

**FILED: May 31, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

TRAVIS HAROLD MICHAEL WIRFS,  
Defendant-Appellant.

Lane County Circuit Court  
200909283

A143423

Maurice K. Merten, Judge.

Submitted on December 21, 2011.

Peter Gartlan, Chief Defender, Office of Public Defense Services, and Zachary Lovett Mazer, Deputy Public Defender, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Jeremy C. Rice, Assistant Attorney General, filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reversed and remanded.

1                    NAKAMOTO, J.

2                    Defendant was convicted of one count of second-degree sodomy, ORS  
3 163.395, and two counts of third-degree sodomy, ORS 163.385. On appeal, he advances  
4 five assignments of error. Specifically, in his first assignment of error, he argues that a  
5 state's witness improperly commented on the credibility of the complainant. In his  
6 second assignment of error, he contends that it was error for the trial court to conclude  
7 that he was fit to proceed to trial. In his third and fourth assignments of error, he argues  
8 that the trial court erred in sustaining the state's objections to two of defendant's questions  
9 on redirect examination of his expert witness. Finally, in his fifth assignment of error, he  
10 contends that it was unconstitutional for the jury to convict him with less than a  
11 unanimous verdict. We conclude that the trial court erred in preventing defense counsel  
12 from asking questions on redirect examination of defendant's expert. Accordingly, we  
13 reverse and remand on that basis and decline to reach defendant's first, second, and fifth  
14 assignments of error.

15                    Because defendant was convicted, we summarize the facts in the light most  
16 favorable to the state. [State v. Vidal](#), 245 Or App 511, 513, 263 P3d 364 (2011), *rev den*,  
17 351 Or 761 (2012). The complainants, AS and AL, are step-brothers and were 14 and 12  
18 years old, respectively, at the time of the incidents. According to AS, while he spent the  
19 night at defendant's home, he awoke to find defendant performing oral sex on him. On  
20 another occasion, both AS and AL spent the night at defendant's home and both testified  
21 that defendant performed oral sex on both of them as they slept.

22                    After the incidents, AS and AL teased each other about being homosexual.

1 When their parents confronted them about the teasing, each complainant denied having  
2 sexual contact with defendant, but claimed the other had had sexual contact with  
3 defendant. The parents became concerned and called the police. Detective Martin met  
4 the family at the Kids First Center, a child abuse assessment center. During interviews  
5 with counselors at the Kids First Center, AS denied that defendant had sexually abused  
6 him, but claimed that defendant performed oral sex on AL. Likewise, AL denied that  
7 defendant had sexually abused him, but claimed that defendant performed oral sex on  
8 AS. Martin told the family that he could not pursue the investigation any further based  
9 on the boys' statements.

10 About a month later, AS told his mother that defendant had performed oral  
11 sex on him. The complainant's mother took AS to the police station where Martin  
12 interviewed him. AS told the detective that he had lied during his interview at the Kids  
13 First Center and that defendant had performed oral sex on him while he slept at  
14 defendant's home. Martin contacted defendant and interviewed him at the police station.  
15 Defendant denied any sexual contact with AS, saying that AS may have misunderstood  
16 defendant patting AS's stomach as his way of saying goodnight. Defendant was not  
17 arrested that day, but he agreed to meet with another detective from the Oregon State  
18 Police two days later. At that interview, defendant confessed to having performed oral  
19 sex on AS on three separate occasions and on AL once. Detectives recorded defendant's  
20 confession. After learning of defendant's confession, AL admitted to Martin that  
21 defendant had sexually abused him. When asked why he had not disclosed the abuse at  
22 the Kids First Center earlier, AL said that he had lied because he was embarrassed.

1 Defendant was arrested and charged with one count of second-degree  
2 sodomy, ORS 163.395, and two counts of third-degree sodomy, ORS 163.385. At trial,  
3 Martin, AS, and AL testified for the state. The state also played for the jury defendant's  
4 tape-recorded confession. Defendant's theory of the case was that none of the witnesses  
5 had told consistent stories about what had happened when AS and AL spent the night at  
6 defendant's home and that his own confession was unreliable, raising a reasonable doubt  
7 that he had committed the crimes charged.

8 To rebut his confession, defendant called Dr. Truhn, a psychologist, to  
9 testify that defendant suffers from a pervasive developmental disorder not otherwise  
10 specified (NOS), alcohol abuse, and a psychotic disorder NOS. According to Truhn's  
11 testimony, a person with a pervasive developmental disorder, when confronted by an  
12 authority figure, does not have adequate coping mechanisms and is susceptible to  
13 acquiescing in the authority figure's demands. The trial court and the parties had Truhn's  
14 report before them as an exhibit during Truhn's testimony, and the report was marked for  
15 identification and is part of the appellate record. However, the report was not admitted as  
16 evidence for publication to the jury. Within the report, Truhn wrote that defendant's IQ  
17 was 96, which placed him in the 39th percentile and was average for a person his age.  
18 His report went on to conclude that, "socially, [defendant] is much younger than his  
19 chronological age. Intellectually and cognitively[,] his functioning appears to be  
20 consistent with his chronological age. The [psychological tests] do indicate that  
21 [defendant] is functioning socially in interpersonal relationships at about the eight to nine  
22 year old level." During trial, Truhn testified that defendant's social-functioning age was

1 approximately that of a child between eight and 10 years old. On cross-examination, the  
2 state asked Truhn whether he concluded in his report that defendant had adequate  
3 intelligence and cognitive skills. Truhn replied yes.

4 On redirect, defense counsel first asked Truhn to turn to page 11 of his  
5 report and to read "the sentence directly above the phrase the prosecutor used to ask you  
6 about [defendant]'s intellectual and cognitive age." The state requested some time to  
7 refer to that page before defense counsel continued his redirect examination. Then  
8 defense counsel asked, "Is someone's social age sometimes different from their  
9 intellectual age, Doctor?" The state objected to the question on the ground that it was  
10 outside the scope of cross-examination, and the court sustained the objection. Defense  
11 counsel then asked whether people who have social difficulties sometimes have normal  
12 intelligence. The state objected again on the same basis, and the trial court sustained the  
13 objection. At closing, the state told the jury:

14 "[Truhn] did the testing and he told you what the results of the  
15 testing were. And the sum and substance of all of that, at least as they tried  
16 to emphasize in his testimony, was that the defendant, while he has average  
17 cognitive abilities, thought processes, et cetera, emotionally he's more  
18 immature than other 21 year-old guys.

19 "With the hopes that the suggestion of that immaturity would allow  
20 them to argue that when he made those statements to the detectives, he was  
21 too immature to know what he was doing. He was too immature perhaps to  
22 appreciate the consequences of what he was doing. He was too immature  
23 certainly to withstand \* \* \* the barrage of questioning by the detectives to  
24 elicit the answers that they wanted. And only the answers that they  
25 wanted."

26 Ultimately, the jury found defendant guilty on all counts.

27 On appeal, defendant combines his arguments for his third and fourth

1 assignments of error, arguing that it was error for the trial court to sustain the state's two  
2 objections to defense counsel's questions of Truhn on redirect examination. The state  
3 argues that defendant failed to preserve the assignments of error because he did not argue  
4 how or why the question was within the scope of cross-examination.

5           The state relies on *State v. White*, 119 Or App 424, 850 P2d 1158, *rev den*,  
6 317 Or 486 (1993), in which the trial court overruled the defendant's objection to the  
7 state's line of questioning regarding defendant's consumption of alcohol. On appeal, the  
8 defendant assigned error to the trial court's overruling of his objection. We held that  
9 objecting alone was not adequate to preserve the claim of error, because it did not  
10 identify the ground on which the defendant challenged the ruling on appeal. *Id.* at 427.

11           The state's reliance on *White* is misplaced. Preservation policies are  
12 prudential and pragmatic in nature. [\*Peeples v. Lampert\*](#), 345 Or 209, 219-20, 191 P3d  
13 637 (2008). The purpose of preservation is to ensure fairness to an opposing party, by  
14 giving the trial court the chance to consider and rule on a contention, and allowing the  
15 opposing party to respond. *Id.* at 220. Whether a party adequately presented a contention  
16 to the trial court varies depending on the nature of the claim or argument. *Id.* In *White*,  
17 the defendant was the appellant and the party who had objected to the introduction of  
18 evidence. The defendant's failure to offer an explanation as to the basis of his objection  
19 did not give the trial court in that case the chance to consider and rule on the contention  
20 that he later raised on appeal. Here, in contrast, when the state objected to defendant's  
21 line of questioning, the state identified the ground on which defendant is now appealing--  
22 whether the question was within the scope of cross-examination.

1           Similarly, the state's argument that defendant was required to make an offer  
2 of proof to preserve his arguments in this case fails, because the trial court and the  
3 prosecutor were aware of the substance of the testimony that defendant would elicit on  
4 redirect. *See State v. Olmstead*, 310 Or 455, 461, 800 P2d 277 (1990) (purposes of an  
5 offer of proof include aiding the trial court to make an informed decision and facilitation  
6 of appellate review). The situation at trial was one in which the written expert report,  
7 available to the trial court and the prosecution, foretold Truhn's answers.

8           Both the state and the trial court understood that, in response to defendant's  
9 questions on redirect, Truhn would testify about the contents of his report and explain  
10 that despite normal intelligence, an adult can have a pervasive developmental disorder of  
11 the type he observed in defendant. When a party assigns error to a trial court's ruling that  
12 excludes evidence, the issue is preserved if "the substance of the evidence was made  
13 known to the court by offer or was apparent from the context." OEC 103(1)(b). Before  
14 asking Truhn the question raised on appeal, defense counsel asked Truhn to turn to page  
15 11 of his report and read "the sentence directly above the phrase the prosecutor used to  
16 ask you about [defendant]'s intellectual and cognitive age." Then the prosecutor asked  
17 for a moment to turn to that page before defense counsel asked the question that is on  
18 appeal. It was apparent from the context of the defense counsel's line of questioning that  
19 the substance of Truhn's testimony would have been related to the prosecutor's questions  
20 about Truhn's report and the legitimacy of Truhn's opinion. The state was not taken by  
21 surprise, and the trial court had a chance to consider the issue. Therefore, we conclude  
22 that defendant's arguments were preserved.

1           Turning to the merits of the arguments, we review a trial court's conclusion  
2 that a party's line of questioning during cross-examination exceeded the scope of direct  
3 examination for errors of law. *State v. Ramirez*, 219 Or App 598, 603, 184 P3d 1138,  
4 *adh'd to on recons*, 222 Or App 603, 195 P3d 404 (2008), *rev den*, 346 Or 158 (2009).  
5 We apply the same standard of review to a ruling foreclosing questions based on the  
6 scope of redirect examination. *See State v. Wise*, 40 Or App 303, 306-07, 594 P2d 1313  
7 (1979) (determining that question was within the scope of redirect by citing case law  
8 concerning scope of cross-examination).

9           The Supreme Court explained, before the adoption of the Oregon Evidence  
10 Code, that, generally, cross-examination "should not be limited to the exact facts stated  
11 on direct examination, but [may] extend[ ] to other matters which tend to limit, explain,  
12 or qualify them, or to rebut or modify any inference resulting therefrom, provided they  
13 are directly connected with the matter stated in the direct examination." *Ritchie v.*  
14 *Pittman*, 144 Or 228, 231, 24 P2d 328 (1933). That broad view of the scope of cross-  
15 examination continues today under OEC 611(2).<sup>1</sup> *Ramirez*, 219 Or App at 602-04. We  
16 now explicitly decide that the scope of redirect examination is the same as the scope of  
17 cross-examination. Redirect may extend to the facts elicited on cross-examination;  
18 matters that tend to limit, explain, or qualify them; or matters that tend to rebut or modify

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<sup>1</sup> OEC 611(2) provides:

"Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."



1 any inference resulting from the cross-examination--provided that the inquiries are  
2 directly connected with the matter stated in cross-examination. *See Ritchie*, 144 Or at  
3 231; *Wise*, 40 Or App at 306-07.

4           Here, defendant's questions on redirect had a tendency to rebut the state's  
5 implication that defendant's normal intelligence is proof that he was not pressured into  
6 signing a confession during his police interview. During cross-examination, the state  
7 asked Truhn about the report he submitted to the court. Specifically, the state asked  
8 whether Truhn had concluded in his report that defendant's intelligence level was  
9 adequately normal for a person his age. Within the same paragraph of the report  
10 containing that conclusion, Truhn had written that "socially, [defendant] is much younger  
11 than his chronological age. Intellectually and cognitively[,] his functioning appears to be  
12 consistent with his chronological age. The [psychological tests] do indicate that  
13 [defendant] is functioning socially in interpersonal relationships at about the eight to nine  
14 year old level." When defense counsel asked Truhn on redirect whether he had  
15 determined that defendant had significant difficulties dealing with social situations, in  
16 spite of his intellectual or cognitive age, he inquired about the same subject that the state  
17 inquired about on cross-examination--the conclusions in his report and their significance  
18 to the reliability of defendant's confession. That question provided additional evidence  
19 that tended to rebut or modify the state's implication, through cross-examination of  
20 Truhn, that the diagnosis was suspect or that defendant's confession during his interview  
21 with police was reliable because he had normal or adequate intelligence. Defense  
22 counsel sought to elicit similar testimony by asking whether people who have social

1 difficulties sometimes have normal intelligence. Thus, defense counsel's questions were  
2 directly and logically connected to the cross-examination and were within the scope of  
3 redirect examination. On that basis, the trial court erred in sustaining the state's  
4 objection.

5           Having determined that the trial court erred, we must now determine  
6 whether that error was harmless. Evidentiary error is not presumed to be prejudicial.  
7 OEC 103(1). We will affirm a judgment despite an evidentiary error if there is "little  
8 likelihood that the error affected the jury's verdict." [State v. Davis](#), 336 Or 19, 32, 77 P3d  
9 1111 (2003). If erroneously admitted or excluded evidence pertained to a "central fact  
10 issue," then it was more prejudicial than if the evidence pertained to tangential issues.  
11 [State v. Marrington](#), 335 Or 555, 566, 73 P3d 911 (2003). Generally, erroneously  
12 admitted or excluded scientifically based testimony from an expert witness weighs  
13 against a determination that the error was harmless. [State v. Johnson](#), 225 Or App 545,  
14 555, 202 P3d 225 (2009).

15           Although the state contends that defendant cannot establish harm due to his  
16 failure to make an offer of proof, defendant contends that the error in excluding the  
17 evidence likely affected the verdict and was not harmless, given that the excluded  
18 evidence was scientific in nature and highly relevant to his defense that his confession  
19 was unreliable. In this case, defendant called only one witness in his defense, Truhn. As  
20 the prosecutor argued to the jury at trial, "the entire defense in this case is Dr. Truhn's  
21 testimony." Defendant's theory of the case was that reasonable doubt about his guilt  
22 existed because none of the witnesses to the sexual encounters gave consistent statements

1 and his confession was unreliable. Defendant, AS, and AL, at one time or another, gave  
2 inconsistent, contradictory statements to detectives, counselors, or at trial. Defendant  
3 used Truhn's testimony to argue that, because defendant has mental and psychological  
4 issues--pervasive developmental disorder NOS such that he has the social skills of an  
5 eight year-old and is susceptible to pressure from authority--his confession was  
6 unreliable. During cross-examination, the state sought to rebut defendant's theory of the  
7 case, in part, by eliciting a new piece of information from Truhn that was damaging to the  
8 defense: that defendant had a normal IQ and cognitive abilities for someone of his age.  
9 The state highlighted defendant's normal intelligence and cognitive skills during its  
10 closing argument and downplayed the significance of Truhn's testimony about  
11 defendant's diagnosis by describing defendant as "immature." By denying defendant the  
12 opportunity to have Truhn explain that an adult person who has normal intelligence can  
13 still have a developmental disorder and the social skills of a child, the trial court hobbled  
14 defendant's ability to rebut the state's argument that the jury should disregard Truhn's  
15 opinion and the theory that defendant had an impairment bearing on the reliability of his  
16 confession. *See Johnson*, 225 Or App at 555 (given the potential for scientifically based  
17 evidence to influence a jury generally, erroneous exclusion of scientifically based  
18 testimony of an expert weighs against a determination that error is harmless).  
19 Accordingly, we hold that the evidentiary error was not harmless.

20                   Reversed and remanded.