IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. LANE EDWARD JESSE, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court No. C110695CR CA A153759 SC S063856

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Washington County
Honorable RICK KNAPP, Judge

Opinion Filed: November 18, 2015
Author of Opinion: Meagan A. Flynn, Judge
Before: Lagesen, Presiding Judge, and
Duncan, Judge, and Flynn, Judge

Continued…

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INTRODUCTION

This case involves the admissibility of expert testimony. The dispute centers on whether that testimony was admissible under OEC 702's requirement that expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue."

The expert testimony contains a psychologist's diagnosis that defendant suffers from a psychological disorder. Defendant offered that diagnosis, along with a limited explanation of its symptoms, to counter evidence that he had confessed multiple times to the conduct at issue in this sex abuse case. Defendant invited the jury to infer that his disorder had caused him to confess falsely. But his expert did not explain the connection between defendant's disorder and any of his confessions, except to say that it was "within the realm of possibility" that one confession, to jail guards, was the product of "distress." Although she had previously used the word "distress" when describing defendant's personal characteristics, she did not explain why "distress" might cause a person to make a confession that was false.

The trial court excluded the proffered testimony, stating that it was "not helpful to the jury," and the Court of Appeals reversed. As explained below, this court should reverse the Court of Appeals' ruling. The trial court did not

abuse its discretion in excluding the testimony because the testimony failed to provide logical connections that were necessary to concluding that defendant's confessions were false and because those missing connections required the application of further expertise.

Question Presented

When a party seeks to argue that a person confessed falsely because of a medical condition but does not offer expert testimony as to how or whether the medical condition made it more likely that the confession was false, does the trial court abuse its discretion in excluding evidence of the medical condition?

Proposed Rule of Law

No. The expert's testimony about the medical condition is not helpful to the trier of fact unless it allows a non-speculative inference that the condition led to a false confession. To draw that inference, a fact-finder must understand how the condition could contribute to a false confession and have some basis for evaluating its likelihood of doing so in the person's circumstances. Unless the medical condition is of the sort where those facts are within an ordinary juror's common knowledge and experience, further expert testimony is necessary to explain those facts. And unless those facts are ones that an ordinary juror can indisputably understand without expert assistance, an appellate court should defer to the trial court's helpfulness determination.

Statement of Facts

A. Based in part on defendant's multiple confessions to sexually abusing the victim, he was convicted of first-degree sexual abuse.

This case is an appeal from defendant's conviction for first-degree sexual abuse of his then-four-year-old daughter. *State v. Jesse*, 275 Or App 1, 3, 362 P3d 1187 (2015). Most relevant to this appeal is evidence that defendant confessed multiple times to the charged conduct.

Defendant's wife provided evidence of two of those confessions. Defendant volunteered to her that he touched their daughter inappropriately. *Jesse*, 275 Or App at 3. He explained that he had been thinking about touching their children for some time and that he "belonged in prison." *Id.* Defendant's wife testified that, several days later, they both signed a document that stated:

> I, [defendant], am admitting to touching my oldest daughter, [M], in an inappropriate way. I went in her room early in the morning and was tucking her into bed when I ran my hand over her diaper, over her pubic area. I then walked out and went to bed. My daughter did not wake up. I have never done this before. When my wife came home from work, I told her. She told me to leave and I agreed to that and to get counseling. I am writing this so my wife, [S], has proof for the protection of our children.

Id. at 4.

The rest of defendant's confessions occurred after his daughter disclosed the abuse nearly a year later, leading to defendant's arrest. *Id*. at 4–5. After nearly a year more had elapsed, defendant approached two deputies while

confined in county jail and asked, "What happens if I confess right now?" *Id*. at 5. A few minutes later, defendant approached them again and said, "I did it. I confess." *Id*. Although a deputy told defendant that the matter was between him and the courts, defendant approached the deputies again to say, "Okay. I touched my daughter. I admit [it]. I'm a jerk." *Id*.

B. The trial court excluded defendant's proffered expert testimony, concluding that defendant had not connected the diagnosis to his assertion that his confessions were false.

Prior to trial, the state moved *in limine* to prohibit defendant from offering the testimony of defendant's counselor, Dr. Callum, about her psychological diagnosis of defendant. *Jesse*, 275 Or App at 5–6.

At the pretrial hearing, Dr. Callum explained that defendant:

> "had very low self-esteem. He was also plagued by fears and many of the cognitions of his childhood, which kept on just ruminating [in] his head, and those were the fears and negative thoughts that he was always having. And which continuously made him wonder if he was okay, what was wrong with him."

Id. at 6 (quoting testimony). Dr. Callum testified further that she diagnosed defendant as suffering from "'adjustment disorder with depressed mood,'" as well as "'trauma related to childhood physical and emotional abuse.'" *Id*. at 6–7 (quoting testimony). Dr. Callum explained the nature of those diagnoses in the following testimony:

> "Adjustment disorder is when they have difficulty in [being] able to cope with the situation or where they have—just not being able to—to put everything together and they are letting it affect

> them. * * * And that is a very typical diagnosis when people are having difficulty in bringing it all together."

Id. at 7 (quoting testimony); *see also id*. at 7 n 2 (describing condition as causing "[v]ery, very poor coping skills"). Dr. Callum further explained: "[Defendant] is unable to adjust to the situation, hence the disorder name, adjustment disorder. He has been very influenced by the distress level that he has been experiencing." *Id*. at 7 n 2.

Other than questioning whether defendant's reading skills were sufficient to allow him to understand his written confession, (Tr 585–86), Dr. Callum discussed defendant's confessions only once in her testimony, in response to a question by the prosecutor about her view of his jailhouse confession to the deputies:

> "In regards to that confession, I would factor my knowledge about him, about his adjustment, you know his high degree of distress and so that—that would be where with my medical certainty would be he was very distressed. *And whether he's confessing to something out of distress, that's within the realm of possibility*."

Id. at 4–8 (quoting testimony; emphasis added).

When pressed by the court and the state to explain the relevance of Dr. Callum's diagnoses, defendant argued that people with poor coping skills and excessive rumination "make false confessions, and make false statements" either due to a misperception of their own culpability or out of excessive

deference to others. *Jesse*, 275 Or App at 9–10 (quoting defendant's argument). Defendant did not proffer any expert testimony supporting that assertion.

The trial court concluded that defendant's diagnosis and its characteristics were "not helpful to the jury" because defendant had not shown a sufficient connection between that evidence and his claim to have confessed falsely. *Id*. at 10. The trial court thus excluded the proffered testimony from Dr. Callum. *Id*.

C. The Court of Appeals concluded that the evidence sufficiently linked defendant's diagnosis to his confessions.

In concluding that the trial court erred in excluding Dr. Callum's testimony, the Court of Appeals explained that "the record supplies a nexus between Callum's testimony about defendant's adjustment disorder and its effect on defendant." *Jesse*, 275 Or App at 16. The Court of Appeals explained that defendant's theory of the case—as articulated by defense counsel in his legal arguments in support of admitting Dr. Callum's testimony—was that he had obsessed over an accidental touching of his daughter and then been "overwhelmed by the stress," causing him to confess falsely. *Id*. In the court's view, Dr. Callum's "testimony was consistent with and would have bolstered that theory, providing a scientific basis—an adjustment disorder that made defendant susceptible to rumination and obsessive thinking, and left him with very poor coping skills—to help explain what would be a highly unusual

reaction to an accidental touching." *Id*. That is, the Court of Appeals viewed Dr. Callum's testimony as sufficient to support a fact-finder's conclusion that defendant's confessions were not "true admission[s] of guilt." *Id*.

Summary of Argument

Expert testimony is not helpful unless it intelligibly connects record evidence to the resolution of a material fact at issue. That is, the opinion is helpful only if the fact-finder can use it to support or undermine the inference of a material fact from the evidence. Here, defendant offered his expert testimony to support his material assertion that his confessions were false. He invited the jurors to infer that his confessions were false, and he asked them to base that inference on the expert's testimony about defendant's psychological disorder.

But that testimony contained little discussion about confessions. Indeed, that testimony made no effort to suggest any likelihood that defendant's confessions were false. At most, the evidence supported an inference that it was "within the realm of possibility" that one confession, to jail guards, was the product of "distress." The expert did not testify that defendant's disorder was of a sort that has been observed by experts as likely to cause false confessions, nor did she explain how that condition can produce a false confession or describe any indicia that a fact-finder could use to determine whether defendant's confessions were linked to his disorder.

Without that type of testimony, the expert left the fact-finder to speculate

as to whether defendant's disorder could have caused him to confess falsely—a matter which requires the application of expertise regarding that disorder and its presentation among those afflicted with it. As a result, the proffered testimony was not helpful under OEC 702 and therefore inadmissible under that rule.

And even if a fact-finder might conceivably be able draw on common knowledge to bridge those gaps in the expert's testimony, a trial court has broad discretion to admit or exclude evidence as helpful or unhelpful under OEC 702. A trial court is best positioned to assess whether an expert's testimony will be helpful to a juror of ordinary knowledge or whether the expert's testimony will instead ask the juror to speculate about matters that require further expertise. The trial court may also consider the likelihood of confusion or unfair prejudice when assessing the helpfulness of expert testimony. For those reasons, the trial court's determination—that the expert's testimony here was not helpful to the jury—is entitled to deference and does not reflect an abuse of discretion.

ARGUMENT

Generally speaking, three rules govern the admissibility of expert testimony: OEC 401 requires expert evidence to be relevant; OEC 702 requires it to "help the trier of fact in deciding a disputed issue"; and, if those "conditions are satisfied, the testimony will be excluded only if it is unduly prejudicial, repetitive, or falls under some other exclusionary provision as provided in OEC 403." *State v. Brown*, 297 Or 404, 409, 687 P2d 751 (1984).

The dispute in this appeal centers on the second of those rules, OEC 702's requirement that an expert opinion must help the trier of fact in determining a fact in issue.

Here, defendant offered testimony in which an expert diagnosed him with a mental disorder and explained the behaviors associated with that diagnosis. Defendant offered that testimony to invite an inference that his confessions were false.

The question for this court is whether the trial court abused its discretion when determining whether the proffered testimony would not have helped the trier of fact in drawing the inference that defendant invited. Because defendant provided no evidence—whether from his expert or otherwise—that allowed the jury to draw the invited inference from the proffered testimony, the trial court did not abuse its discretion.

A. OEC 702 allows expert testimony only if the trial court, in its discretion, concludes that it is helpful to the fact-finder.

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.

OEC 702 (emphasis added). This court typically discusses that rule's requirements under a shorthand standard of "helpfulness." *See, e.g.*, *Brown*,

297 Or at 417 (discussing "OEC 702's helpfulness standard"); *State v. O'Key*, 321 Or 285, 319, 899 P2d 663 (1995) (discussing "the helpfulness requirement in OEC 702"); *State v. Lyons*, 324 Or 256, 279, 924 P2d 802 (1996) (discussing the "helpfulness requirement of OEC 702").

OEC 702's helpfulness inquiry is one that, in most circumstances, gives courts discretion to choose from among a range of permissible outcomes rather than mandating a particular result. *Cf. State v. Titus*, 328 Or 475, 481, 982 P2d 1133 (1999) (contrasting the legal nature of an OEC 401 inquiry, which "can yield only one correct answer," with the discretionary nature of an OEC 403 inquiry, which "may allow for more than one legally correct outcome").[1]

This court first discussed the breadth of discretion contained in OEC 702's helpfulness standard soon after that rule became effective, in *State v. Stringer*, 292 Or 388, 392, 639 P2d 1264 (1982).[2] There, this court explained

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[1] The helpfulness standard—because of its discretionary nature—stands in contrast to the purely legal inquiry necessitated by the requirement that scientific evidence be reliable. As this court explained when first developing its present standard for reliability of scientific evidence, the reliability inquiry is "'unlike the question * * * of the helpfulness of particular expert testimony to the trier of facts in a specific case'" because "'the reliability of a scientific technique or process does not vary according to the circumstances of each case.'" *Brown*, 297 Or at 412 (quoting *Reed v. State*, 391 A2d 364, 367 (Md 1978)); *O'Key*, 321 Or at 320 n 45 (similar).

[2] Although *Stringer* drew its analysis from cases decided before the enactment of the OEC, that analysis is sound because the commentary to OEC

Footnote continued…

that, when the helpfulness question "is doubtful or reasonably could be decided either way," a trial court "has latitude in admitting the evidence" and should be "affirm[ed] whether the trial court admits the evidence or refuses to admit the evidence." *Id*. at 394. And *Stringer* incorporated by reference this court's earlier discussion of helpfulness in *Yundt v. D & D Bowl, Inc*., 259 Or 247, 258–59, 486 P2d 553 (1971). In *Yundt*, this court explained that a trial court's discretion is constrained only at the margins—when "a jury clearly is not equally well qualified [to draw the invited inference] and needs help to find the truth" and when "a jury clearly is equally qualified without help from opinion testimony." 259 Or at 259. But in the wide gulf between those margins, a trial court's helpfulness determination is entitled to deference. *See State v. Middleton*, 294 Or 427, 437, 657 P2d 1215 (1983) ("[T]here is no bright line separating issues within the comprehension of the jurors from those that are not.").

When exercising its discretion to assess helpfulness, a trial court must be guided by this court's explanation that, to be helpful, "the subject of the testimony must be within the expert's field, the witness must be qualified, and the foundation for the opinion *must intelligibly relate the testimony to the fact*."

(…continued)
702 explains that the rule "does not change existing law." Commentary to OEC 702 (1981).

State v. Lyons, 324 Or 256, 270, 924 P2d 802, 810 (1996) (internal quotation marks omitted, emphasis added). That is, the opinion is helpful only if the fact-finder can use it to support or undermine the inference of a material fact from the evidence.

In *O'Key*, this court explained four ways in which an expert opinion can be used to support or undermine a fact-finder's inferences:

> "(1) supplying general propositions which will permit inferences from data which the trier of fact would otherwise be forced to find meaningless;
>
> (2) applying general propositions to data so as to generate inferences where the complexity of the body of propositions applied, the difficulty of the application, or other factors make the expert's conclusion probably more accurate or precise than that of the trier of fact;
>
> (3) modifying, qualifying, and refining general propositions which the trier of fact may reasonably be expected to use; and
>
> (4) adding specialized confirmation and, thus, confidence to general propositions otherwise likely to be assumed more tentatively by the trier."

321 Or at 298 (line breaks added; quoting William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 Or L Rev 349, 360 (1992)).

Those four forms of fact-finding assistance are generally the only ways in which an expert can assist the fact-finder. *See* Strong, 71 Or L Rev at 360 (suggesting, "based upon the existing decisions" that the foregoing list

"approaches completeness" in enumerating possible ways to help the fact-finder). As discussed below, defendant's proffered expert testimony was helpful in none of those ways, and it could not have been helpful in any other way. For that reason, the trial court did not abuse its discretion when excluding it as unhelpful under OEC 702.

B. The trial court properly concluded that the proffered testimony was unhelpful.

Defendant offered his expert testimony to establish, as a material fact, that his confessions were false. Defendant invited the jury to infer that fact from Dr. Callum's testimony about his psychological disorder. But because Dr. Callum's testimony did not help the fact-finder draw that inference in any of the four ways set forth in *O'Key*, that testimony is distinguishable from expert testimony that this court has held to be helpful in other cases. And that testimony could not have been helpful in any other way because it contained a logical gap that could be bridged only with further expert testimony. That deficiency distinguishes this case from expert testimony that federal courts have held to be helpful under the parallel federal rule of evidence. And finally, even if an ordinary juror could be said to be capable of bridging the logical gap between Dr. Callum's testimony and a false confession, this court should defer to the trial court's helpfulness determination because that determination encompasses other discretionary considerations such as unfair prejudice and

confusion of issues.

1. Because Dr. Callum's testimony was not helpful in any way identified by this court in *O'Key*, that testimony is distinguishable from expert testimony that this court has held to be helpful in other cases.

By enumerating the ways in which expert testimony can be helpful to a jury, *O'Key* provides a framework useful for understanding (1) how expert testimony was helpful in other cases where this court has reviewed that inquiry and (2) why the expert testimony in this case was different from the expert testimony in those cases.

a. Dr. Callum's testimony was not helpful in the first way listed in *O'Key*.

Dr. Callum's testimony was not helpful in the first way identified in *O'Key*. That testimony did not "supply[] general propositions which [would] permit inferences from data which the trier of fact would otherwise be forced to find meaningless." *O'Key*, 321 Or at 298 (internal quotation marks omitted). Although Dr. Callum diagnosed defendant as suffering from adjustment disorder, the jury would be forced to find that diagnosis meaningless absent additional testimony supplying general propositions connecting that diagnosis to false confessions.

Missing from Dr. Callum's testimony—about defendant's psychological diagnosis, obsessive rumination, and poor coping skills—was any suggestion that defendant's condition or its symptoms made him more likely than he would

be *without* that condition to confess to something he did not do. Perhaps, as a clinical matter, defendant's disorder was one that has been known to cause that result, and perhaps defendant's manifestation of that disorder was severe enough to do so. But if so, that conclusion required the application of expertise to bridge the gap between a speculative inference and a reasonable one. *Cf. State v. Bivins*, 191 Or App 460, 467–668, 83 P3d 379, 383 (2004) (explaining how "the experience of logical probability" separates reasonable inferences from speculative ones).

And although Dr. Callum did testify that a confession caused by distress was "within the realm of possibility," *Jesse*, 275 Or App at 8, saying that something is "possible" does not make it any less speculative. Put differently, a statement of mere possibility, without any estimate of likelihood—and especially one further qualified by invoking only some unspecified portion of the "realm of possibility"—is speculative, and it is all the more speculative when unaccompanied by any explanation of indicia that a juror can use to identify a false confession caused by defendant's disorder.

Moreover, to say that a confession could be caused by distress is not the same as saying that the confession could be false. That is, a confession caused by distress could be false, or it could simply be the product of a pathological inability to maintain a false denial in the face of distress. Dr. Callum's testimony provided the jury with no non-speculative basis to choose from

among those possibilities.

Even if a juror might understand that some mental disorders might increase the likelihood of false confessions, that juror would be speculating to conclude that defendant's disorder and symptoms were of the sort that would do so. And because that analysis turns on an understanding of an ordinary juror's knowledge, the trial court's conclusion is entitled to deference—a trial court's experience with jury pools makes it better equipped than an appellate court to assess the scope of an ordinary juror's common knowledge.

b. Dr. Callum's testimony was not helpful in the second way listed in *O'Key*.

Nor was Dr. Callum's testimony helpful in the second way enumerated in *O'Key*. That testimony did not "apply[] general propositions to data so as to generate inferences where the complexity of the body of propositions applied, the difficulty of the application, or other factors make the expert's conclusion probably more accurate or precise than that of the trier of fact." *O'Key*, 321 Or at 298 (internal quotation marks omitted). To be helpful in that way, an expert must use expertise to apply a general principle to the facts of a particular case, so as to offer precisely the inference that a party is inviting the fact-finder to draw.[3] But Dr. Callum never opined that, from her knowledge of defendant and

[3] Such testimony about an ultimate issue is permissible. *See* OEC 704 ("Testimony in the form of an opinion or inference otherwise admissible is

Footnote continued…

his disorder, she believed his confession to be false.[4]

Contrast Dr. Callum's testimony here with expert testimony that helpfully applied expertise to infer—in a criminally negligent homicide case—the point of impact from evidence in the record regarding the known facts of a vehicular crash. *See State v. Stringer*, 292 Or 388, 390–93, 639 P2d 1264 (1982). Although such an expert could simply explain the general propositions of physics supporting that ultimate inference, those propositions are too complex to allow the fact-finder to draw the inference as accurately as the expert can.

Analogizing this case to the foregoing example, Dr. Callum's testimony here was akin to an expert's testimony about the specific scientific propositions underlying crash reconstruction, without any testimony applying those propositions to the facts of the case. In that context, a trial court would not abuse its discretion by concluding that an ordinary juror cannot intelligibly infer

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(…continued)
not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

[4] Of course, that sort of testimony might have amounted to impermissible vouching. *See generally State v. Lupoli*, 348 Or 346, 357, 361, 234 P3d 117 (2010) (explaining impermissibility of one witness commenting on the truth or falsity of another witness's statements). But that circumstance does not obviate the need to comply with OEC 702's helpfulness standard, especially when Dr. Callum could have made her testimony helpful in other ways discussed in this brief.

any material fact from the expert testimony. Here too, the trial court was entitled to conclude that an ordinary juror could not intelligibly infer, from evidence about defendant's disorder and symptoms, that he confessed falsely. At a minimum, an appellate court should defer to the trial court's conclusion about an ordinary juror's capacity in this regard.

c. Dr. Callum's testimony was not helpful in the third way listed in *O'Key*.

Dr. Callum's testimony also failed to assist the jury in the third way enumerated in *O'Key*. That testimony did not "modify[], qualify[], and refin[e] general propositions which the trier of fact may reasonably be expected to use." *O'Key*, 321 Or at 298 (internal quotation marks omitted). That is, the testimony did not attempt to challenge jurors' misconceptions and undermine the strength of an inference they might otherwise draw from evidence. For example, Dr. Callum did not opine that defendant's symptoms—such as obsessive rumination—would cause him to unreasonably feel culpable for conduct that normal people would believe to be non-criminal, thereby undermining the expected inference that only a guilty person would confess. Nor did she opine that false confessions are typical for people suffering from defendant's disorder or that the circumstances of defendant's confessions bore indicia similar to those of false confessions observed in other cases.

Thus, Dr. Callum's testimony here was not helpful in the way that the

expert testimony was held to be helpful in *State v. Middleton*, 294 Or 427, 657 P2d 1215 (1983). That case presented the possibility that a fact-finder might be expected to discredit, in light of a later retraction, a child victim's initial allegation of sexual abuse. *Id*. at 435–37. But an expert testified that the particular victim's behavior was "very much in keeping" with those of children abused by a family member, and the expert further testified that "it's very typical" for a sex abuse victim to retract an allegation of abuse, which is a "very common kind of thing to happen" and which is a product of guilt about the familial effects of an accusation. *Middleton*, 294 Or at 432 nn 5–6; *see also id*. at 432 n 6 (explaining not only that victims feel guilty, but that those feelings will cause them to run away from home, as the victim there did); *id*. at 437 ("If a qualified expert offers to give testimony on whether the reaction of one child *is similar to the reaction of most victims* of familial child abuse, and if believed this would assist the jury in deciding whether a rape occurred, it may be admitted." (emphasis added)). Therefore, this court deemed the expert testimony admissible under OEC 702.

In short, the admissible testimony in *Middleton* contained an expert's express explanation of the victim's behavior in terms of a common pattern and suggesting that it was consistent with that pattern. If the expert in *Middleton* had explained that a retraction is merely possible rather than consistent with and explained by a commonly observed pattern marked with objective indicia, the

trial court could have concluded that the expert's testimony was unhelpful to the jury's task—that is, assessing whether to view the retractions in that case differently than they normally would. Here, Dr. Callum made no effort to discuss any common pattern of false confessions, to explain the connection between defendant's disorder and that pattern, or to suggest that defendant's confessions bore indicia consistent with that pattern. For that reason, the trial court was permitted to conclude that the testimony was unhelpful.

d. Dr. Callum's testimony was not helpful in the fourth way listed in *O'Key*.

Finally, Dr. Callum's testimony was not helpful in the fourth way identified in *O'Key*: that testimony did not "add[] specialized confirmation and, thus, confidence to general propositions otherwise likely to be assumed more tentatively by the trier." *O'Key*, 321 Or at 298 (internal quotation marks omitted). Because Dr. Callum did not opine that defendant's confession was false, her testimony could not confirm that material inference.

Contrast Dr. Callum's testimony with the testimony that provided helpful confirmation in *State v. Gherasim*, 329 Or 188, 985 P2d 1267 (1999). In that assault case, the jury was faced with a factual dispute as to whether the defendant was the assailant or whether defendant had merely offered the victim a ride to assist her after someone else had assaulted her. *Id*. at 190–91. The victim's accounts contained some factual discrepancies, and only some of the

details that she remembered about the assailant and his car matched the defendant and his car. *Id*. at 190–91, 195. Although the jury could have inferred without expert assistance that the victim's memory was incorrect, an expert's testimony about the defendant's dissociative amnesia was admissible to strengthen that inference by both confirming and explaining it. *Id*. at 198 (concluding that expert's testimony was helpful because it would have contained an opinion that "the victim suffered from dissociative amnesia and that that condition affected her capacity to remember what had occurred on the night that she was assaulted"). Here, by contrast, Dr. Callum offered no testimony to explain how defendant's condition could have caused him to confess falsely, and she offered no opinion even to confirm the soundness of such an inference.

2. Dr. Callum's testimony could not have been helpful in any other way because it contained a logical gap that could be bridged only with the application of *further* expertise.

To summarize the foregoing analysis, defendant invited the jury to infer the falsity of his confessions from Dr. Callum's testimony about defendant's disorder and symptoms, but Dr. Callum failed to bridge the gap between defendant's condition and a false confession.

Again, Dr. Callum's testimony was limited to a diagnosis of adjustment disorder and an explanation that the disorder made defendant prone to obsessive rumination and left him with "poor coping skills" and a "difficulty in bringing it

all together." *Jesse*, 275 Or App at 5–7 & n 2. Dr. Callum also testified: "whether he's confessing to something out of distress, that's within the realm of possibility." *Id*. at 8.

What Dr. Callum's testimony lacked was any information about the prevalence of false confessions in people suffering from conditions like defendant's, any explanation of how that condition can produce a false confession, or any other indicia to allow the jury to determine whether the confessions in this case were in fact the false product of defendant's condition. Because this court should defer to the trial court's conclusion that such information is beyond the knowledge of an ordinary juror, that information must have come from Dr. Callum or another expert.[5] But without an expert to provide that connection, defendant's invited inference was irrational and speculative. *See State v. Tucker*, 315 Or 321, 340 n 4, 845 P2d 904 (1993)

[5] Such information would not have been vouching. This court has recognized that certain types of generalized expert opinions "can assist a jury and ordinarily would be admissible" because they would not be, "in and of themselves, impermissible vouching." *State v. Lupoli*, 348 Or 346, 362, 234 P3d 117 (2010); *State v. Southard*, 347 Or 127, 134, 140 n 12, 218 P3d 104 (2009) (recognizing that an expert may aid the jury's fact-finding and credibility-determining task by explaining relevant "criteria that [go] beyond a juror's common experience"); *see also Middleton*, 294 Or at 435 ("Neither of the experts directly expressed an opinion on the truth of the victim's testimony. Much expert testimony will tend to show that another witness either is or is not telling the truth. This, by itself, will not render evidence inadmissible." (internal citation omitted)).

(Unis, J., concurring) ("If expertise is required to supply the rational link between the opinion or inference and the perceived facts, the opinion or inference will not be admissible unless the requirements for expert testimony under OEC 702 have been met."). That is, without further expert testimony, Dr. Callum's proffered testimony could not have been helpful to the jury in any way.

Defendant's trial argument in support of Dr. Callum's testimony shows precisely where that testimony fell short. In an attempt to explain to the court the significance of Dr. Callum's testimony, defendant argued:

> I think his psychological profile also applies to the statements of the guards, because of his poor coping skills and his excessive rumination and his hallucinatory behavior, which, you know, Dr. Callum talked about and this is the nexus * * *, is that people who have poor coping skills, try different strategies, and – *and people make false confessions, and make false statements*.

(Tr 654–55 (emphasis added); *see also* Tr 656 (arguing that, "because of his excessive rumination" and "poor coping skills," defendant "began ruminating * * * and wondering because of his familial origin, if he was turning into the kind of person that would do something like this to his daughter").

If Dr. Callum's testimony actually contained the propositions asserted in defense counsel's argument (if Dr. Callum had testified, for example, that "people with poor coping skills who engage in excessive rumination often make false confessions"), defendant's arguments might have had some merit. But

those connections are missing in Dr. Callum's testimony, and defendant's counsel lacks the expertise to supply those connections by simply arguing them to the court. To hold otherwise would invite creative lawyers to cloak otherwise speculative arguments in the auspices of "science" by putting on carefully curated testimony from an expert who declines to cast a speculative inference as impossible.

3. That deficiency in Dr. Callum's testimony distinguishes this case from expert testimony that federal courts have held to be helpful under the parallel federal rule of evidence.

Those missing connections are what distinguish this case from federal cases in which expert testimony was held admissible to support an inference of false confession. Federal authorities should be persuasive because OEC 702 is modeled on its federal counterpart and because its text remains materially identical with regard to the helpfulness requirement. *See* Commentary to OEC 702 (1981) (noting that OEC 702 "is identical to Rule 702 of the Federal Rules of Evidence," and "adopt[ing] the commentary of the federal advisory committee"); *see also* Fed R Evid 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if * * * the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue * * *."). And the federal rule's helpfulness standard, like Oregon's, is also one that vests discretion in the trial court. *See United*

States v. Hoffman, 832 F2d 1299, 1310 (1st Cir 1987) ("The trial judge has a hands-on familiarity with the nuances of the case—nuances which may not survive transplantation into a cold appellate record. Thus, the district court's assessment of what will or will not assist the jury is entitled to considerable deference in the Rule 702 milieu.").

For example, the Seventh Circuit held that the trial court should have admitted expert testimony to support a defendant's theory that "due to a personality disorder that makes him susceptible to suggestion and pathologically eager to please," the defendant had "'confessed' to a crime that he did not really commit, in order to gain approval from the law enforcement officers who were interrogating him." *United States v. Hall*, 93 F3d 1337, 1341–45 (7th Cir 1996). But in that case, one expert would have testified "that experts in his field agree that false confessions exist, that individuals can be coerced into giving false confessions, and that certain indicia can be identified to show when they are likely to occur." *Id*. at 1341, 1345. Another expert would have testified about the defendant's "susceptibility to various interrogation techniques and his propensity to give a false confession." *Id*. at 1345. But Dr. Callum's testimony in this case contains no similar basis to support inferring that defendant here confessed falsely as a result of his disorder.

The expert testimony that should have been admitted in *United States v.*

Shay, 57 F3d 126, 133 (1st Cir 1995)—a case relied upon in *Hall*, 93 F3d at 1344—is similarly distinguishable because it contained similar testimony linking a disorder to false confessions. In *Shay*, the expert "was prepared to testify that [the defendant] suffered from a mental disorder that caused him to make grandiose statements *similar in nature* to the statements that the government was seeking to use against him." *Shay*, 57 F3d at 133 (emphasis added). That testimony was admissible in *Shay* because the jury "was unqualified to determine without assistance the particular issue of whether [the defendant] may have made false statements against his own interests because he suffered from a mental disorder." *Id*. But in *Shay*, unlike in this case, the expert provided a link between the disorder and false confessions: the expert "would have testified that * * * [the defendant] suffered from a recognized mental disorder that caused him to make false statements even though they were inconsistent with his apparent self-interest." Here, because the record contained no basis for linking defendant's disorder to a false confession, the jurors were unable to draw that link themselves, and the expert testimony was therefore not helpful.

Yet another example can be found in *United States v. Roark*, 753 F2d 991, 994 (11th Cir 1985). There, an expert should have been allowed to testify that the defendant "was extremely susceptible to suggestions and that someone with her level of suggestibility could be 'suggested' into making up untrue

stories." *Id*. The expert also would have testified that the conditions of the defendant's interrogation "made it very possible that she would create stories to please her questioners," and that the defendant's "handwritten confession was seen as being characteristic of her highly suggestible personality." *Id*. The record here, by contrast, contains no evidence that defendant was susceptible to confessing falsely as a result of his disorder, nor does it contain any evidence that his confessions bore any indicia of being produced by his disorder. Instead, Dr. Callum testified generally about defendant's coping skills and rumination, and she opined only that a confession produced by distress was within the "realm of possibility."

Ultimately, the deficiency in this case is no different from the deficiency that supported excluding expert testimony in *United States v. Davis*, 772 F2d 1339, 1344 (7th Cir), *cert den*, 474 US 1036 (1985). In that case, the expert testimony was a diagnosis of compulsive gambling offered in support of an insanity defense to charges of check forging. *Id*. at 1343–44. But that evidence was unhelpful to the fact at issue (the defendant's ability to conform his conduct to the requirements of law) without an explanation of "why a compulsion (or uncontrollable impulse) to gamble translates—seemingly automatically—into an uncontrollable impulse to obtain money illegally with which to gamble." *Id*. at 1344. Here, similarly, the record contains no explanation why an inability to cope or a tendency to obsessively ruminate would translate into a tendency to

confess falsely.

4. Even if Dr. Callum's testimony left no gap that the jury could not bridge, the trial court was permitted to exclude it as unhelpful due to the potential for prejudice and confusion.

This court has recognized that OEC 702 is essentially a special rule of relevancy and prejudice. *Brown*, 297 Or at 417 (recognizing "the relevancy and prejudice analysis implicated in OEC 702's helpfulness standard"). That is, OEC 702 allows a trial court to assess the likelihood of unfair prejudice and confusion when assessing helpfulness.

Here, the testimony did little more than raise the possibility of inferring a false confession, but it was not helpful to the jury's task of assessing the likelihood of that inference. Instead, the testimony was likely to confuse the jury as to how to consider the possibility that defendant raised. At the same time, the testimony was unfairly prejudicial because the aura of science invoked by Dr. Callum could have caused the jury to give her suggestion more weight than her opinion warranted. *See State v. Southard*, 347 Or 127, 140-41, 218 P3d 104 (2009) (fact that a diagnosis "came from a credentialed expert, surrounded with the hallmarks of the scientific method," created substantial risk that jurors would be "overly impressed or prejudiced" by the testimony").

In light of those other considerations, Dr. Callum's testimony was not so clearly helpful as to deprive the trial court of discretion to exclude it. An appellate court should disturb a trial court's helpfulness determination only

when no reasonable judge could disagree about the expert's helpfulness. This case does not present such a circumstance.

CONCLUSION

This court should reverse the decision of the Court of Appeals and affirm the trial court's judgment of conviction.[6]

Respectfully submitted,

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[6] In the alternative, because the state requested OEC 403 balancing at the trial court level, (Tr 644), any error in the OEC 702 analysis should not entitle defendant to the new trial ordered by the Court of Appeals. Rather, if the trial court erred under OEC 702, then this court should remand for trial court to resolve the state's preserved and pending OEC 403 objection. If the trial court would have excluded the evidence under OEC 403, the trial court should reinstate the judgment of conviction; if not, it should hold a new trial.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 20, 2016, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Neil F. Byl, attorneys for appellant, 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 6,996 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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