

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

ALAN ALNE,  
*Petitioner-Respondent,*

*v.*

Mark NOOTH,  
Superintendent,  
Snake River Correctional Institution,  
*Defendant-Appellant.*

Malheur County Circuit Court  
1304179P; A158811

J. Burdette Pratt, Senior Judge.

Argued and submitted March 17, 2016.

Ryan Kahn, Assistant Attorney General, argued the cause for appellant. With him on the brief were Frederick M. Boss, Deputy Attorney General, and Anna M. Joyce, Solicitor General.

Jed Peterson argued the cause for respondent. With him on the brief was O'Connor Weber LLP.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

EGAN, J.

Affirmed.

**EGAN, J.**

In this post-conviction relief case, the superintendent appeals the post-conviction court’s judgment granting petitioner relief and setting aside his convictions for sodomy in the first degree, ORS 163.405; unlawful sexual penetration in the first degree, ORS 163.411; and sexual abuse in the first degree, ORS 163.427. The superintendent argues that the post-conviction court erroneously concluded that petitioner’s trial counsel’s failure to object to testimony by a state’s witness commenting on the credibility of the complainant rendered his performance constitutionally inadequate. We affirm.

We review the post-conviction court’s grant of relief for legal error. *Green v. Franke*, 357 Or 301, 312, 350 P3d 188 (2015). The post-conviction court’s express and implicit factual findings are binding if there is evidence to support them. *Id.* “If the post-conviction court failed to make findings of fact on all the issues—and there is evidence from which such facts could be decided more than one way—we will presume that the facts were decided consistently with the post-conviction court’s conclusions of law.” *Id.* We state the facts in accordance with that standard.

The charges against petitioner stemmed from statements that a nearly five-year-old girl, the complainant, made to her father. She alleged that petitioner had touched her vagina with his fingers and mouth when petitioner was babysitting the complainant while her parents were out of the house. The complainant was taken to CARES for an evaluation and was interviewed by Thomas Findlay and a doctor.

A video of that CARES interview was offered as an exhibit at trial. The complainant, who was 12-years old at the time of trial,<sup>1</sup> testified that petitioner touched her genitals with his finger and tongue. Findlay, who had been a child interviewer for CARES for 10 years, also testified for the state. He testified that he had a master’s degree in social work, which was required to be an interviewer. He also

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<sup>1</sup> Petitioner’s original conviction was reversed, resulting in a retrial several years later. See *State v. Alne*, 219 Or App 583, 184 P3d 1164 (2008).

testified that he was a licensed clinical social worker and had personally conducted over 2,000 child abuse evaluations, of which 1,500 involved videotaped interviews. Portions of his video-recorded interview with the complainant were played during his testimony, and he was asked to comment on those portions. During direct examination, the state asked Findlay whether the words and descriptions of the acts alleged by the complainant were appropriate for a child her age.

“[STATE]: Okay. She made an allegation of essentially oral sodomy or oral sexual activity?”

“[FINDLAY]: Mm-hmm.”

“[STATE]: And in your training and experience, is that something that non-abused mere five-year-old would sort of have the developmental ability to manufacture or come up with?”

“And if you don’t understand my question, let me know.”

“[FINDLAY]: Well, if you could ask that again, I just want to make sure I answer the question.”

“[STATE]: Well, we’re talking about an act of oral sexual contact.”

“[FINDLAY]: Yes.”

“[STATE]: In your training and experience in dealing with children, is that something that a child who has not been abused would ordinarily come up with or burst out with?”

“[FINDLAY]: Not generally. I think again I look at the statements that she made about that and the way in which she described it. We do try to discern to the best of our ability is a child describing something that was an experience, or by the way that they’re describing the event, does it appear as if that’s an experienced event, or is that something that they could have seen or something like that.”

“From my training and experience, I thought again that she provided information that was from a child’s point of view, and it just seemed like a genuine statement.”

Petitioner’s counsel did not object to Findlay’s testimony.

At trial, evidence was introduced that the complainant's mother had taken complainant to CARES three previous times to be examined for sexual abuse unrelated to petitioner. There was also testimony that the complainant may have, at some time prior to her allegations of abuse by defendant, witnessed her parents engaging in sexual activity and may have seen pornographic videos playing on two occasions. Additionally, the defense brought an expert to testify about the memories of young children and how they may be affected and influenced by what they have seen.

In the state's closing argument, the district attorney told the jury that the complainant was "the heart of the state's case" and repeated that the statements she made in her interview with Findlay were "critical." They were critical, according to the state, "because they provide[d] the information that [the jury] need[ed] to make a decision and to conclude that [petitioner] did in fact sexually abuse [the complainant]." The state further argued that the complainant's statements were made using age-appropriate words that demonstrated that she was reporting events that actually happened to her, mirroring Findlay's testimony.

Petitioner was convicted of first-degree sodomy, unlawful sexual penetration, and first-degree sexual abuse. He appealed, and we affirmed without opinion. *State v. Alne*, 250 Or App 144, 281 P3d 685, *rev den*, 352 Or 377 (2012).

Petitioner then petitioned for post-conviction relief on the grounds that he had received inadequate and ineffective assistance of counsel under the state and federal constitutions. He argued that Findlay's expert testimony that the complainant's statement "seemed \*\*\* genuine" was impermissible vouching for the credibility of the complainant. Moreover, argued petitioner, an attorney exercising reasonable professional skill and judgment would have objected to that testimony and moved to strike it or moved for a mistrial because the inadmissibility of such vouching had been clearly established for decades. Petitioner also contended that there was a reasonable probability that counsel's failure to object affected the jury's verdicts. Petitioner argued that, because the jury's determination of guilt was based on a credibility contest between the complainant and

petitioner, Findlay's qualifications and experience as an expert witness impermissibly affected the jury's credibility determination when he testified that he believed that the victim was telling the truth. Petitioner's trial counsel did not submit an affidavit explaining his actions to the post-conviction court.

The post-conviction court concluded that petitioner proved by a preponderance of the evidence that his trial counsel was constitutionally inadequate by failing to object to Findlay's testimony and that "the failure to do so was likely or had a tendency to have affected the results of the trial." It determined that Findlay commented on the credibility of the statements that the complainant made during the CARES interview because Findlay's testimony was that he believed that the complainant's statements seemed to have been based on events that had actually happened. The post-conviction court also concluded that "[t]here is no evidence to support the argument that the trial attorney's failure to object was reasonable trial strategy." The court noted that, while petitioner's attorney did call an expert to testify about, and call into question, children's memories in general, petitioner's expert neither testified about, nor challenged, the complainant's credibility. In addition, the post-conviction court concluded that there was nothing in petitioner's defense that was strengthened by allowing the interviewer's testimony to be presented to the jury. Lastly, the post-conviction court concluded that trial counsel's failure to object to the vouching likely affected the outcome of the trial because there was no physical evidence and the credibility of the complainant's testimony was, according to the state during its closing argument, the "heart of the state's case."

On appeal, the superintendant contends that the post-conviction court erred when it concluded that petitioner's counsel was constitutionally inadequate or ineffective by not objecting to Findlay's testimony because not all reasonable attorneys would have viewed Findlay's testimony as an impermissible comment on the complainant's credibility. Additionally, the superintendant argues that petitioner did not prove that he suffered prejudice and that, even if we

rejected the foregoing bases for reversal, we should, nonetheless, remand for the post-conviction court to address counsel's potential strategies for not objecting.

Post-conviction relief is warranted when there has been a "substantial denial" of a petitioner's "rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void." ORS 138.530(1)(a). The state-based constitutional right to adequate assistance of counsel derives from Article I, section 11, of the Oregon Constitution, which provides, in part, that, "[i]n all criminal prosecutions, the accused shall have the right \*\*\* to be heard by himself and counsel." The federal constitutional right to effective assistance of counsel derives from the Sixth Amendment to the United States Constitution's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right \*\*\* to have the Assistance of Counsel for his defence."

To obtain post-conviction relief based on a claim of inadequate assistance of counsel under Article I, section 11, a petitioner must prove, by a preponderance of the evidence, that his trial counsel did not exercise reasonable professional skill and judgment and that petitioner suffered prejudice as a result of counsel's inadequate performance. *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991). Prejudice may be demonstrated by showing that counsel's acts or omissions had a tendency to affect the outcome of the prosecution. *Montez v. Czerniak*, 355 Or 1, 6-7, 322 P3d 487, *adh'd to as modified*, 355 Or 598, 330 P3d 595 (2014). The standards for inadequate assistance of counsel are functionally equivalent under both the state and federal constitutions. See *Krummacher v. Gierloff*, 290 Or 867, 871, 627 P2d 458 (1981) (state and federal standards use different words but "embody similar objectives"); see *Strickland v. Washington*, 466 US 668, 688, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984) (Under the federal constitution, a petitioner must show that trial counsel's performance "fell below an objective standard of reasonableness" and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

We first review the post-conviction court’s conclusion that trial counsel failed to exercise reasonable professional skill and judgment when he did not object to Findlay’s testimony that the complainant’s video-recorded statements “seemed \*\*\* genuine.” We do not assess counsel’s decisions with the benefit of hindsight but, instead, ask “whether those decisions reflected, at the time they were made, a reasonable exercise of professional skill and judgment.” [\*Pereida-Alba v. Coursey\*](#), 356 Or 654, 662, 342 P3d 70 (2015). Generally, to exercise professional skill and judgment “counsel must \*\*\* prepare himself on the law to the extent appropriate to the nature and complexity of the case so that he is equipped to \*\*\* exercise professional judgment.” *Krummacher*, 290 Or at 875.

It has long been established in Oregon that a witness may not directly comment on the credibility of another witness. *See, e.g., State v. Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983) (“We expressly hold that in Oregon a witness, expert or other-wise, may not give an opinion on whether he believes a witness is telling the truth.”). The reason for that rule against vouching is that “[w]itness testimony regarding the veracity of another witness invades the jury’s role as the sole judge of the credibility of another witness.” [\*State v. Higgins\*](#), 258 Or App 177, 180, 308 P3d 352 (2013), *rev den*, 354 Or 700 (2014) (internal quotation marks and brackets omitted).

The principle that one witness may not vouch for another “applies whether the witness is testifying about the credibility of the other witness in relation to the latter’s testimony at trial or is testifying about the credibility of the other witness in relation to statements made by the latter on some other occasion.” *State v. Keller*, 315 Or 273, 285, 844 P2d 195 (1993). “Applying that principle is a straightforward matter when one witness states directly that he or she believes another witness, or that the other witness is honest or truthful.” [\*State v. Lupoli\*](#), 348 Or 346, 357, 234 P3d 117 (2010).

The post-conviction court concluded that Findlay commented on the credibility of the complainant when he expressed his belief that her statement was “genuine”

because it was based on events that actually happened. The superintendent's argument on appeal attempts to distinguish between "true vouching," in which the witness's testimony was a clear comment on the credibility of another witness, and cases in which the witness provides testimony that tended to provide support for an inference that the other witness is telling the truth, which may or may not be admissible depending on the facts of the case. The superintendent argues that Findlay's testimony was of the latter category and that the question of whether it was impermissible vouching is fact specific and subject to debate. Consequently, the superintendent contends, trial counsel's failure to object was not objectively unreasonable. We find the superintendent's distinction inapplicable to this case.

"True vouching" occurs when one witness testifies "that he or she believes that another witness is or is not credible." *State v. Corkill*, 262 Or App 543, 552, 325 P3d 796, *rev den*, 355 Or 751 (2014). While expert testimony will often tend to assist the trier of fact in determining that another witness either is or is not telling the truth, that, by itself, will not render evidence inadmissible. *Middleton*, 294 Or at 435. The question, rather, is whether the testimony at issue directly expressed an opinion on the truth of another witness's statement or merely tended to show that another witness either is or is not telling the truth. *Logan v. State of Oregon*, 259 Or App 319, 329, 313 P3d 1128 (2013) (citing *Middleton*, 294 Or at 435).

In *Milbradt*, the Supreme Court held that "[a]n opinion that a person is not deceptive, could not lie without being tripped up, and would not betray a friend (to wit: the defendant) is tantamount to the same thing." 305 Or at 630. And, in *Keller*, the court held that a doctor impermissibly commented on the credibility of the alleged victim by testifying that "[t]here was no evidence of leading or coaching or fantasizing" in that complainant's interview at CARES, and that the child was "obviously telling you about what happened to her body." 315 Or at 285.

In this case, Findlay explicitly testified that he believed the complainant's allegations against petitioner



were “genuine,” which was the equivalent of saying that she was telling the truth. Findlay was asked whether a child that age would “come up with” allegations of abuse without having been abused. In his answer, Findlay stated that he aimed to discern whether the complainant’s statements described lived experience by looking at the statements she made and how she made them. His conclusion, as he expressed to the jury, was that the complainant’s statements and the words and concepts she used to make them showed him that they were made from a child’s perspective and that they seemed “genuine.” Findlay’s testimony that the complainant’s statements were genuine could only be a comment on the validity and truth of those statements. He vouched for the veracity of the complainant’s allegations immediately after he had said that he was attempting to discern whether the statements described lived experiences. He even prefaced his conclusion that the complainant’s statements were genuine with reference to his training and experience, further bolstering the effect of his conclusion. That is true vouching.

To be sure, not all of Findlay’s testimony was true vouching, and portions of Findlay’s testimony would have been properly admitted and would not have warranted objection, such as his testimony that the complainant used developmentally appropriate wording and concepts. There is no doubt, however, that Findlay’s testimony that the information that the complainant provided during the CARES interview “just seemed like a genuine statement” was a direct comment on the credibility of the complainant, expressing Findlay’s belief that the complainant was telling the truth about the abuse she alleged. It was not, as the superintendent argues, testimony that requires close analysis to determine whether it was a comment on the credibility of another witness or a statement that provided support for an inference that the complainant was telling the truth. *Cf. State v. Arnold*, 133 Or App 647, 652, 893 P2d 1050 (1995) (witness’s testimony “that the victim was ‘spontaneous,’ ‘eager to disclose’ and ‘very articulate,’ described the victim’s demeanor while making the statements and were not comments on the victim’s credibility that were so prejudicial as to require reversal”).

Here, the jury did not have to infer anything from the witness's description of his interaction with the complainant and did not have to connect any dots to understand that Findlay, relying on his training and experience, believed that the complainant's account of events was true. Findlay's testimony did not merely present evidence from which the jury could infer that the complainant was telling the truth. The case law is clear, and had been clear for decades before the trial, that vouching testimony is inadmissible because of the high risk of prejudice of that testimony. At the time of Findlay's testimony, trial counsel should have recognized that risk of prejudice that Findlay's testimony presented and objected. Consequently, by not objecting to Findlay's testimony that the complainant's statement seemed genuine, trial counsel failed to exercise reasonable professional skill and judgment.

Next, we review whether petitioner proved that trial counsel's failure to object had a tendency to affect the result of the trial. To establish prejudice on a claim based on a trial counsel's failure to object to the admission of evidence, a petitioner must establish that the objection would have been well taken when the criminal case was tried. *Logan*, 259 Or App at 327. The petitioner must then establish that, given the totality of the circumstances, the admission of the objectionable evidence had a tendency to affect the jury's verdict. *Cunningham v. Thompson*, 188 Or App 289, 296, 71 P3d 110 (2003), *rev den*, 337 Or 327 (2004). Because many factors can affect the outcome of a jury trial, the tendency to affect the outcome standard requires more than a mere possibility, but less than a probability; the issue is whether trial counsel's acts or omissions "*could have tended to affect*" the outcome of the case. *Green*, 357 Or at 322-23 (emphasis in original).

As we discussed above, the law has been clear that, "in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes [another] witness is telling the truth." *Middleton*, 294 Or at 438. An objection to Findlay's vouching testimony, therefore, would have been sustained.

The post-conviction court concluded that it was likely that Findlay's vouching statement affected the

outcome of the trial because there was no physical evidence to support the charges, Findlay's testimony strengthened the state's argument in a case that was a credibility contest in which the testimony of the complainant was the "heart" of the state's case, and petitioner was convicted on non-unanimous verdicts on all three counts.

Findlay testified that in light of his experience conducting thousands of interviews with children suspected of having been sexually abused, he thought the complainant's statement describing the alleged sexual abuse was genuine. Vouching testimony is not admissible precisely because it presents an unjustifiable risk that the witness's conclusion on the credibility of another witness will invade the jury's exclusive role as judge of a witness's credibility. That risk is even greater where the jury may defer to an expert's determination of credibility because of the expert's experience and training.

In this case, the credibility of the complainant was critical. There was no physical evidence of sexual abuse and petitioner's expert witness testified about the difficulty in judging the validity of young children's memories when they had been exposed to external stimuli that may have shaped or otherwise affected their memories. The jury's decision turned on the credibility of the complainant; the state said as much in its closing argument. Findlay's testimony gave improper support to the complainant's credibility. For those reasons, we conclude that Findlay's testimony that the complainant's statements were genuine could have tended to affect the outcome of the trial. Petitioner was, therefore, prejudiced by trial counsel's failure to object to Findlay's vouching testimony.

Finally, the superintendent argues that, even if we do not reverse on the foregoing issues, we should remand for the post-conviction court to address whether petitioner's trial counsel had valid trial strategies that would have supported his failure to object to Findlay's testimony. In its judgment, the post-conviction court concluded that "[t]here is no evidence to support the argument that the trial attorney's failure to object was reasonable trial strategy." The superintendent contends that the judgment demonstrates that

the post-conviction court did not consider potential strategic reasons for trial counsel to fail to object to the vouching testimony. Additionally, the superintendent argues that the judgment shows that the post-conviction court placed the burden on him to show that trial counsel had made a strategic decision. While we agree that when, as in this case, the superintendent argues that the petitioner's trial counsel made a reasonable tactical choice, that argument does not shift the burden of production and proof from the petitioner, *Pereida-Alba*, 356 Or at 662, we disagree that the post-conviction court's judgment requires us to remand.

We have stated that Oregon's case law "suggest[s] that it will be the rare case in which reasonable trial strategy will include allowing witnesses—particularly those with pertinent expertise—to vouch for the credibility of people who report sexual abuse." *Berg v. Nooth*, 258 Or App 286, 298, 309 P3d 164 (2013). This case does not present circumstances under which it would have been a reasonable trial strategy to allow a witness to vouch for the credibility of the complainant. Petitioner has demonstrated that his trial counsel failed to exercise the reasonable professional skill and judgment for which counsel was employed and that that failure tended to affect the outcome of the trial. That failure cannot properly be characterized as a tactical choice. See *Krummacher*, 290 Or at 875 ("Errors which result from a failure to use the professional skill and judgment for which the lawyer is employed cannot be characterized as tactical choices.").

In petitioner's trial memorandum to the post-conviction court, he argued that there could be no reasonable tactical justification to excuse trial counsel's failure to object. The post-conviction court agreed that Findlay's testimony was improper vouching and concluded that there was no evidence to support the argument that trial counsel's failure to object was due to a reasonable trial strategy. That is sufficient. The post-conviction court recognized petitioner's burden to prove that his trial counsel was inadequate, but neither petitioner nor the post-conviction court are required to affirmatively propose and then counter every possible reason for trial counsel to have purposefully failed to object to

vouching testimony by an expert witness. We agree that in this case there is no reasonable justification for trial counsel to have consciously and purposefully failed to object to Findlay's testimony.

In sum, we conclude that the post-conviction court did not err in granting petitioner post-conviction relief because petitioner's trial counsel was constitutionally inadequate under Article I, section 11, and the Sixth Amendment by failing to object to Findlay's vouching testimony. Trial counsel failed to exercise reasonable professional skill and judgment in failing to object and petitioner suffered prejudice as a result of counsel's inadequate performance.

Affirmed.