW3d 14, 26-27 (2005). [9] As matter of common knowledge, that is what police officers do during an interrogation—attempt to elicit a response from a witness and encourage the witness to give a full and accurate account. Depending on the case, a reasonable juror may not even assume that all of an officer's statements during an interrogation are a faithful or accurate reflection of the officer's actual beliefs; in any event, the officer's questions are unlikely to carry the "aura of reliability or validity" that accompanies in-court testimony, particularly expert testimony. *See Middleton*, 294 Or at 437 (recognizing that "jurors could be so impressed by the 'aura of reliability' of expert testimony that they might trust it more than their own perceptions.").

In contrast, an expert's sworn testimony that a particular witness is telling the truth carries a high risk that the jury will defer to that opinion. *State v. Southard*, 347 Or 127, 140–41, 218 P3d 104 (2009)(testimony from expert created "a substantial risk that the jury may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the evidence.") The

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[9] *See also, State v. Castaneda*, 215 NC App 144, 149, 715 SE 2d 290, 294 (2011) ("The majority of appellate courts of other jurisdictions that have considered such statements have held them admissible based on the rationale that such "accusations" by interrogators are an interrogation technique and are not made for the purpose of giving opinion testimony at trial.")

same might be said of the testimony of a lay witness who is testifying under oath, particularly if the lay witness has a special fund of knowledge or experience, unavailable to the jury, from which to make a credibility assessment. The statement of a mother, for example, who testifies that she knows that her child is telling the truth carries a high risk of interfering with the credibility assessment of the jury, which may be inclined to defer to the mother's intuition and experience regarding her own child.

A statement by a police officer to a suspect during an interrogation expressing the belief that a suspect is lying is unlikely to carry the same risk, as the facts of this case help to illustrate.

All of Gates' comments to defendant were unsworn statements, made out of court, in the context of a police interview, where comments of this kind are a commonplace and familiar tactic to elicit information. Jurors would reasonably have inferred merely from the circumstances (i.e., that Gates had arrested defendant and the state had put him on trial) that Gates did not believe defendant. Detective Gates' did not suggest that she was privy to any special information or that she had particular experience or intuition as a police officer underlying her opinions about who was telling the truth. She alluded only to undisputed and unremarkable facts—namely, that the children had no apparent reason to lie and that defendant had begun the interview by being less than truthful—and she made the comments to invite defendant's response. In all

of these respects, the statements at issue here are a far cry from the kinds of in-court, sworn vouching testimony by an expert that this court has said constitute reversible error.

For all of those reasons, courts in several other jurisdictions have taken the same approach to credibility comments made during a police interrogation that this court took in *Odoms—i.e.*, rejecting a categorical exclusion of such comments, and concluding that the admissibility of such evidence can appropriately be handled by the ordinary rules of evidence, including the equivalents of OEC 105, 401, and 403.[10] As one of those courts explained,

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[10] It appears that majority of jurisdictions, though not all of them, take this approach. *See, e.g., Dubria v. Smith*, 224 F3d 995, 1001 (9th Cir 2000) (rejecting, in habeas corpus case, the petitioner's argument that detective's "comments and questions contained statements of disbelief of [petitioner]'s story, opinions concerning [petitioner]'s guilt, elaborations of the police theory of [victim]'s death, and references to [defendant]'s involvement in the crime" should have been redacted from tape and transcript because "[t]he questions and comments by [the detective] placed [petitioner]'s answers in context"); *State v. Boggs*, 218 Ariz 325, 334–35, 185 P3d 111, 120–21, *cert den*, 555 US 1086 (2008) (upholding trial court's admission of video in which detective "repeatedly accused [the defendant] of lying" because detective's "accusations were part of an interrogation technique and were not made for the purpose of giving opinion testimony at trial"); *State v. Cordova*, 137 Idaho 635, 641, 51 P3d 449, 455 (Idaho App Ct 2002) (concluding that "officers' comments made during both interrogations indicating that they believed [defendant] was lying were admissible for the purpose of providing context to [defendant]'s inculpatory answers").

Other courts have treated such out-of-court comments as equivalent to in-court vouching testimony and have ruled them inadmissible. *State v. Elnicki*, 279 Kan 47, 57, 105 P3d 1222, 1229 (2005) (concluding that jury "should be

Footnote continued…

"[a]lmost all of the courts that have considered the issue recognize that this form of questioning is a legitimate, effective interrogation tool. And because such comments are such an integral part of the interrogation, several courts have noted that they provide a necessary context for the defendant's responses." *Lanham v. Commonwealth*, 171 SW3d 14, 26-27 (2005) (agreeing that such comments are not subject to the vouching rule). *See also, People v. Musser*, 494 Mich 337, 353 (2013)(rejecting suggestion that the officers' credibility comments in videotaped interrogation were categorically inadmissible as improper comments on credibility and concluding that the issue could be "adequately addressed by [the] existing rules of evidence.")

B. In this case, the trial court correctly denied defendant's motion.

Because the vouching rule does not apply to an out-of-court statement that is relevant for some purpose other than its truth, the trial court correctly denied defendant's motion. As discussed below, the challenged portions of the videotape provided relevant context for defendant's responses and to show their

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(…continued)
prohibited from hearing" videotape of detective's statements during interview that defendant "was a liar," that defendant was "'bullshitting'" the detective, and that defendant was "'weaving a web of lies'" just as "[a] jury is clearly prohibited from hearing such statements from the witness stand"); *Commonwealth v. Kitchen*, 730 A2d 513, 521 (Pa Super, 1999) (accusing defendant of lying during an interrogation is "akin to a prosecutor offering his or her opinion on the truth or falsity of the evidence presented by a criminal defendant" and is inadmissible).

effect on defendant. It follows that the statements were not subject to the vouching rule. Although defendant could have requested a limiting instruction, or challenged the evidence under OEC 401 or OEC 403, he did not do so. This court should therefore affirm the trial court's judgment.

1. The challenged statements were admissible as context for defendant's responses and to show their effect on defendant.

An out-of-court statement is not hearsay and is admissible if it is relevant to show the statement's effect upon the listener's state of mind or to provide context for understanding a defendant's admissions. *See* Laird C. Kirkpatrick, Oregon Evidence § 801.01[3][d], 705 (6th ed 2013). Here, the probative value of Detective Gates' statements was not in their "truth"—*i.e.*, that defendant was a liar or that the victims were truthful—but in the context they provided to the interview and the opportunity they provided the jury to assess defendant's demeanor and the extent to which defendant changed his answers in response.

A concrete example helps to illustrate the point. Among the portions of the videotape that defendant asked the court to redact as vouching this statement:

> [GATES:] And then we have kids that nobody has a history of saying that they're liars, that they make up false accusations about people. They're not troublemakers. These are fairly honest kids other than just your usual kid stuff. You know, no allegations of abuse of any kind in the past that they could be recollecting.

(Tr 494). But, as the transcript shows, that statement provided useful context for understanding what happened next:

> [DEFENDANT:] Right. They're generally good kids. My —and I don't know her, but and yeah, they're generally good kids.
>
> [GATES:] Okay. And yet you're saying that she's lying about all this stuff, some of it — you —you're basically her uncle. You have a great relationship. And out of the blue when they have an allegation you're saying that everything that she's saying basically is a lie.
>
> [DEFENDANT:] Not everything. It could have been misinterpreted.
>
> [GATES:] Okay. And that's what I'm looking for.
>
> [DEFENDANT:] I never said — I never –
>
> [GATES:] What could be misinterpreted?
>
> [DEFENDANT:] I never touched her leg.
>
> [GATES:] Is there another part of her body that you touched? Was it on top of the blanket maybe or –
>
> [GATES:] Maybe stand up and I flick a blanket off me that lands on her * **

(Tr 494-95).

If the detective's statement had been redacted from the video, the jury would have been left with anisolated response by defendant that would make little sense without the surrounding context. Additionally, the jury—without the opportunity to hear the questions and comments that preceded defendant's statements and changes in demeanor—would not have been able to effectively

understand the conversation that was happening or to evaluate defendant's demeanor in the video interview or the reasonableness of his responses. Furthermore, the jury would not have had an opportunity to *see* how the substance of defendant's answers changed in response to this line of inquiry. At the outset of the interview, defendant had categorically denied touching But in the passage above, in response to Gates' questions, defendant's story changes slightly, and he suggests the possibility that might have "misinterpreted" some action. Gates' questions are thus admissible not for their truth but to provide relevant context and to show the effect they had on defendant.

Notably, the arguments that the state made in the trial court were consistent with this purpose. There was no suggestion that the Gates' comments during the interview were relevant opinion evidence. Instead, the prosecutor's arguments and cross-examination focused on defendant's responses, and in particular how defendant had lied at the outset of the interview, and how his answers had shifted over the course of the interview. (Tr 866; 971). Initially, defendant claimed he had only been in bedroom two times. Later in the interview he stated that it might have been more than that. (Tr 867-68; 972). At the outset of the interview he categorically denied having touched but when pressed to explain why should would lie, he suggested might have misinterpreted something he did. (Tr 869-870). As

these examples demonstrate, Gates' comments shed light on the responses that that elicited and the comments are admissible for that purpose.

2. To the extent that defendant now argues the statements were not relevant for a non-opinion purpose his argument is unpreserved and is without merit.

On review in this court, defendant does not dispute the general proposition that a police officer's credibility comments during an interrogation of the kind here at issue *can* be admissible for some purpose other than their truth, *i.e.*, to provide context or to show their effect on the defendant. (BOM 42-43). Yet he argues that in the particular circumstances of this case, Detective Gates's comments were not admissible for any non-opinion purpose. But his argument in that regard is unpreserved and, in any event, without merit.

Defendant contends that the statements at issue in this case are distinguishable from *Odoms* because the statements here, unlike those in *Odoms*, were not relevant to show that they had actually any effect on defendant. In that regard, he notes,

> In this case, the challenged evidence was not offered to show its effect on defendant's state of mind, *i.e.*, how and why he changed his story during the interrogation. Defendant did not change his story. * * * Therefore the evidence was not admissible for its effect on defendant's state of mind.

(BOM, 42-43) (emphasis added). Thus framed, defendant's objection is essentially an argument that the challenged statements were not logically relevant under OEC 401 because they did not actually shed any meaningful

light on defendant's responses. Defendant never made that argument in the trial court, and this court should therefore not address it on review. ORAP 5.45. *See also Odoms*, 313 Or at 84 (declining to reach the question whether statements were admissible under OEC 401 or 403 because defendant "did not ask the trial court to exclude any portion of [the] testimony under OEC 401 or OEC 403. His only objection was that the * * * testimony * * * was an impermissible comment on [the defendant's] credibility").

In any event, his argument fails on its merits. As just explained, defendant *did* change his story. They were subtle changes, to be sure—defendant did not break down and confess guilt by the end of the interview—but they were changes that cast doubt on defendant's denials and were relevant for the jury. In any case, the premise of defendant's argument—that the only permissible purpose of Gates' questions would be to show how defendant changed his story in response to those questions—is incorrect. As noted, providing context to understand defendant's answers and demeanor is also a permissible purpose, and here, many of defendant's specific responses would have made little or no sense to the jury if the jury had not also been allowed to hear what Detective Gates had said to prompt defendant's specific response.[11]

[11] In addition, defendant's relevance argument on review is belied by the very arguments that defendant made in the trial court. As noted, in his closing argument, defendant described some of Detective Gates' interrogation

Footnote continued…

3. To the extent that defendant argues that the trial court erred by admitting the evidence without a limiting instruction, that argument also is unpreserved and unavailing.

Defendant also contends that the trial court could not have admitted the statements for some purpose other than their truth because the court did not give a limiting instruction telling the jury not to use the statements for their truth. (BOM 43). The state agrees that defendant would have been entitled to a limiting instruction under OEC 105 if had he asked for one. But he did not ask for one, and it was his burden to do so.

OEC 105 provides,

> "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly."

(Emphasis added). The rule thus "requires that counsel specifically request a limiting instruction," and "failure to do so will generally waive the right to claim error on appeal." Laird C. Kirkpatrick, *Oregon Evidence* § 105.03, 64

(…continued)
techniques and urged the jury to watch the interrogation video in its deliberations and to pay special attention to the manner in which, despite those Gates' skilled techniques, according to defendant, he steadfastly and "credibly" denied the allegations. (Tr 1019-1021). As defendant recognized, juxtaposing the manner in which Detective Gates confronted defendant by suggesting that she believed the victims, with defendant's repeated denials, was useful to demonstrate the effect it had on defendant's state of mind—namely, that despite being goaded by Gates, defendant did not change his story. In that sense, too the evidence is relevant—albeit in a way that aids defendant but not the state—and therefore satisfies OEC 401.

(6th ed 2013). To preserve a claim that a trial court erred by failing to give a particular limiting instruction, a defendant must actually ask for that instruction.

Defendant failed to do so. Therefore, defendant's suggestion on review that the trial court was required to give a limiting instruction is not preserved and is not reviewable unless it qualifies as plain error. ORAP 5.45(1). But here, defendant does not ask this court to engage in plain error review or suggest that the trial court committed plain error. Regardless, any plain error argument would be unavailing.

For plain error to occur, the alleged error must appear "on the record" and be "obvious." *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991). Neither of those requirements is met. For error to appear on the record, "the reviewing court must not need to go outside the record to identify the error or choose between competing inferences, and the facts constituting the error must be irrefutable." *Ailes*, 312 Or at 381-82. That requirement is not met when one available inference is that the litigant chose not to object. *State v. Gornick*, 340 Or 160, 170, 130 P3d 780 (2006).

Almost any time that a litigant fails to request a limiting instruction, one available inference is that the litigant chose not to object. As a tactical matter, attorneys frequently choose not to request limiting instructions. Professor Laird Kirkpatrick explains that counsel "may wish to avoid emphasizing the evidence or alerting the jury to its possible prohibited use." Kirkpatrick, *Oregon*

Evidence § 105.03, at 65. Indeed, substantial empirical research suggests that limiting instructions are not useful, can backfire, and should *not* be given:

> Significant empirical research generally supports the conclusion that even comprehensible limiting instructions can backfire—that for a number of reasons, more accurate results are achieved when the judge refrains from issuing a limiting instruction than when the court does instruct the jury. One study, for example, concluded that an instruction to consider a criminal defendant's criminal record only as it reflects on the defendant's credibility did not reduce, and might even have increased, the likelihood that the jury would misuse the evidence. Other studies have reached similar conclusions. Some, though not as conclusive, certainly question the usefulness of limiting instructions. If these studies are correct, perhaps limiting instructions should *not* be given.

David P. Leonard, *The New Wigmore: Selected Rules of Limited Admissibility*, § 1.11.5, 113 (2002) (footnotes omitted; emphasis original). Given the strategic considerations involved, when a litigant fails to request a limiting instruction, or fails to request a different limiting instruction, one available inference is that the litigant chose not to object. For the same reason, this court has not required trial courts to *sua sponte* give limiting instructions and, instead, has assumed that a litigant forfeits any right to one absent a timely request. *See State v. Clegg*, 332 Or 432, 442-43, 31 P3d 408 (2001); *State v. Stevens*, 328 Or 116, 138, 970 P2d 215 (1998). The same considerations apply here. If an out-of-court comment on credibility is admitted for a relevant, non-opinion purpose, the court should not be required *sua sponte* to give a limiting instruction, because the parties may have good reason not to want such an instruction.

Instead, and consistent with the rule, a party wishing for a limiting instruction must request it.

4. Defendant did not argue that Gates' statements were inadmissible under OEC 403 in the trial court and he has abandoned the OEC 403 argument he advanced in the Court of Appeals.

In addition to asking for a limiting instruction, defendant also *could* have argued that the probative value of some or all of the challenged statements were substantially outweighed by the risk of undue prejudice. But, as the Court of Appeals correctly recognized, the only argument that defendant made in the trial court was a vouching objection. A vouching objection and an OEC 403 objection are not the same thing. As explained, a vouching objection is a claim that a witness's direct comment on credibility is categorically inadmissible and must be excluded. An OEC 403 objection, by contrast, asks the court to exercise its discretion to exclude evidence on the ground that the probative value is substantially outweighed by the risk of unfair prejudice. Defendant made no such argument. In any event, although defendant did advance an unpreserved argument under OEC 403 in the Court of Appeals, he has abandoned that argument in this court.[12]

[12] For the reasons discussed above, the trial court did not err. Notably, however, even assuming the court did err, defendant fails to explain how he was prejudiced by that error, though it is his burden to do so. *See State v. Lotches*, 331 Or 455, 487, 17 P3d 1045 (2000) ("A defendant in a criminal case

Footnote continued…

CONCLUSION

Defendant's vouching argument was incorrect and the trial court correctly rejected it. This court should affirm the trial court's judgment and the judgment of the Court of Appeals.

Respectfully submitted,

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(…continued)
assigning error to the exclusion or admission of evidence must establish that the error was not harmless.") In the court of appeals, defendant argued that this case was essentially "a swearing match," and credibility was the "key issue," and that the failure to redact the videotape created a substantial risk that the jury would not make its own independent assessment of defendant's credibility. (App Br 26). But given the context in which Gates' comments were made, the jury's observation of those videotaped comments unlikely affected the ability of the jurors—who heard the victims and defendant testify firsthand—to independently asses the witness's credibility. Indeed, it was *defendant* who during his closing argument played a portion of the tape, who urged the jury to watch the videotape during its deliberations, and who argued that defendant's resolute denials in the face of Gates' interrogation techniques made the tape "in itself [] a reason to acquit him, a very good reason." (Tr 1020-21).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 9, 2015, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Eric R. Johansen, attorneys for petitioner on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,919 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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