

FILED: May 21, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

SANTOS CUEVAS,
Defendant-Appellant.

Malheur County Circuit Court
09082394C

A149668

J. Burdette Pratt, Judge.

Argued and submitted on January 02, 2014.

Jesse Wm. Barton argued the cause and filed the brief for appellant.

Matthew J. Lysne, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.*

GARRETT, J.

Affirmed.

*Garrett, J., *vice* Duncan, J.

1 GARRETT, J.

2 Defendant was convicted of three counts of first-degree sodomy, ORS
3 163.405, one count of second-degree sodomy, ORS 163.395, five counts of first-degree
4 sexual abuse, ORS 163.427, and one count of second-degree rape, ORS 163.365. The
5 trial court imposed consecutive sentences on all but two counts, for a total sentence of
6 569 months. On appeal, defendant argues that the trial court erroneously (1) allowed the
7 state to show the jury videotaped interviews of defendant's victims; (2) allowed the state
8 to introduce expert opinion testimony from a lay witness; (3) denied defendant's motion
9 for a mistrial based on the state's closing and rebuttal arguments; and (4) made certain
10 determinations at sentencing that, defendant argues, should have been submitted to the
11 jury. We reject defendant's arguments and, accordingly, affirm the judgment.

12 I. BACKGROUND

13 Defendant was charged with sexually abusing, sodomizing, and raping two
14 of his stepdaughters, S and K, during the several years that he was married to their
15 mother. S and K both came forward to describe the abuse several years after it was
16 alleged to have occurred.

17 Of importance to this appeal are two videotaped interviews that S and K
18 gave at the Sexual Trauma Abuse Response Center (STAR Center). In those interviews,
19 both victims reported numerous instances of sexual abuse, some of which resulted in
20 charges against defendant and some of which did not. S also referenced defendant
21 smoking crystal methamphetamine and blowing the smoke into S's mouth; this conduct

1 was not included in the state's charges against defendant. In the videotapes, S and K also
2 answered personal background questions about topics including their schooling, hobbies,
3 and pets. S and K both testified at the trial about the sexual abuse; much of that
4 testimony reflected what they had described in the STAR Center interviews.

5 Before trial, defendant moved to exclude the STAR Center videotaped
6 interviews, arguing that they contained (1) inadmissible hearsay, (2) evidence that was
7 not relevant under OEC 402, (3) evidence that was unfairly prejudicial under OEC 403,
8 and (4) evidence of other prior bad acts that was not admissible under OEC 404(3).
9 During a hearing on defendant's motion, the state conceded, and the trial court ruled, that
10 the videotaped interview of S was hearsay and that the hearsay exception in OEC
11 803(18a)(b) did not apply.¹ The court then played the videotape of K's STAR Center
12 interview for the record. At the conclusion of the video, defendant objected to several
13 portions of the video. Specifically, defendant argued that, because the interviewer in the
14 video had told K that, during interviews, "we always tell the truth," the STAR Center
15 staff had effectively vouched for K's credibility. Defendant also argued that portions of
16 the video in which K provided personal information were irrelevant and prejudicial
17 because they had the potential to unfairly endear K to the jury. Finally, defendant argued
18 that, to the extent K was describing crimes committed against S, the OEC 803(18a)(b)

¹ As we explained in *State v. Lamb*, 161 Or App 66, 71-72, 983 P2d 1058 (1999), OEC 803(18a)(b) provides that "the hearsay statements of a child victim under the age of 18 are admissible so long as the child victim testifies at the proceeding and is available for cross-examination." S was 18 years old at the time of her STAR Center interview.

1 hearsay exception did not apply.

2 The trial court agreed that K's descriptions of defendant committing crimes
3 against S were inadmissible hearsay and would need to be redacted. The court ruled that
4 the other portions of the videotape were admissible under OEC 803(18a)(b), OEC 401,
5 and OEC 403. The court explained its reasoning as follows:

6 "I don't view the description of the rules as being vouching. [The
7 staff person] didn't say anything about whether she believed [K] or not, she
8 simply said, 'These are the rules. We want you [to] tell the truth, we want
9 you to follow these rules.' And certainly, I think it's significant and
10 important for the jury to hear that to understand the setting for the--her later
11 discussion. The same thing with the small talk, if you will, about who [K]
12 is and where [K] lives and so forth. Certainly, if [the staff person] simply
13 walked in, sat down, and says, 'Okay, tell me about your sexual abuse' the
14 jury should have the right to understand that also. I think the jury has the
15 right to understand the context in which these discussions took place. I
16 don't see anything prejudicial about that. They are simply, 'Where do you
17 live? [What] are your favorite classes?' Those kinds of things. It simply
18 sets the tone and lets the jury understand what the circumstances and the
19 environment [were]."

20 The state did not introduce either videotape during its case-in-chief. During
21 defendant's opening statement, defendant's counsel suggested that the children's mother
22 had convinced S and K to lie about defendant's abuse because she was angry about
23 defendant's infidelity and the fact that he had impregnated another woman. Defendant
24 questioned Ontario Police Detective Rodriguez and criticized the police investigation as
25 deficient in numerous respects. In particular, Rodriguez testified that police had relied
26 almost exclusively on the STAR Center interviews and had not done follow-up
27 interviews with S or K, their mother, defendant, or other family members.

28 Rodriguez responded to the state's question about the STAR Center staff's

1 ability to investigate crimes by testifying that he "was satisfied with the interview that
2 took place." He also explained that he had not personally interviewed S or K because he
3 believed that they would feel uncomfortable speaking to a male police officer and that,
4 based on his past dealings with defendant and his family, he believed that it would have
5 been counterproductive to contact them about the investigation.

6 Having previously authenticated the two videotaped STAR Center
7 interviews, the state moved to admit them on the ground that, because defendant had
8 made an issue of the adequacy of the investigation, the recordings were admissible for the
9 nonhearsay purpose of showing that Rodriguez's investigation was adequate. The trial
10 court admitted the recordings over defendant's objections:

11 "I'm allowing it in--[defense counsel] raised the issue as to whether or not
12 the length of the interviews [was] sufficient given the timeframe. And I'm
13 going to allow it in so that the jurors can see what the interview consisted
14 of so they can determine whether or not, under the circumstances, it was an
15 appropriate investigation. That's the issue [the defense has] been raising:
16 [W]as this an appropriate investigation? Did you talk to certain people?
17 The interview wasn't long enough given the circumstances. Given that
18 issue, the content of the interview is significant as to whether it was an
19 appropriately long interview. And so you can't criticize the length and then
20 not allow the jury to see the content so they can determine whether or not it
21 was an appropriately lengthy interview."

22 Before playing the videotapes for the jury, the court issued the following
23 limiting instruction:

24 "[The tapes are] not being offered to prove the truth of what was being said.
25 In other words, you should not view them from the standpoint of whether or
26 not what is being said is true or not. But the issue has been raised as to
27 whether or not the interviews were lengthy enough and were--whether or
28 not the interviews were adequate. And so I'm going to--I'm admitting [the
29 tapes] for the purpose of allowing you to see the content of those interviews

1 so you can make that judgment as to whether or not the time and length of
2 the interview was adequate. But you should not accept what is being said
3 there as necessarily being true."

4 This appeal also concerns the testimony of a former Department of Human
5 Services caseworker who had visited the family's home in 1998 to investigate a report of
6 unsanitary living conditions. The former caseworker, Hansen, testified that she found the
7 report to be unsubstantiated and that "[e]verything appeared fine" at the house.

8 Defendant did not ask Hansen about sexual abuse. During cross-examination, the state
9 asked whether Hansen had been sent to investigate sexual abuse and whether anyone
10 reported sexual abuse during her visit. Hansen answered "no" to both questions. The
11 state then asked, "[I]s it your experience that kids automatically just tell you if they're
12 being sexually abused?" Defendant objected, and the court excused the jury.

13 Defendant argued that, to the extent that Hansen intended to testify
14 generally about the behaviors of sexually abused children, such testimony is scientific
15 evidence that Hansen was unqualified to offer. Defendant also argued that the state's
16 questioning went beyond the scope of direct examination of Hansen. The state then
17 attempted to lay a proper foundation for the introduction of scientific evidence. Hansen
18 testified that she had worked for child protective services for a total of 13 years; that she
19 had a bachelor's degree in social work; and that she had received specialized training in
20 "child sexual abuse, on neglect, on psychological damage, law enforcement issues on
21 how to interview, those types of things." She stated that she had worked on 100 cases
22 involving child sexual abuse and had testified as an expert witness "on the issue of child

1 sexual abuse" more than 20 times. She also acknowledged, however, that she was not a
2 licensed psychologist and that she was not "qualified to do psychological evaluations."

3 The court ruled that Hansen would be allowed to testify about her own
4 experience with children who were victims of sexual abuse but would not be allowed to
5 offer scientific evidence.² Hansen then testified:

6 "[THE STATE]: Now, over the course of your career, have you had an
7 experience to interview a kid who would not disclose any form of abuse,
8 but years later, the abuse was corroborated?"

9 "[HANSEN]: Yes.

10 "[THE STATE]: How many times?"

11 "[HANSEN]: More so than having them report abuse at the time--the first
12 time of interview.

13 "* * * * *

² Specifically, the court ruled:

 "THE COURT: * * * I'm going to allow the testimony as to what she has experienced, but I think when she starts--when you got to the point where she was testifying as to what victims of sex abuse do and why, I think that the--I don't think she's--I don't think you've laid the appropriate foundation for that. I'll allow her to testify as to what she's experienced in terms of interviewing children and non-disclosure, because that's basically--that's simply her experience.

 "[THE STATE]: I'm assuming she can get into that her experience has been--kids who she's talked to who didn't disclose, but then later it was confirmed that they were being abused. . .

 "THE COURT: Correct, but as to why children don't disclose, I think that gets into the scientific area."

1 "[THE STATE]: And in your career, even when children disclosed abuse,
2 did you ever see those same children displaying affection towards the
3 person that abused them?

4 "[HANSEN]: Yes.

5 "[THE STATE]: How frequently did that occur?

6 "[HANSEN]: Most all the time.

7 "[THE STATE]: So the--based on your training and experience, they didn't
8 show tremendous fear of the abuser?

9 "[HANSEN]: Not mostly. Children love their parents.

10 "[THE STATE]: Specific kids. Not general.

11 "[HANSEN]: Specific kids--general--the kids that I have interviewed * * *
12 still love their parents when they come in and report things. So there is a
13 part of--a small percentage of those that are absolutely fearful. But for the
14 most part, children still love their parents--the ones that I have
15 interviewed."

16 During its closing argument, the state displayed a PowerPoint slide that
17 asserted that "[a] 30-minute interview is more than enough" and reminded the jury that
18 "[y]ou saw the interviews"; "[y]ou saw the demeanor of the girls"; and "Detective
19 Rodriguez had more than enough." The prosecutor also told the jury,

20 "You saw what the officers did in their investigation, you heard the defense
21 counsel claim that 30 minutes is not enough and that somehow Detective
22 Rodriguez did a lousy investigation. You had an opportunity to see the
23 investigation that was done in this case. You saw--had the opportunity to
24 look at the demeanor that Detective Rodriguez relied on in submitting this
25 case. You saw the STAR interview. You saw these kids on the stand."

26 Defendant objected and requested a mistrial, arguing, among other things, that the
27 PowerPoint slide and the prosecutor's remarks amounted to impermissible comments on
28 the credibility of S and K. The trial court denied the motion and declined to give a

1 A. *First and Second Assignments of Error: STAR Center Interviews*

2 Defendant's arguments on appeal differ in part from the arguments that he
3 raised to the trial court. He now argues that it was error for the court to admit the videos
4 because (1) the recorded interviews were outside the scope of defendant's cross-
5 examination; (2) the STAR Center staff's comments constituted an impermissible
6 comment on witness credibility; and (3) the admission of the videos violated defendant's
7 rights to confront his accuser. In addition, defendant argues that the videos should have
8 been redacted before being shown to the jury because some portions of them were
9 irrelevant and other portions contained allegations that defendant committed other
10 uncharged crimes and bad acts.³

11 As an initial matter, we address the state's assertion that several of those
12 arguments are not preserved. In order to preserve a claim of error, "a party must provide
13 the trial court with an explanation of his or her objection that is specific enough to ensure
14 that the court can identify its alleged error with enough clarity to permit it to consider and
15 correct the error immediately, if correction is warranted." *State v. Wyatt*, 331 Or 335,
16 343, 15 P3d 22 (2000); ORAP 5.45(4). A pretrial evidentiary ruling typically preserves
17 associated claims of error even if the issue is not relitigated during the trial itself. *State v.*
18 *Cole*, 323 Or 30, 35, 912 P2d 907 (1996) ("Once an evidentiary ruling is made pretrial,
19 the lack of later relitigation of the same issue, even where a statute permits relitigation on

³ Defendant also argued to the trial court that the videos should be excluded because their probative value was outweighed by the danger of unfair prejudice. *See* OEC 403. Because defendant does not reprise that argument on appeal, we do not address it.

1 a discretionary basis, does not render any claim of error associated with the ruling
2 unpreserved.").

3 First, we agree with the state that defendant did not preserve his argument
4 regarding the right to confrontation. The record reflects that, apart from a fleeting and
5 isolated reference to "defendant's rights to confrontation and due process under
6 Amendments VI and XIV of the United States Constitution and Article I, section 11, of
7 the Oregon Constitution" in defendant's motion to exclude the STAR Center videos,
8 defendant never actually made an argument as to how the introduction of the videos
9 denied him the right to confront his accusers. We will not address an argument that the
10 trial court did have an opportunity to consider.

11 The state also argues that defendant failed to preserve his argument that
12 statements in the videos were an "improper comment on the credibility of the victims."
13 The state correctly points out that defendant did not raise this argument during the trial
14 itself. Nevertheless, we conclude that defendant sufficiently preserved the issue for
15 appeal. During the hearing on defendant's pretrial motion to exclude the video
16 recordings, defendant argued that the portions of K's video in which STAR Center staff
17 "describe[] all of the rules" were not admissible. Defendant specifically cited the phrase
18 "[w]e always tell the truth in here" and argued that that staff person was "basically telling
19 the jury 'You're going to tell the truth in here.'" Defendant then argued that that comment
20 "violated [*State v. Southard*, 347 Or 127, 218 P3d 104 (2009),] and every vouching case
21 that's ever existed." The trial court rejected defendant's arguments, explaining, "I don't

1 view the description of the rules as being vouching. [The staff person] didn't say
2 anything about whether she believed [K] or not, she simply said, "These are the rules. We
3 want you [to] tell the truth, we want you to follow these rules." The lack of later
4 relitigation did not render defendant's argument unpreserved. *Cole*, 323 Or at 35.

5 We now turn to defendant's arguments that are properly before us on
6 appeal, beginning with the assertion that the trial court should not have admitted the
7 STAR Center videotapes during the state's cross-examination of Rodriguez because they
8 contained material that was beyond the scope of the direct examination. Under OEC
9 611(2), "[c]ross-examination should be limited to the subject matter of the direct
10 examination and matters affecting the credibility of the witness." Questions on cross-
11 examination "should not be limited to the exact facts stated on direct examination, but
12 [may] extend[] to other matters which tend to limit, explain, or qualify them, or to rebut
13 or modify any inference resulting therefrom, provided they are directly connected with
14 the matter stated in the direct examination." *Ritchie v. Pittman*, 144 Or 228, 231, 24 P2d
15 328 (1933). A trial court's ruling as to whether a line of questioning during cross-
16 examination exceeds the scope of the direct examination is reviewed for errors of law.
17 *State v. Wirfs*, 250 Or App 269, 274, 281 P3d 616, *rev den*, 352 Or 377 (2012).

18 We reject defendant's argument that the videotapes contained material that
19 went beyond the scope of direct examination. Defendant pursued a theory at trial that the
20 girls' mother had persuaded them to falsely accuse defendant in retaliation for defendant's
21 extramarital affair some years earlier and that police failed to uncover that because they

1 were negligent in investigating the girls' allegations. Consistently with that theory,
2 defense counsel's direct examination of Rodriguez placed the adequacy of the
3 investigation--and, specifically, the sufficiency of the STAR Center interviews--squarely
4 at issue. The trial court correctly allowed the prosecution to respond by introducing the
5 videotaped interviews so that the jury could assess the validity of defendant's contention
6 that the interviews were inadequate.

7 With respect to defendant's second argument, it is well settled that a witness
8 may not testify that, in his or her opinion, another witness is telling the truth. *State v.*
9 *Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983); *see also State v. Milbrant*, 305 Or
10 621, 629, 756 P2d 620 (1988) ("The assessment of credibility is for the trier of fact * *
11 *."). Nor may a witness offer testimony that, when viewed in the context of the trial
12 proceedings, is "tantamount to stating that another witness is truthful." *State v. Viranond*,
13 346 Or 451, 458, 212 P3d 1252 (2009) (quotation marks omitted). Here, defendant
14 argues that the portion of the STAR Center video in which a staff member tells K during
15 the interview that "we always tell the truth" was a comment on K's credibility.

16 We disagree. At most, that comment expressed the interviewer's
17 expectation that K answer her questions honestly; it did not imply that the interviewer
18 actually believed that K had been honest during her interview. Indeed, the "we always
19 tell the truth" comment was made before the interview with K had even begun in earnest.
20 Thus, the jury would have understood that the staff member was not yet in the position to

1 form, let alone express, an opinion about K's honesty.⁴

2 Defendant's final argument is that certain portions of the videos should
3 have been redacted. We conclude that, even if it was error to admit the STAR Center
4 videotapes without redacting irrelevant material or references to defendant's other bad
5 acts, it was harmless error. An error is harmless if there is little likelihood that it affected
6 the verdict. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). Here, defendant first
7 argues that the videos "contained irrelevant personal background information about [the
8 victims'] likes and dislikes." As we understand it, that argument refers to portions of the
9 videos in which the STAR Center staff began the interviews by briefly asking S and K
10 about school, pets, and hobbies. At trial, defendant argued that that information was
11 prejudicial because it would endear S and K to the jury. We conclude that there was little
12 likelihood that the jury's verdict was affected by S and K's brief answers to the types of
13 basic personal background questions that were asked in this case.

14 Defendant also argues that OEC 404(3) required that any references to
15 "other crimes, acts, or wrongs" be redacted from the video. For the most part, the
16 videotapes mirror the in-court testimony of S and K. It is true, however, that S briefly
17 mentioned other bad acts committed by defendant; S said that defendant had blown
18 crystal methamphetamine smoke into her mouth, and she briefly described an incident of

⁴ The record also reflects that the staff member who conducted K's interview never testified at trial. As we explained in *State v. Brooks*, 247 Or App 676, 681 n 2, 270 P3d 388, *rev den*, 352 Or 265 (2012), "*Middleton* and its progeny only preclude comments about the credibility of a witness, whether that witness testifies or not, by *another witness at trial*." (Emphasis in original.)

1 sexual abuse that does not appear to have been charged. But S testified in person and
2 without objection that defendant had touched her "in a sexual way" "[h]undreds of times"
3 and "[p]retty much on a daily basis." Given that testimony, the passing references in the
4 video to uncharged conduct were unlikely to have a significant impact on the jury.
5 Finally, and most critically, the jury was specifically instructed not to accept the
6 statements made on the video as substantive evidence. We presume that the jury
7 followed those instructions. *State v. Thompson*, 328 Or 248, 271, 971 P2d 879, *cert den*,
8 527 US 1042 (1999); *see also State v. Hennagir*, 246 Or App 456, 266 P3d 128 (2011),
9 *rev den*, 352 Or 33 (2012) (holding that a similar cautionary instruction rendered
10 harmless any error in the court's failure to redact portions of a video).

11 B. *Third Assignment of Error: Denial of Motion for a Mistrial*

12 Defendant moved for a mistrial, arguing (as relevant on appeal) that the
13 prosecutor's rebuttal statement and Rodriguez's testimony were improper comments on
14 the credibility of S and K. Defendant also requested that the court instruct the jury not to
15 consider any assessment by Rodriguez of the girls' demeanor during the interviews. The
16 trial court denied the motion for a mistrial and refused to give defendant's requested
17 instruction. Defendant challenges both rulings in his third assignment of error.

18 We review a trial court's ruling denying a motion for mistrial for abuse of
19 discretion. *State v. Arreola*, 250 Or App 496, 500, 281 P3d 634, *rev den*, 353 Or 103
20 (2012). Denial of a mistrial motion will be deemed error only "when a defendant's ability
21 to obtain a fair trial has been impaired." *State v. Vann*, 158 Or App 65, 72, 973 P2d 354

1 (1999).

2 There is no indication in the record that Rodriguez explicitly vouched for
3 the credibility of either witness. The issue, therefore, is whether, in context, Rodriguez's
4 statements were tantamount to testimony that those witnesses were credible. The context
5 for Rodriguez's remarks includes the facts that the STAR Center videos were introduced
6 in order to demonstrate that Rodriguez conducted "an appropriate investigation" and that
7 the prosecutor referenced the "demeanor" of S and K while discussing the videos during
8 his rebuttal argument.

9 Defendant argues that Rodriguez's testimony suggested that "he found the
10 interviews so satisfactory that he concluded he could arrest defendant straight away, with
11 no further investigation." Defendant then argues that, in light of the purpose for which
12 the videotapes were admitted, the jury would necessarily be invited to conclude that
13 Rodriguez believed that S and K were telling the truth. We disagree, however, with
14 defendant's characterization of Rodriguez's remarks. Most of Rodriguez's testimony
15 consisted of various explanations about why further interviews would not be productive.
16 Although it is true that, at one point, Rodriguez testified that he was "satisfied with the
17 [STAR Center] interviews that took place," that answer cannot be understood as a
18 comment on the credibility of either S or K. Rather, that response came in answer to
19 defendant's questions about the STAR Center staff's training. In other words, Rodriguez
20 avoided directly commenting on the credibility of either victim.⁵

⁵ Defendant is correct that all of the evidence that he is challenging tends to show

1 The state's reminder to the jury that it "had the opportunity to look at the
2 demeanor that Detective Rodriguez relied on in submitting this case" presents a closer
3 question. We conclude, however, that the trial court was not required to grant a mistrial.
4 First, the state's rebuttal argument came in response to defendant's argument that the
5 police investigation was inadequate. The trial court properly gave the state latitude to
6 respond by arguing that the STAR Center interviews were sufficient. *State v. Guritz*, 134
7 Or App 262, 270, 894 P2d 1235, *rev den*, 321 Or 560 (1995) (stating that "[t]he
8 prosecutor has the right * * * to reply to argument made by opposing counsel, and, in
9 doing so, statements may be made which otherwise would be improper"). Furthermore,
10 although the trial court did not give a curative instruction after the prosecutor made those
11 remarks, the court had already instructed the jury not to view the videos "from the
12 standpoint of whether or not what is being said is true or not" but rather "whether or not
13 the time and length of the interview was adequate." Under those circumstances,
14 defendant's ability to receive a fair trial was not impaired.

15 C. *Fourth Assignment of Error: Hansen's Testimony*

16 In his fourth assignment of error, defendant argues that the trial court erred
17 in (1) allowing testimony from Hansen that exceeded the scope of direct examination,
18 and (2) having concluded that Hansen was not a qualified "expert witness," nonetheless

that S and K were telling the truth. That alone, however, does not make Rodriguez's remarks improper. *See Viranond*, 346 Or at 460 (holding that testimony does not amount to impermissible vouching simply because it tends to rehabilitate the credibility of other witnesses); *Middleton*, 294 Or at 435 (noting that many times the testimony of one witness will "tend to show that another witness either is or is not telling the truth").

1 allowing Hansen to testify "as if she were an expert." We review the trial court's
2 evidentiary rulings for errors of law. *State v. Sanchez-Alfonso*, 352 Or 790, 797, 293 P3d
3 1011 (2012).

4 First, we conclude that Hansen's testimony on cross-examination was not
5 beyond the scope of direct examination just because the prosecution asked questions
6 about sexual abuse. We agree with the state that the purpose and relevance of defendant's
7 direct examination of Hansen was to support an inference that, because things appeared
8 to be "fine" during her visit, it was less likely that defendant was abusing S or K at or
9 around that time. Because the inference that defendant was asking the jury to draw was
10 directly connected to Hansen's testimony about her observations, the prosecution was
11 entitled to refute that inference on cross-examination, "even to the extent of inquiring into
12 a different set of facts than those that were elicited on direct." *State v. Stevens*, 328 Or
13 116, 133, 970 P2d 215 (1998).

14 With respect to defendant's second argument, defendant incorrectly
15 characterizes the trial court's ruling as being that "Hansen was not qualified to testify as
16 an expert witness." The record indicates that Hansen had relevant training and
17 experience in the field of child-abuse investigations and that the court properly allowed
18 her to testify as an expert on those issues. Because Hansen did not have specialized
19 training in the field of child psychology, the court ruled that she was not qualified to offer
20 *scientific* evidence about the behavior of child sexual abuse victims. Although the line
21 between those two types of expert testimony "may be fine, it is not artificial." *State v.*

1 *Rambo*, 250 Or App 186, 195, 279 P3d 361 (2012), *rev den*, 353 Or 203 (2013). The
2 distinction is that "[s]pecialized expert opinion evidence based on a witness's training and
3 experience draws its force from that training and experience, but not necessarily from the
4 mantle of science." *Id.* By contrast, scientific evidence is that which "draws its
5 convincing force from some principle of science, mathematics and the like." *State v.*
6 *Brown*, 297 Or 404, 407, 687 P2d 751 (1984). Whether testimony is scientific "depends
7 primarily on 'whether the trier of fact will perceive the evidence as such.'" *State v.*
8 *Whitmore*, 257 Or App 664, 670, 307 P3d 552 (2013) (quoting *State v. Marrington*, 335
9 Or 555, 561, 73 P3d 911 (2003)). "[T]he key question in determining whether proffered
10 testimony is 'scientific,' and thus requires a special foundation, is 'whether the expert's
11 assertions possess significantly increased potential to influence the trier of fact as
12 scientific assertions.'" *Rambo*, 250 Or App at 193 (quoting *Marrington*, 335 Or at 561-
13 63).

14 We agree with the state and the trial court that Hansen's testimony on cross-
15 examination was not impermissible *scientific* evidence. The issue here is similar to what
16 we confronted in *State v. Clemens*, 208 Or App 632, 145 P3d 294 (2006), *rev den*, 342 Or
17 299 (2007). *Clemens* involved the testimony of the investigating officer, Robles, who
18 "had relevant training and experience in the area of child sexual abuse investigations, but
19 not * * * any relevant or specialized education or knowledge in the field of psychology
20 and child behavior." *Id.* at 638-39. During trial, Robles testified that "the victim's
21 statement was generally consistent with the nonchronological reporting patterns of child

1 abuse victims." *Id.* at 635. We concluded that Robles's statement was not scientific
2 evidence:

3 "The disputed portion of his testimony * * * did not 'involve the vocabulary
4 of scientific research.' Nothing in Robles's testimony suggested to the court
5 that his opinions were 'grounded on conclusions that have been reached
6 through application of a scientific method to collected data.' Further, by its
7 comments the court made clear that it was aware of the difference between
8 testimony based on personal experience, such as that provided by Robles,
9 and testimony that is scientific in nature. Based on the record as a whole,
10 then, we conclude that Robles's disputed statement retained no 'increased
11 potential' to influence the trier of fact as a scientific assertion."

12 *Id.* at 639 (quoting *Marrington*, 335 Or at 563).

13 The same reasoning applies here. The trial record reflects that the
14 prosecutor's questions and Hansen's answers were explicitly framed in terms of her own
15 career, training, and experience. Hansen did not refer to studies, research, scholarly
16 literature, or anything else that would cause a jury to infer that her testimony was based
17 on more than her personal experience, as in the cases that defendant cites on appeal. *See*,
18 *e.g.*, *State v. Perry*, 347 Or 110, 218 P3d 95 (2009). Hansen's testimony thus did not
19 draw its convincing force from some principle of science. *See also Rambo*, 250 Or App
20 at 195 (holding that trial court did not err in admitting testimony that drew its force from
21 training and experience rather than "the mantle of science"). The trial court did not err by
22 admitting her testimony.

23 D. *Fifth Assignment of Error: Sentencing*

24 At sentencing, the trial court determined that all of defendant's felony
25 convictions, except for the merged Counts 2 and 6, and Counts 4 and 8, were separate

1 criminal episodes. Three consequences flowed from that determination. First, the court
2 could impose consecutive sentences. *See* ORS 137.123 (allowing a court to impose
3 consecutive sentences when a defendant is "simultaneously sentenced for criminal
4 offenses that do not arise from the same continuous and uninterrupted course of
5 conduct"). Second, each time the trial court passed sentence on a count representing a
6 separate criminal episode, the court considered that count to be part of defendant's
7 criminal history for the purpose of the remaining counts. *See State v. Bucholz*, 317 Or
8 309, 314, 855 P2d 1100 (1993) ("Nothing in the wording of the criminal history rule
9 excludes consideration of the conviction for a separately occurring crime merely because
10 the two separate crimes are sentenced on the same day and in the same session of
11 court."). Third, the so-called "shift-to-I" rule did not apply.⁶ *Orchard v. Mills*, 247 Or
12 App 355, 358, 270 P3d 309 (2011), *rev den*, 352 Or 33 (2012) ("[T]he 'shift-to-I' rule

⁶ The "shift-to-I" rule refers to Oregon's 99-block Sentencing Guidelines Grid. A trial judge uses those guidelines in the following manner:

"A sentencing judge uses the grid to determine the proper sentence for a given conviction by, first, identifying the appropriate category for the crime of conviction on the vertical crime seriousness scale; then, determining the appropriate category for the convicted offender on the horizontal criminal history scale; and, finally, locating the grid block where the two categories intersect.

"The criminal history scale classifies an offender's history according to the number and nature of the offender's prior convictions. OAR 213-004-0006(1). The scale consists of nine categories, ranging from 'A' (the highest) to 'I' (no criminal history)."

State v. Burns, 259 Or App 410, 414, 314 P3d 288 (2013) (citations omitted).

1 applies only when consecutive sentences are imposed for crimes that arise from a single
2 criminal episode.").

3 Crimes arise from different criminal episodes when they are not part of the
4 same "continuous and uninterrupted conduct that * * * is so joined in time, place and
5 circumstances that such conduct is directed to the accomplishment of a single criminal
6 objective." ORS 131.505(4). On appeal, defendant does not challenge the trial court's
7 decision to impose consecutive sentences. He concedes, in other words, that the court
8 was permitted to make the factual determination that his crimes were separate criminal
9 episodes and then to impose consecutive sentences based on that fact. Defendant argues,
10 however, that that same factual finding cannot be used as a basis to increase his criminal
11 history score and to avoid the shift-to-I rule.

12 Defendant's argument is based on *Apprendi v. New Jersey*, 530 US 466,
13 120 S Ct 2348, 147 L Ed 2d 435 (2000), and *Blakely v. Washington*, 542 US 296, 124 S
14 Ct 2531, 159 L Ed 2d 403 (2004). Those cases stand for the proposition that the Sixth
15 Amendment to the United States Constitution requires that, "[o]ther than the fact of a
16 prior conviction, any fact that increases the penalty for a crime beyond the prescribed
17 statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."
18 *Apprendi*, 530 US at 490. That rule is easily applied when, for example, a conviction
19 entered years earlier, during a different proceeding, operates to increase the penalty for a
20 subsequent conviction. Under such circumstances, the "prior conviction" exception
21 would apply and the trial court would be permitted to determine the defendant's criminal

1 history. *Apprendi*, however, did not address whether, in the course of determining that a
2 prior conviction exists, a trial court is also permitted to determine certain predicate facts,
3 such as whether multiple convictions arose out of separate criminal episodes.

4 That is precisely the issue we addressed in *State v. Mallory*, 213 Or App
5 392, 162 P3d 297 (2007), *rev den*, 344 Or 109 (2008). In that case, we cited with
6 approval *U.S. v. Harris*, 447 F3d 1300, 1304 (10th Cir 2006), in which the Tenth Circuit
7 observed that

8 "[t]he time, place, and substance of the prior convictions can ordinarily be
9 ascertained from court records associated with those convictions, and the
10 Supreme Court has held that the Constitution allows sentencing courts to
11 rely on such records to make findings about prior convictions."

12 We noted, however, that a "separate criminal episode" determination *cannot* always be
13 made simply by referring to the court's records. That is so because

14 "a factfinder in a criminal case does not necessarily have the opportunity or
15 responsibility to determine the scope of the criminal episode or episodes
16 involved in the case. Stated differently, a factfinder in a criminal case often
17 makes no finding of fact that conclusively determines the temporal,
18 locational, and circumstantial scope of the episode at issue, because the
19 determination of those matters is not necessary to adjudicate the defendant's
20 guilt of a particular offense. Thus, for example, a factfinder's verdict that a
21 defendant committed theft of property belonging to a particular victim on a
22 particular date does not necessarily conclusively determine whether a
23 separate conviction for a different theft from the same victim on the same
24 date arose from the same criminal episode. To make that determination, it
25 is necessary to consider the relationship of the crimes in time, place, and
26 circumstance."

27 *Mallory*, 213 Or App at 402. Thus, in *Mallory*, we concluded that "[t]he conclusion of
28 'separateness' * * * does not implicate the requirements of *Apprendi* and *Blakely*, unless it
29 requires *factfinding beyond a determination of what is in the court records.*" *Id.* at 405

1 (emphasis added).

2 After our decision in *Mallory*, the United States Supreme Court issued its
3 opinion in *Oregon v. Ice*, 555 US 160, 129 S Ct 711, 172 L Ed 2d 517 (2009), which held
4 that *Apprendi* does not apply to "[t]he decision to impose sentences consecutively." 555
5 US at 168. In that case, the Supreme Court construed *Apprendi* and *Blakely* as applying
6 to any finding of fact that "increases the maximum punishment authorized *for a*
7 *particular offense*." *Id.* at 163 (emphasis added). The Court declined to extend the rule
8 to the finding of "any fact declared necessary to the imposition of consecutive, in lieu of
9 concurrent, sentences." *Id.*

10 As noted above, defendant does not argue that *Apprendi* and *Blakely*
11 precluded the trial court from imposing consecutive sentences on the basis of the court's
12 finding of separate criminal episodes. Such an argument would have been foreclosed by
13 *Ice*. Defendant argues, rather, that the finding of separate criminal episodes by the trial
14 court could not be used to enhance the penalties for particular crimes through the court's
15 calculation of defendant's criminal history score and the avoidance of the shift-to-I rule.

16 We agree with defendant in part. As mentioned above, the jury convicted
17 defendant of 10 counts; the trial court determined that the 10 counts comprised a total of
18 eight separate criminal episodes. The jury was not asked to determine the precise dates
19 of those episodes. The jury was, however, instructed that, in order to find defendant
20 guilty for a particular count, it had to find that the crime occurred while the family was
21 living at a particular address. Therefore, the jury found that three crimes (Count 1, Count

1 3, and Count 7) occurred when the family was living in a home on 2nd Avenue in
2 Ontario; that three crimes (Count 5, Count 9, and Count 10) occurred when the family
3 was living in a home on 1st Avenue in Ontario; and that the remaining crimes occurred
4 after the family moved to Nyssa (including Count 2 and Count 4).⁷ In other words, the
5 "court records" reflect that defendant's crimes were committed during three distinct
6 periods of time, at three different locations. Under *Mallory*, the trial court was permitted
7 to rely on those records to find that crimes occurring during different time periods and at
8 different locations were part of separate criminal episodes.

9 We reach a different conclusion, however, for the crimes that occurred
10 within the same time period and at the same location. As to those crimes, the only way
11 that the trial court could have concluded that they arose from separate criminal episodes
12 was to conduct additional "factfinding beyond a determination of what is in the court
13 records." *Mallory* teaches that that was error under *Apprendi* and *Blakely*.

14 We also conclude, however, that that error was harmless. A federal
15 constitutional error does not require reversal "if the reviewing court may confidently say,
16 on the whole record, that the constitutional error was harmless beyond a reasonable
17 doubt." *State v. Cook*, 340 Or 530, 544, 135 P3d 260 (2006). Applying that standard, we
18 have found a similar sentencing error to be harmless where "the testimony of the victim *
19 * * clearly established that each of the offenses was a separate incident; that is, they each
20 occurred at different times and at different locations over a period of years." *State v.*

⁷ Again, Counts 6 and 8 were merged into other crimes and, therefore, we do not consider them for the purposes of our sentencing analysis.

1 *Bowen*, 220 Or App 380, 383, 185 P3d 1129, *rev den*, 345 Or 415 (2008) (quotation
2 marks omitted). The same is true here.

3 There was no testimony that defendant abused S and K together at or near
4 the same time. Thus, one could reasonably conclude that all of defendant's crimes
5 against S were separate episodes from his crimes against K. That leaves only two pairs
6 of crimes that occurred at the same location involving the same victim: Counts 3 and 7
7 (involving S, at the 2nd Avenue house) and Counts 9 and 10 (involving S, at the 1st
8 Avenue house).

9 The uncontradicted testimony at trial establishes that Counts 3 and 7, and
10 Counts 9 and 10, were all separate criminal episodes. S testified that, with respect to the
11 charges in Count 7, defendant abused her when she was "[a] kindergartner." With respect
12 to Count 3, she described an act of first-degree sodomy that occurred when she was in
13 first grade. S testified that the conduct in Count 9--sexual abuse that occurred while S
14 was playing on a bunk bed ladder in her sister's room--happened "right when we moved"
15 to the house on 1st Avenue when she was nine years old. By contrast, in describing the
16 conduct constituting Count 10, S testified that defendant raped her in her "mom's room"
17 after he sent her sisters outside to play. That incident occurred when she was nine or 10.
18 None of that testimony was contradicted at trial. Accordingly, we can "confidently say *
19 * * beyond a reasonable doubt" that the conduct at issue was not "joined in time, place
20 and circumstances" and was directed towards the accomplishment of different criminal
21 objectives. Consequently, any sentencing error based on the court's findings of separate

1 criminal episodes was harmless.

2 III. CONCLUSION

3 In summary, we conclude that the trial court did not err in admitting the
4 STAR Center videotapes. The videotapes did not contain material that was beyond the
5 scope of defendant's direct examination or that constituted a comment on witness
6 credibility. Furthermore, any failure to redact portions of the videos was harmless. We
7 conclude that neither the prosecutor's rebuttal statement nor Detective Rodriguez's
8 testimony contained improper comments on the credibility of a witness. We conclude
9 that Hansen's testimony was not beyond the scope of defendant's direct examination and
10 that she did not offer scientific evidence during the state's cross-examination. Her
11 testimony was based on her training and experience. Finally, we conclude that the trial
12 court did err when it calculated defendant's criminal history score and declined to apply
13 the shift-to-I rule based on the court's own finding of separate criminal episodes. That
14 error, however, was harmless because the uncontroverted testimony at trial established
15 that the criminal episodes were separate.

16 Affirmed.