IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RICHARD RAY CONE,
Defendant-Appellant.

Jefferson County Circuit Court
13CR09206; A157670

Annette C. Hillman, Judge.

Submitted November 15, 2016.

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

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jonathan N. Schildt, Assistant Attorney General, filed the brief for respondent.

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

GARRETT, J.

Affirmed.

Duncan, J. pro tempore, dissenting.

GARRETT, J.

Defendant appeals a judgment of conviction for one count of sexual abuse in the first degree, ORS 163.427. On appeal, defendant raises two assignments of error. We reject without discussion the second assignment, which challenges the proportionality of defendant's sentence under *State v. Rodriguez/Buck*, 347 Or 46, 217 P3d 659 (2009). We write to address the first assignment, in which defendant argues that the trial court plainly erred in failing to *sua sponte* strike the testimony of a witness who said that she "totally believed" the victim's disclosure of abuse. For the reasons explained below, we conclude that the trial court did not plainly err, and we therefore affirm.

Defendant was charged by indictment with one count of first-degree sexual abuse based on his alleged contact with a 13-year-old girl, B. Defendant waived his right to a jury trial. At the bench trial, the state presented evidence consisting of B's own testimony as well as the testimony of witnesses who described what B had told them about defendant's actions.

The evidence established that defendant moved in with B, her mother, and her older brother when B was seven or eight years old. B testified that in November or December 2012, when she was 13, defendant touched her vaginal area over her clothes. B testified that she shared that information with her friend, D, within several days of the incident. Several months later, in March or April 2013, B and D together told D's mother, Strawn, about the incident. Strawn testified that she did not immediately share B's disclosure with authorities because B had asked her not to, explaining that she feared the consequences if defendant got in trouble because he was the sole provider for the family. In the course of the state's direct examination of Strawn, the prosecutor asked Strawn to describe her reaction to B's disclosure, and Strawn testified, "That it wasn't right. I was a little bit, you know, a little shocked at it, because [defendant's] always been, you know, so, like a father figure to her. But, I mean, I totally, I believed her."

There was also evidence that after making her disclosures to D and Strawn, B told her mother about the

incident. According to the mother's testimony, B told her that defendant had touched her by the "buttocks" and "crotch," and that B responded by kicking him and leaving the room. B's mother told B to let her know if it happened again, but she did not confront defendant or otherwise disclose the incident.

The incident came to the attention of police in July 2013 when the Department of Human Services (DHS) informed Detective Webb that a parent had overheard a conversation between the parent's child and the child's friend, in which the friend said that B said defendant had touched her. The parent interpreted the account as a description of child sexual abuse and made a report to DHS. Webb testified that he interviewed B, who made statements incriminating defendant. B was later interviewed at a child abuse assessment center by a forensic interviewer, Hasbrouck, who also testified at trial. Hasbrouck testified that B described defendant's touching her "crotch" and "butt," and that B also said she had reported the incident to D, Strawn, and her own mother shortly after it occurred.

Defendant's theory at trial was that the abuse never occurred and that B had fabricated the allegations. In support of that theory, defendant's closing argument emphasized what he called "astounding" discrepancies between B's accounts of the incident in her various disclosures. Importantly for purposes of this appeal, defendant also attempted to establish that neither Strawn nor B's mother believed B's disclosures. In cross-examination of both witnesses, defendant highlighted their failures to report the incident to authorities, suggesting that those failures reflected their opinions that B was not credible. In closing argument, defendant argued that Strawn had failed to act because she did not believe B:

> "[I]s it reasonable to believe that, if [Strawn] really believed [B], that she's going to sit on this information, that she's not going to walk in to [the law office where Strawn worked] and say 'god, I got a tough situation here, I got this sweet kid and she's telling me this sex abuse happened. And I just want to help her and I don't want there to be repercussions. So what do we do? Do we go to the police first or DHS?

> "Is it reasonable to believe that [Strawn], with her background, is just going to sit on this information if she really believed it? Or isn't it obvious that [Strawn] had some real doubts about the story, about the likelihood of this having happened, about the manner in which this is described, and so she doesn't go to her trusted employer or anyone else to discuss this."

Defendant made a similar point as to B's mother, arguing that she would have said something to someone if she believed B's account.

The trial court convicted defendant and sentenced him to the mandatory prison term of 75 months under ORS 137.700.

On appeal, in his first assignment of error, defendant argues that the trial court erred in not striking Strawn's testimony on direct examination that she "totally believed" B's disclosure. Defendant concedes that he did not preserve that error by objecting below, but argues that the trial court's failure to *sua sponte* strike that portion of Strawn's testimony is plain error. *See State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990) (explaining that, under ORAP 5.45(1), we may review unpreserved error as plain error if (1) the error is "one 'of law,'" (2) the error is "obvious, not reasonably in dispute," and (3) the error "appears 'on the face of the record,'" such that the court need not "go outside the record or choose between competing inferences to find" the error, "and the facts that comprise the error are irrefutable").

The state acknowledges that Strawn's testimony constituted impermissible "vouching," but argues that the trial court did not commit plain error because (1) the record supports a plausible inference that defendant *chose* not to object to Strawn's testimony for strategic reasons, and (2) if that is true, then the trial court did not "err" by declining to intervene in the parties' litigation. *See State v. Corkill*, 262 Or App 543, 551, 325 P3d 796, *rev den*, 355 Or 751 (2014) (reasoning that, if a "claimed 'plain error' is associated with a trial court not having *sua sponte* interrupted a line of questioning (or not having excluded the resulting evidence *sua sponte*)," then the error must not only result in the

admission of testimony that would have been "inadmissible if they had been objected to," but must also "relate to the trial court having not taken affirmative steps to intervene in the parties' litigation").

At the outset, the state's concession that Strawn's testimony constituted impermissible "vouching" is well-taken; there is no doubt that Strawn was directly expressing an opinion about B's credibility. *See State v. Chandler*, 360 Or 323, 330, 380 P3d 932 (2016) ("This court has long held that one witness may not comment on the credibility of another witness."). It is also true that, in some instances, the trial court has an obligation to intervene *sua sponte* and strike vouching testimony even if a party fails to object, and that the trial court's failure to take such steps can be plain error. *See, e.g.*, *State v. Pergande*, 270 Or App 280, 284-85, 348 P3d 245 (2015) (trial court plainly erred by failing to strike *sua sponte* a social worker's testimony that child complainants did not show signs of being coached when they described alleged abuse); *State v. Higgins*, 258 Or App 177, 180-81, 308 P3d 352 (2013), *rev den*, 354 Or 700 (2014) (trial court plainly erred by not striking *sua sponte* a witness's testimony that her daughter, the complainant, "wasn't lying").

As the state points out, however, a trial court does not commit *plain* error by failing to *sua sponte* strike vouching testimony if the record supports a plausible inference that the defendant may have made a strategic choice not to object to that testimony. *See, e.g.*, *State v. Vage*, 278 Or App 771, 777, 379 P3d 645, *rev den*, 360 Or 697 (2016) ("It is well established that an 'error does not qualify as plain error if the record contains a competing inference that the party may have had a strategic purpose for not objecting,' and that competing inference is plausible.").

That is the case here. As noted, a central part of defendant's strategy was to cast doubt on whether Strawn and B's mother believed B's disclosures of abuse. That was a theme during defendant's cross-examination of both witnesses as well as his closing argument. In that light, it is at least plausible that defendant made a strategic choice not to object to Strawn's testimony on direct examination that she "believed" B, precisely because defendant intended to

place that "belief" in issue himself by suggesting reasons to doubt it. If defendant's counsel intended to "open the door" to an inquiry into whether Strawn believed B, he may have expected that the prosecution would have been permitted to respond by eliciting Strawn's vouching testimony on re-direct examination, making an objection pointless. *See, e.g.*, *State v. Miranda*, 309 Or 121, 128, 786 P2d 155, *cert den*, 498 US 879 (1990) ("A defendant's own inquiry on direct examination into the contents of otherwise inadmissible statements opens the door to further inquiry on cross-examination relating to those same statements."); *State v. Caulder*, 75 Or App 457, 460-61, 706 P2d 1007, *rev den*, 300 Or 451 (1985) (reasoning that, where "[d]efense counsel's cross-examination raised the issue of * * * veracity," the trial court did not err in later denying defendant's motion to strike certain testimony asserted to be vouching, because "'[h]aving opened the door, defendant cannot be heard to complain because the prosecution stepped through.'") (quoting *State v. Barger*, 43 Or App 659, 664, 603 P2d 1240 (1979)).

The fact that the "vouching" by Strawn was a passing comment from a lay witness—the mother of B's friend—rather than an expert is a further reason why defendant may have concluded that there was little to be gained by an objection, particularly where defendant intended to make an issue of whether Strawn believed B's story. In *State v. Hanson*, 280 Or App 196, 203-04, 380 P3d 1136, *rev den*, 360 Or 751 (2016), the defendant similarly argued that the trial court had plainly erred in not striking *sua sponte* the witness's testimony that her daughter, the victim, "never lies" and is a "very truthful child." *Id.* We reasoned that under the circumstances, which included (among others) that the testimony was "from the victim's mother rather than being the 'kind of expert vouching testimony' that most often has prompted us to conclude that the trial court plainly should have stricken the testimony *sua sponte*," and where the testimony was also "intentionally brought up and used by defendant on cross-examination," it was "plausible that defendant may have concluded that there was little to gain by objecting to the testimony, and that defendant had a strategic reason not to do so." *Id.* at 204 (quoting *State v. Inman*, 275 Or App 920, 932, 366 P3d 721 (2015), *rev den*, 359 Or 525 (2016)).

In short, because the record supports a plausible inference that defendant made a conscious choice not to object to Strawn's comment, we conclude that the trial court did not plainly err in declining to *sua sponte* strike that testimony.

Finally, even if we concluded that the trial court committed plain error, we would not exercise discretion to correct that error under these circumstances. *See Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 382 n 6, 823 P2d 956 (1991) (even where the reviewing court identifies an error that is plain, the court "must exercise its discretion to consider or not to consider the error"). Relevant factors under *Ailes* include

> "the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way ***."

312 Or at 382 n 6.

Although Strawn's comment does constitute vouching, our case law has recognized that not all species of vouching are equally dangerous. In *Hanson*, as noted above, it was material to our analysis that the witness was the victim's mother, not an expert. *See also Inman*, 275 Or App at 933 (describing risk that "even a single vouching statement by a witness *** with years of experience and training in the field of child abuse prevention, can be given considerable weight by the jury" (internal quotation marks omitted)).[1]

This case does not involve vouching by an expert. Defendant has not made a persuasive case that, in this bench trial, the trial court was likely to be unduly swayed in its role as fact-finder by a lay witness's passing statement that she "believed" a child complainant, particularly given defendant's extensive argument placing that belief into question. Accordingly, we conclude that any error was not

[1] The fact that Strawn was a lay witness is what differentiates this case from most of those cited by the dissent. *See, e.g.*, *State v. Almanza-Garcia*, 242 Or App 350, 351, 255 P3d 613 (2011).

grave enough to warrant the exercise of our discretion under *Ailes*.

Affirmed.

DUNCAN, J. pro tempore, dissenting.

For more than 30 years, it has been clear that, under Oregon law, "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth." *State v. Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983). Applying that rule, we have held, for example, that a trial court erred by admitting testimony by a complainant's mother that she "never doubted [the complainant] for a second." *State v. Vargas-Samado*, 223 Or App 15, 17, 195 P3d 464 (2008).

Not only does Oregon law prohibit a witness from commenting on the credibility of another witness, it requires trial courts to strike, *sua sponte*, vouching testimony elicited by the state or volunteered on the state's examination, unless the record shows that it is plausible that the defendant made a strategic choice not to object to the testimony. *State v. Ramirez-Estrada*, 260 Or App 312, 325, 317 P3d 322 (2013), *rev den*, 355 Or 317 (2014). A trial court's failure to do so constitutes plain error. Thus, we have held, for example, that a trial court plainly erred in failing to strike, *sua sponte*, a mother's testimony, volunteered during the state's examination, that her daughter, the complainant, "wasn't lying." *State v. Higgins*, 258 Or App 177, 180-81, 308 P3d 352 (2013), *rev den*, 354 Or 700 (2014).

In this case, defendant was charged with one count of sexual abuse of the complainant, B, and his defense was that B had fabricated the allegations. The case turned on the credibility of B, because the state's evidence consisted of B's testimony and the testimony of other witnesses who testified about what B had told them. One of those witnesses was Strawn, the mother of a friend of B's, D. At the outset of its direct examination of Strawn, the state elicited testimony that Strawn had a close relationship with B. Strawn testified, "I believe I know [B] pretty well. I talk to her a lot. She *** and [D] were like inseparable for quite a while." Strawn also characterized her relationship with B as "almost

the same" as her relationship with her own daughter, noting that B "could talk to [her] about anything." Thereafter, when asked about her reaction to B's report that defendant had abused her, Strawn testified that she "totally believed" B. In my view, Strawn's testimony that she "totally believed" B was impermissible vouching under *Vargas-Samado* and *Higgins*, and the trial court's failure to strike it, *sua sponte*, was plain error under *Higgins*.

The state and majority do not dispute that Strawn's testimony that she "totally believed" B was impermissible vouching. But the state argues, and the majority agrees, that the trial court did not plainly err in failing to strike the testimony because defendant may have had a strategic reason for not objecting to it.

I respectfully disagree. As mentioned, it is error for a trial court to fail to strike vouching testimony elicited by the state or volunteered on the state's examination, unless the record supports a plausible inference that the defendant made a strategic choice to not object to the testimony. *Ramirez-Estrada*, 260 Or App at 320. The inference "must be 'plausible' in view of 'what actually occurred at trial.'" *Id.* at 319 (quoting *State v. Lovern*, 234 Or App 502, 512, 228 P3d 688 (2010)). A reviewing court cannot simply presume that a defendant made a tactical choice to not to object to impermissible vouching testimony. *Ramirez-Estrada*, 260 Or App at 319. Thus, for example, in *Higgins*, we rejected the state's claim that the defendant had failed to object to impermissible vouching testimony because he "might not have wanted to cause the jury to 'dwell on'" the testimony, where "nothing in the record indicat[ed] that [the] defendant made any kind of strategic choice not to object[.]" 258 Or App at 181. In *Higgins*, we also noted that we are "particularly reluctant" to draw an inference that a defendant failed to object to impermissible vouching testimony "in a case that rests almost entirely on the complainant's testimony." *Id.*

In this case, defendant's defense was that B had fabricated the allegations against him because she was angry with him and wanted attention from others. In support of his assertion that B was not credible, defendant pointed out the inconsistencies in B's statements and that neither

Strawn nor B's mother relayed B's reports to authorities. Given that defense, it is not plausible that defendant made a strategic choice not to object to Strawn's testimony that she "totally believed" B. That testimony was completely contrary to both defendant's general assertion that B was not credible and his specific assertion that Strawn had not believed B's report to her.

Contrary to the majority's conclusion, it is not plausible that defendant made a strategic choice not to object to Strawn's impermissible vouching testimony so that he could put Strawn's belief in B's report at issue. Defendant's assertion that Strawn did not believe B was based on Strawn's failure to relay B's report to authorities; it was not dependent on Strawn making an in-court statement about whether she believed B. Defendant was in a position to challenge Strawn's belief based on Strawn's conduct, and he would not have, by making such a challenge, "opened the door" for Strawn to engaging in impermissible vouching. *See* *State v. Hollywood*, 250 Or App 675, 676, 282 P3d 944 (2012) (trial court's admission of nurse's testimony explaining that she diagnosed complainant as having been sexually abused, despite complainant's prior recantations of allegation of physical abuse, because "there [was] no lying going on" was plain error).

Moreover, this case is readily distinguishable from the cases relied on by the majority, in which the defendants elicited the testimony at issue. In *State v. Miranda*, 309 Or 121, 128-29, 786 P2d 155, *cert den*, 498 US 879 (1990), the defendant himself elicited otherwise inadmissible statements during his direct examination, and the court held that, by doing so, the defendant opened the door to an inquiry on cross-examination by the state into the same statements. Similarly, in *State v. Hanson*, 280 Or App 196, 203-04, 380 P3d 1136, *rev den*, 360 Or 751 (2016), the defendant "intentionally brought up and used" the vouching testimony during his cross-examination. *See also State v. Caulder*, 75 Or App 457, 460-61, 706 P2d 1007, *rev den*, 300 Or 451 (1985) (addressing the scope of rebuttal evidence). Here, in contrast, the defendant did not elicit or use (or have any reason to elicit or use) the challenged testimony.

I also disagree with the majority's conclusion that, even if the trial court erred in failing to strike Strawn's impermissible vouching testimony, we should not exercise our discretion to correct the error. We have consistently exercised our discretion to correct similar errors, due to their gravity. *See, e.g.*, *Hollywood*, 250 Or App 675; *State v. Lopez-Cruz*, 256 Or App 32, 299 P3d 569 (2013); *State v. Bahmatov*, 244 Or App 50, 260 P3d 592 (2011); *State v. Almanza-Garcia*, 242 Or App 350, 255 P3d 613 (2011). As we have explained, in cases like this one, where there is no physical evidence of the alleged abuse and there are no eyewitnesses, the case "boil[s] down *** to a credibility contest between the complainant and defendant," and evidence commenting on the credibility of either is "likely to be harmful." *State v. Lowell*, 249 Or App 364, 370, 277 P3d 588, *rev den*, 352 Or 378 (2012). That likelihood is increased when the witness whose testimony is at issue is held out as having a heightened ability to evaluate the complainant's testimony. Thus, in *Higgins*, we exercised our discretion to review the trial court's failure to strike, *sua sponte*, the complainant's mother's testimony that she knew the complainant "wasn't lying." 258 Or App at 181-82. As we noted, the mother was "privy to the complainant's behaviors, characteristics, and past experiences[,]" and "[t]hat fact significantly increase[d] the risk that the jury's credibility determination was affected by [her] comments." *Id*. at 182.

The majority suggests that, even if the trial court erred, we should not exercise our discretion to correct the error because this was "a bench trial." 289 Or App at ___. I disagree. We have expressly rejected the assertion that we should assume that a trial court conducting a bench trial did not consider erroneously admitted evidence. *See, e.g.*, *Lopez-Cruz*, 256 Or App at 38-39 (holding that, in a case that is largely dependent on a complainant's credibility, a reviewing court must conclude that the admission of impermissible vouching testimony was not harmless, unless the trial court states that it did not rely on the testimony); *Almanza-Garcia*, 242 Or App at 351 (explaining that, although the trial court did not mention the challenged evidence in its findings of fact, its failure to do so did not mean that the court did not consider the evidence). Moreover, such an assumption

would be particularly unwarranted here, because the state's case depended on B's credibility, which was the subject of Strawn's impermissible vouching testimony, and because the state emphasized that testimony in its closing argument to the court.

The majority acknowledges that we have corrected the erroneous admission of vouching testimony in other cases involving bench trials, but asserts that those cases are distinguishable because they "involved vouching testimony by an *expert* witness." 289 Or App at 397 n 1 (emphasis added). It is true that Strawn was not an expert witness, in that she did not have professional expertise in the assessment of children's reports of abuse, but the state presented her as someone who had personal expertise regarding B, given their close relationship. As we observed in *Higgins*, impermissible vouching testimony by a witness who is "privy to the complainant's behaviors, characteristics, and past experiences" carries an increased risk of affecting a factfinder's assessment of the complainant's credibility.[1]

In sum, because the trial court plainly erred by failing to strike, *sua sponte*, the clear vouching testimony elicited by the state in its examination of Strawn, a person whose opinion regarding the credibility of B's report could carry significant weight, I would, as we have in similar cases, reverse and remand this case.

Therefore, I respectfully dissent.

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[1] The majority suggests that, if the trial court erred in admitting Strawn's impermissible vouching testimony, this is not an appropriate case for us to exercise our discretion to review the error because the testimony is not "as dangerous" as other vouching testimony. 289 Or App at ___. In support, the majority cites *Hanson*. But *Hanson* concerned whether the record supported an inference that the defendant made a strategic choice not to object to the challenged vouching evidence, not whether it was unlikely that the evidence affected the verdict. Moreover, we based our conclusion regarding the possibility that the defendant made a tactical decision not to object on several factors, which are not present in this case, including that the challenged testimony was "not directly related to the victim's allegations of sexual abuse, but, instead, was aimed at a collateral issue" and, as discussed above, was "intentionally brought up and used by defendant on cross-examination." *Hanson*, 280 Or App at 204.