IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of R. W. G.,
a Youth.

STATE OF OREGON,
Respondent,

v.

R. W. G.,
Appellant.

Washington County Circuit Court
J150210; A161324

Ricardo J. Menchaca, Judge.

Argued and submitted April 4, 2017.

Paula Johnson Lawrence argued the cause and filed the brief for appellant. With her on the brief was The Lawrence Law Firm.

Jonathan N. Schildt, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before DeHoog, Presiding Judge, and Hadlock, Chief Judge, and Schuman, Senior Judge.

HADLOCK, C. J.

Affirmed.

Schuman, S. J., concurring in part, dissenting in part.

HADLOCK, C. J.

Youth appeals a delinquency judgment finding him within the juvenile court's jurisdiction based on conduct that, if committed by an adult, would constitute two counts of first-degree sexual abuse. The counts relate to youth's abuse of two victims, M and A. On appeal, youth raises four assignments of error, the first three of which we reject without discussion. In his fourth assignment of error, youth contends that the juvenile court erred "when it found the youth to be under the jurisdiction of the court on Count 2 [related to victim A] beyond a reasonable doubt." For the reasons set out below, we conclude that youth did not preserve that claim of error and that it would not be appropriate for us to address the claim on a "plain error" basis. Accordingly, we affirm.

An extended discussion of the facts is unnecessary. As relevant to youth's fourth assignment of error, the basic scenario is this: In a two-count petition, youth was alleged to have sexually abused M and A, who are sisters. Count 2 alleged that youth had abused three-year-old A by causing her to touch youth's testicles. The court found that A was not competent to testify and allowed evidence of A's out-of-court statements to come in through other witnesses, primarily A's mother. After a bench trial, the court found beyond a reasonable doubt that "youth *** got [A] to touch his testicles." Accordingly, the court concluded that youth was within the juvenile court's jurisdiction on Count 2. Based on facts not pertinent here, the court also found youth to be within the juvenile court's jurisdiction on Count 1.

As noted above, youth argues that the juvenile court erred when it found him "to be under the jurisdiction of the court on Count 2 beyond a reasonable doubt." Specifically, youth contends that the record does not include evidence from which a factfinder could reasonably infer that A did, in fact, touch his testicles. Youth asks us to review that determination *de novo*, but we decline to do so because this is not an exceptional case in which *de novo* review is warranted. *See* ORAP 5.40(8)(c) (court exercises discretion to review *de novo* "only in exceptional cases"). Accordingly, if we set out to review youth's challenge to the sufficiency

of the evidence, our task would be "to determine whether, viewing the evidence in the light most favorable to the state, a rational trier of fact could have found the essential elements of the [alleged act] beyond a reasonable doubt." *State v. J. C. L.*, 261 Or App 692, 700, 325 P3d 740 (2014). In other words, we would review the record to determine whether the evidence is legally sufficient to support the adjudication.

We would set about that task, however, only if youth had preserved for appeal his contention that the evidence is legally insufficient to support the adjudication on Count 2. The state contends that he did not. Youth, on the other hand, asserts that he preserved the claim of error in his closing argument, implicitly relying on cases holding that, in certain circumstances, a party can preserve an insufficiency-of-the-evidence argument in a closing argument to the trial court. *See, e.g.*, *State v. McCants/Walker*, 231 Or App 570, 576, 220 P3d 436 (2009), *rev'd on other grounds*, *State v. Baker-Krofft*, 348 Or 655, 239 P3d 226 (2010) ("in a bench trial, a defendant may * * * preserve a challenge to the legal sufficiency of the evidence by clearly raising the issue in closing argument"). Youth points specifically to the first sentence of his closing argument, in which he asserted that "it's our position that this did not happen."

Youth's argument in support of preservation implicitly assumes that nearly *any* closing argument in a bench trial will serve to preserve an argument that the evidence is legally insufficient to support a verdict favoring the party with the burden of proof. That is not correct. There is an important distinction between (1) an argument that seeks to convince a trial court, sitting as fact finder, not to be *persuaded* by the evidence favoring the other party, and (2) an argument that seeks to convince the trial court that the evidence is *legally* insufficient to support a verdict for that other party. And, to preserve an "insufficiency of the evidence" claim for appeal, a party must present the trial court with the latter type of argument. *McCants*, 231 Or App at 576 ("whether by way of a motion for judgment of acquittal or in closing argument, a defendant must sufficiently identify the asserted *legal insufficiency* of the state's proof" (emphasis added)); *State v. Forrester*, 203 Or App 151, 155, 125 P3d 47 (2005), *rev den*, 341 Or 141 (2006) ("To preserve a claim

of error concerning the legal sufficiency of the state's evidence, a defendant must—even in a case tried to the court—challenge the legal sufficiency of the evidence at trial."); *see also* *State v. Gonzalez-Valenzuela*, 358 Or 451, 454 n 1, 365 P3d 116 (2015) (the defendant adequately preserved an "insufficient evidence" argument by "challeng[ing] the legal sufficiency of the state's evidence in her closing arguments"); *State v. Habibullah*, 278 Or App 239, 242 n 1, 373 P3d 1259 (2016) (the defendant's argument, in closing, "that the state had failed to present sufficient evidence to support a finding of guilt" on certain counts was the functional equivalent of a motion for judgment of acquittal).

In this case, youth's closing argument did not include any contention that the evidence was legally insufficient to support a finding that he was within the juvenile court's jurisdiction on Count 2. Nor did youth make that argument even obliquely; he did not assert, in closing, that the court *could not* find that he had committed the alleged acts, nor did he argue that the record did not include any evidence that would support such a finding.

Rather, youth's closing argument was aimed entirely at persuading the juvenile court *as a fact finder* that it should have at least a reasonable doubt as to youth's guilt of the charges involving both victims. After beginning his closing argument with the assertion that "it's our position that this did not happen," youth's lawyer argued that M's statements and mother's testimony were not worthy of belief. Specifically, the lawyer asked the juvenile court to compare various statements made by M and note "some discrepancy going on," he pointed to mother's statement that M frequently lies, and he noted possible contradictions in M's trial testimony. Youth's lawyer also suggested that M had a motive to falsely accuse youth, as with youth "out of the house, she was able to get her old—old room back." After asserting that M had "some sort of bias" against youth, and noting youth's continuing denial that he had engaged in the alleged abuse, the lawyer set out what he characterized as "the reasonable doubt explanation *** for what's going on": he noted that M had previously suffered abuse when she was very young, asserted that mother had "start[ed] to see [youth] with suspicion and everything he does with

suspicion, and the first time that something *** comes up, she immediately thinks the absolute worst of [youth]."

The defense argument with respect to the allegation involving A was extremely brief. Youth's lawyer noted that youth had given "an explanation of bouncing [A] on his knee" and suggested that that incident, like those involving M, had simply been "blown out of proportion."

Those arguments to the juvenile court are not arguments that the evidence was insufficient *as a matter of law* to support findings that youth was within the juvenile court's jurisdiction on either count. Not only did youth not make any such argument generally, he never alluded to the contention that forms the basis of his appeal to this court—that the record includes no evidence that A actually touched youth's testicles. In the absence of any such contention, youth's insufficient-evidence argument is not preserved for appeal. *Cf.* *State v. Paragon*, 195 Or App 265, 268, 97 P3d 691 (2004) (to preserve an insufficiency of evidence argument for appeal, a motion for judgment of acquittal must identify "the specific theory on which the state's proof was insufficient"). Moreover, youth does not attempt to overcome the lack of preservation by arguing that his claim of error establishes that the juvenile court plainly erred when it found youth within the court's jurisdiction. Accordingly, we will not undertake a plain-error analysis. *J. D. v. S. K.*, 282 Or App 243, 249, 387 P3d 1161 (2016), *rev den*, 361 Or 439 (2017) (declining to consider a particular argument on appeal "because it is unpreserved and petitioner does not request plain error review").

Affirmed.

SCHUMAN, S. J., concurring in part, dissenting in part.

The juvenile court found beyond a reasonable doubt that youth committed two acts of sexual abuse, one act against each of two sisters: M (Count 1) and A (Count 2). The majority affirms both findings. I concur with the affirmance on Count 1, but the majority and I part company with respect to Count 2. The majority concludes that youth's

challenge to the Count 2 finding was not adequately preserved below. I disagree.

Youth argues on appeal that the record does not contain legally sufficient evidence to support the juvenile court's factual finding, beyond a reasonable doubt, that youth "got [A] to touch his testicles." Neither the state nor the majority argues to the contrary. Rather, the state argues, and the majority agrees, that youth's "insufficient evidence" argument was not presented to the juvenile court. Yet youth's counsel began his closing argument with the assertion, "Judge, it's our position that this did not happen." Had counsel said, "Judge, it's our position that *there is no evidence that this happened*," preservation would have undeniable. In context, the two statements are functionally equal. The state asserted that youth committed an act amounting to sexual abuse, including compelling A to touch his testicles; youth asserted that "this did not happen." Although that statement was not as clear as it could have been, it was sufficient to alert the court to the argument that the evidence did not suffice to prove that the asserted act *did* happen.