IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
ERIC PAUL DOYLE,
Defendant-Appellant.

Lane County Circuit Court
201503402; A160738

Karrie K. McIntyre, Judge.

Argued and submitted July 31, 2018.

Stephanie J. Hortsch, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Doug M. Petrina, Assistant Attorney General, argued the cause for respondent. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Ortega, Presiding Judge, and Egan, Chief Judge, and Powers, Judge.*

ORTEGA, P. J.

Affirmed.

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* Egan, C. J., *vice* Garrett, J. pro tempore.

ORTEGA, P. J.

Defendant appeals his conviction for first-degree sexual abuse, ORS 163.427, assigning error to the trial court's ruling that defendant was precluded from confronting the victim, F, at trial with evidence that she had previously falsely accused others of sexual abuse. He contends that our decision in *State v. LeClair*, 83 Or App 121, 730 P2d 609 (1986), provides him with the right, under the state and federal confrontation clauses, to cross-examine F given the evidence that she had made prior false accusations. The state asserts that the trial court correctly applied *LeClair* to preclude such questioning. Under *LeClair*, 83 Or App at 130-31, if there is some evidence from which the court could find that the victim had made a false accusation of past sexual abuse, the court must balance whether the probative value of that evidence is "substantially outweighed by the risk of prejudice, confusion, embarrassment or delay." Because the court's findings are supported by evidence and because the court did not abuse its discretion in balancing probative value with potential for prejudice and confusion, we affirm.[1]

The pertinent facts are undisputed and largely procedural. The charges underlying the conviction involve alleged sexual abuse of then eight-year-old F. On the night of the alleged abuse, F, members of her family, and defendant, a friend of F's mother and stepfather, attended an evening basketball game at a middle school. During the game, defendant and F went to a classroom, where defendant allegedly showed F sexually explicit videos on his phone and then put his hand underneath her clothing and touched her vagina. Video surveillance footage established that defendant and F were in the classroom together for about 28 minutes.

Before trial, the state sought to preclude defendant from confronting F with evidence that she had previously made several false accusations of sexual abuse, and the court held a hearing outside the presence of the jury

[1] After the initial briefing was complete, defendant filed a supplemental brief that included a supplemental assignment of error that assigned error to the trial court's instruction to the jury that it could return a nonunanimous verdict. Defendant contends that the Sixth and Fourteenth Amendments to the United States Constitution require unanimous jury verdicts. We reject that argument on the merits without further discussion.

to evaluate that evidence. In particular, defendant sought to cross-examine F about prior accusations of sexual abuse against her brothers, father, and stepfather.[2] Defendant argued that, in accordance with the criteria for admission under *LeClair*, (1) F had recanted the accusations against her father and brothers; (2) there was "some evidence" that the accusations against her brothers, father, and stepfather were false; and (3) the evidence is highly probative as to F's credibility, and questioning F would be sufficiently simple in that it would not cause jury confusion or create unnecessary delay. Defendant contended that, "as a practical matter," the case "probably [fell] most clearly under the third prong"—the "some evidence" balancing test—of *LeClair*, rather than the recantation prong.

The state maintained that the evidence "falls short" of what *LeClair* requires, arguing that there was no evidence demonstrating false accusations of sexual abuse. Citing *State v. Maxwell*, 172 Or App 142, 150, 18 P3d 438, *rev den*, 332 Or 559 (2001), the state argued that, as to F's father, this was "a situation where the victim denies ever making the allegations proffered by defense," so the issue is nothing more than a "factual dispute." As such, the existence of the allegations is "a collateral matter on which the admission of evidence would have unnecessarily delayed the trial and confused the issues before the jury." *Id.*

To provide context for the parties' arguments, we pause to summarize *LeClair*. In that case, the defendant, who was charged with sex crimes related to the abuse of a seven-year-old victim, sought to introduce evidence that the victim had previously made false accusations of sexual abuse. *LeClair*, 83 Or App at 123. The trial court concluded that the evidence was not admissible and forbade the defendant from cross-examining the victim about the incidents on the basis "that that line of inquiry would unduly shift

[2] In his response to the state's motion *in limine*, defendant stated that he "intends to cross-examine [F] about her prior allegations of sexual abuse by her brothers, stepfather, father, and unknown neighbor boys." This is the only time the "unknown neighbor boys" were mentioned in this motion, while "brothers and father" and "stepfather" are specifically analyzed applying *LeClair*. The trial court found that there was no credible evidence that F accused neighbor children of sexually abusing her, and defendant does not challenge that ruling on appeal.

the focus of the trial from the incident involving [the] defendant to the other incidents." *Id.* at 125. On appeal, we concluded that "[e]vidence of previous *false accusations* by an alleged victim is not evidence of *past sexual behavior* within the meaning of the Rape Shield Law and, therefore, is not inadmissible under OEC 412." *Id.* at 126-27 (emphases in original). On the other hand, we noted that OEC 608(2) "forbids any inquiry or cross-examination into specific incidents of conduct for impeachment purposes," and that "[s]pecific instances of conduct include false statements." *Id.* at 127. We further noted that the Confrontation Clause of Article I, section 11, of the Oregon Constitution allows a defendant to impeach a witness on cross-examination, though a defendant's confrontation right is not absolute. *Id.* at 128-29. We explained that "a court may prohibit cross-examination for impeachment purposes when the probative value of the evidence that the defendant seeks to elicit is *substantially* outweighed by the risk of prejudice, confusion, embarrassment or delay." *Id.* at 129 (emphasis in original).

Accordingly, we held that, as to evidence of prior false accusations of sexual abuse,

> "regardless of the prohibitions of OEC 608, the Confrontation Clause of Article I, section 11, requires that the court permit a defendant to cross-examine the complaining witness in front of the jury concerning other accusations she has made if 1) she has recanted them; 2) the defendant demonstrates to the court that those accusations were false; or 3) there is some evidence that the victim has made prior accusations that were false, unless the probative value of the evidence which the defendant seeks to elicit on the cross-examination (including the probability that false accusations were in fact made) is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay."

Id. at 129-30.

We turn now to the evidence presented at the pretrial hearing that formed the basis of the trial court's decision to preclude defendant from questioning F about prior alleged false accusations of sexual abuse. In March 2012, F's mother reported to the Washington State Department of Social Services that F had alleged sex abuse. Defendant sought to introduce as exhibits the two resulting intake

reports, which described what F's mother said to the intake worker about the accusations. The first narrative included the following:

> "[F] has reported to mother *** and stepfather *** that different males of all ages have had sex with her. [F] casually denies it immediately afterwards. Mother has tried to explain to [F] that these are very serious accusations but [F] thinks it is funny.
>
> "[F] told mother that stepfather sneaks into her bedroom and has sex with her. Mother asked [F] if she just told the truth and [F] said 'no.'
>
> "[F] previously accused her brothers *** of having sex with her. She also accused *** her father of having sex with her. A short time later [F] denied these allegations were true.
>
> "*****
>
> "Mother said these sexual abuse allegations are false but she does not know what to do. Mother is afraid that if [F] gets sexually abused in the future no one will believe it because of her history of telling lies."

The following came from the second report:

> "Mother asked [F] if she knew what sex is. [F] said 'no.'
>
> "*****
>
> "Mother took [F] to be examined by a pediatrician twice. There were no physical signs of sexual abuse. This pediatrician asked [F] if these allegations are true. [F] shrugged her shoulders and said 'no.'"

Defendant's other proposed exhibit was a report prepared by a defense investigator documenting a witness interview with stepfather on May 22, 2015. Referring to the alleged accusations from when F was five years old, the report recites the following:

> "[F's stepfather] states that he explained [to a detective and a child services officer] *** that [F] had been caught watching [him] and [F's mother] having sex and figured that this is where she came up with the story. He denied having any sexual contact with [F]."

At the hearing on the motion, the parties stipulated that the brothers would indicate that they had neither sexually penetrated F nor abused her in any way. F's father and stepfather each testified that they had never had any sexual contact with F. F's stepfather testified on direct examination that he heard F tell the detective that the stepfather had not had sexual contact with her. On cross-examination, however, he testified that he "d[id]n't believe" that he had heard F say that he "didn't sexually abuse her." Rather, it was F's mother who told him.

On direct examination, F's mother testified that she recalled that F told her that the allegations were not true, that she "believe[d that F] told the doctor that no, [the accusations] weren't [true]," and that she had "explain[ed] to [F] that these were serious accusations." When the mother was asked what she had previously said to the detective involved in the investigation of defendant's case, this colloquy followed:

> "[DEFENSE COUNSEL]: Did you indicate to [the detective] that *** '[F] said her dad raped her. Then she said [her stepfather] raped her. Then she said it was each one of her brothers.'
>
> "[MOTHER]: You know what, I was high [on methamphetamine during the interview with the detective]. So I don't know. I know that she made allegations. I know it was unfounded. I don't know what else you want me to say. I don't remember all the little details.[3]
>
> "[DEFENSE COUNSEL]: Presumably when you're high you've said that he—that these folks raped her; I mean, that's what she said?
>
> "[MOTHER]: She made allegations against [stepfather] having sex with her, yes.
>
> "[DEFENSE COUNSEL]: And then—but you told [the detective] that that was also—that it had been said about her dad as well as her two brothers?

[3] The detective that investigated the 2012 report testified that F's mother had reported that F told mother that dad and stepfather had "raped" F and that his impression was that mother "knew what she was saying," *i.e.*, that she did not appear high, and that they had had a lengthy, lucid conversation.

"[MOTHER]: She made allegations against them too. The nature of the allegations I do not remember. Whether it was touching or sex, I don't remember.

"[DEFENSE COUNSEL]: So if you used the phrase 'raped,' you were just using that colloquially?

"[MOTHER]: I don't believe I even said rape. I—she said that [stepfather] had sex with her and that's all I've ever said during any of it."

F testified on direct examination that she had never told her mother that stepfather had "done something" to her but that she had told the detective. She also testified that her father and brothers "had never done anything" to her.[4] She recalled going to the pediatrician and telling him, with her mother present, about the touching but not an examination "to see if they had touched" her.

At the conclusion of the hearing, the court rejected defendant's *LeClair* arguments, ruling that defendant would not be permitted to cross-examine F on past sexual abuse accusations. The court began by discussing why it was precluding questioning of F about her accusation regarding her stepfather, stating that it was "appropriate to review the allegations against [the stepfather] separately from any allegations against father and stepbrothers." The court added:

"Regarding [F's stepfather], I find that [F] has not recanted any accusations that she made against [F's stepfather]. I do not find [the mother] to be credible in her recitations as they relate to any recanting of [F] related to [the stepfather].

"I find that [F] was alert during her testimony today. She was oriented. She was attentive to questioning. She was not shy about correcting either attorney when she felt

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[4] F was consistent on this point. For example, in three instances, F testified:

(1) "[DEFENSE COUNSEL]: And you said none of it happened, that none of those people touched you?

"[F]: And I said except for [stepfather]."

(2) "[F]: I told the doctor that [stepfather] touched me."

(3) "[STATE]: Did you ever tell anybody *** that your dad *** touched you inappropriately—

"[F]: It wasn't dad. *** It was [stepfather]."

> it was necessary and appropriate, and she remained adamant throughout her testimony that it was [her stepfather] who abused her.
>
> "I also note for the record that [F's stepfather] was late to court despite a subpoena to be here, that he was inconsistent in his testimony, and that he was self-serving in denying any accusations in recitation to the Court about how the [] CPS and criminal investigation proceeded. Therefore, as it relates to any previous accusations of abuse against [the stepfather], I find that they are factually in dispute and that it's an unlitigated allegation, so any questioning on this matter shall be deemed *** inadmissible."

In essence, the trial court found that F had not recanted the allegations as to her stepfather (category one) and that defendant had failed to show that F's accusation regarding her stepfather was, in fact, false (category two). The court then made an alternative ruling under category three.

> "However, I also find that even if the third prong of the *LeClair* analysis applies in this matter, that some evidence exists *** that the victim has made prior allegations that were false, I find that it is prejudicial to the State and would lead to jury confusion, and therefore is deemed inadmissible on those grounds."

Regarding the denial of cross-examination of F as to accusations regarding her father and brothers, the court stated:

> "As it relates separately to the allegations against father and the brothers, I do view that somewhat differently. We are here on, *** actually, potentially, the first prong that she made an allegation and then recanted them.
>
> "And then, third, that there was some evidence of a prior accusation that [was] false. However, I find that the statements that were made were made by a whimsical five-year-old who, mother states during her testimony today, made some, quote, something about sex abuse, [which] was the only allegation that [mother] indicated or at least testified to regarding any disclosures by [F]. But she also denied—or she also indicated that [F] immediately re-denied that that was true.

> "I would say that the statements that [mother] made lacked specificity. They were again denied adamantly by the child. The child is now nine years old. I find mother's insertion of exaggeration of terminology, calling the incidences as rape or rape accusations, were made admittedly while the mother was high. While it has slight probative value, I believe it is outweighed by the prejudicial effect on the jury. And for the jurors to speculate upon a cross-examination could lead to confusion, so I am ruling any questioning on that as inadmissible."

ANALYSIS

On appeal, defendant assigns error to the trial court's denial of his motion to permit cross-examination of F regarding her allegedly false accusations against her stepfather, father, and brothers. He renews his argument that *LeClair*'s first and third categories provide the basis for his right to confront F.

Initially, the state contends that this court should entirely overrule or, alternatively, modify and refine *LeClair* because it was "wrongly decided." As we recently reiterated in *State v. Silver*, 283 Or App 847, 852, 391 P3d 962, *rev den*, 361 Or 886 (2017), "we must not, and do not, lightly overrule our precedents." (Internal quotation marks and citations omitted.) "We only overrule cases that are plainly wrong, a rigorous standard grounded in presumptive fidelity to stare decisis." *Id.* (internal quotation marks and citation omitted). We are not persuaded that our holding in *LeClair* is "plainly wrong," and we therefore decline the state's invitation to overrule that case.

We turn to defendant's arguments applying *LeClair* to this case. Because the trial court analyzed the accusations against F's stepfather separately from the other accusations, we likewise do so here.

F'S STEPFATHER

We agree with the state that defendant did not preserve his arguments as to F's stepfather under category one; therefore, we address defendant's argument pertaining to

previous accusations against the stepfather under *LeClair* category three.[5]

As noted, a defendant may be entitled to impeach a victim by questioning her about prior accusations when "there is some evidence that the victim made prior accusations that were false, unless the probative value of the evidence which the defendant seeks to elicit on cross-examination (including the probability that false accusations were in fact made) is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay." *LeClair*, 83 Or App at 130. We review such balancing for abuse of discretion. *State v. Arellano*, 149 Or App 86, 90, 941 P2d 1089 (1997), *rev dismissed as improvidently allowed*, 327 Or 555 (1998) ("[U]nder *LeClair*, *** if the evidence of a prior false accusation is within the third category, we review the court's decision for abuse of discretion.").

Although there is a basis in the record for the trial court's finding that F had not recanted her allegations and, indeed, "remained adamant" in her testimony that her stepfather abused her, the record contains "some evidence" that F's allegations against the stepfather were false, as required under *LeClair*—that is, the stepfather's denial of the accusations and F's mother's assertion that the victim recanted the accusations. The question then becomes "whether the probative value of the evidence which the defendant seeks to elicit on cross-examination (including the probability that false accusations were in fact made) is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay." *LeClair*, 83 Or App at 130.

The trial court's engagement with that question is not as robust as we might wish. The court noted matters reflecting on the relative credibility of F, her stepfather, and her mother, noting that F was "alert," "oriented," "attentive to questioning," and "not shy," whereas the stepfather was late to court and "inconsistent" and "self-serving" in his testimony, and F's mother was not credible in her assertions

[5] The trial court found that there was no recantation, stating: "Regarding [the stepfather], I find that [F] has not recanted any allegations that she made against [the stepfather]." Even if, *arguendo*, defendant had preserved the category one argument, the court's finding is supported by the record.

that F had recanted her allegations. Reviewed for abuse of discretion, we take those findings to relate to the probative value of the inquiry that defendant sought to make. The court further noted that "even if *** some evidence exists of false allegations *** it is prejudicial to the State and would lead to jury confusion." Although the analysis could be clearer, we understand the trial court to have concluded that the probative value of the inquiry defendant proposed to make was substantially outweighed by the risk of prejudice and confusion. Under the circumstances presented here, the trial court did not abuse its discretion in so concluding.

F'S FATHER AND BROTHERS

We turn to defendant's *LeClair* category one and three arguments regarding F's father and brothers. First, the state contends that defendant failed to preserve his category one argument because, even though he raised such an argument in his written response to the state's motion, "at the hearing, defendant strongly suggested that category one did not apply and that the court should apply [only] the category-three analysis."

We are not persuaded. "[W]e have consistently held that an issue is preserved for our review if it is presented clearly in a written motion, notwithstanding a party's failure to reiterate all of its arguments at a subsequent hearing." *State v. Mejia*, 287 Or App 17, 22, 401 P3d 1222 (2017); *see also, e.g.*, *State v. Holt*, 279 Or App 663, 667, 670, 381 P3d 897 (2016) (holding that even though the defendant did not reiterate the argument at a subsequent hearing, he "preserved his request *** by raising it in his motion *in limine*, *** although [the] defendant's statement of his position was relatively basic" (internal quotation marks omitted)). Here, defendant did not withdraw his category one argument, which the trial court clearly understood was at issue. By presenting a category one argument in his written response to the state's motion, defendant preserved his argument that F had recanted her accusations against her father and brothers.

As to the merits, *LeClair*'s first category requires us to determine whether the record supports the trial court's

finding that F did not recant her accusations against her father and brothers. "'Recantation' means the unequivocal public withdrawal of an allegation." *State v. Wonderling*, 104 Or App 204, 208, 799 P2d 1135 (1990). The court's finding regarding whether or not there has been a recantation is binding on appeal if the record supports it. *State v. Taylor*, 275 Or App 962, 965, 365 P3d 1149 (2015); *see Arellano*, 149 Or App at 90 (under *LeClair*, we are bound by the trial court's finding that an accusation was not recanted if there is evidence to support that finding).

Here, the principal evidence of recantation came from F's mother, and the court found that her testimony regarding both the accusations and the alleged recantations did not constitute an "unequivocal public withdrawal."[6] The record, then, supports the trial court's view that defendant failed to establish *LeClair*'s first prong.

As to defendant's category three arguments, the trial court did not abuse its discretion in balancing the pertinent factors. First, it found that there was "some evidence" of F's false accusations. Second, the court questioned the probative value of the evidence, explaining that F made the accusations, if at all, as a "whimsical" five-year-old who, four years later, testified adamantly that she had never made them. The court further explained that the only evidence that F had made the accusations came from F's mother when she was "admittedly high" and that her current testimony "lacked specificity" and "exaggerat[ed]" or "insert[ed] *** terminology" when she called the accusations "rape or rape allegations." In the end, the court expressed the view that cross-examination of F on this topic would have "slight probative value" and would be "outweighed by the prejudicial effect on the jury" and "could lead to confusion." That assessment was within the trial court's discretion.

In summary, we conclude that, on this record, the trial court did not abuse its discretion under *LeClair* category three in deciding that, on balance, cross-examination

[6] Indeed, the trial court, viewing the evidence, evinced doubt as to whether F ever made any accusations against her father and brothers, as claimed by her mother, a position that F maintains. If there is no accusation, then there is no accusation to recant, obviating *LeClair* category one entirely.

related to F's allegedly false accusations regarding her stepfather, father, and brothers should be excluded.

Affirmed.