IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent on Review,
v.
ROBERT LEWIS HENLEY,
aka Sonny Henley,
Petitioner on Review.

(CC 09072338C) (CA A154810) (SC S064494)

On review from the Court of Appeals.*

Argued and submitted June 15, 2017.

Mary M. Reese, Senior Deputy Public Defender, Salem, argued the cause and filed the briefs for petitioner on review. Also on the brief was Ernest G. Lannet, Chief Defender, Office of Public Defense Services.

Jordan R. Silk, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before, Walters, Chief Justice, and Balmer, Kistler, Nakamoto, Flynn, Duncan, and Nelson, Justices.**

NAKAMOTO, J.

The decision of the Court of Appeals and the judgment of the circuit court are reversed, and the case is remanded to the circuit court for further proceedings.

Kistler, J., dissented and filed an opinion in which Balmer, J., joined.

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* Appeal from Malheur County Circuit Court, Patricia A. Sullivan, Judge. 281 Or App 825, 386 P3d 126 (2016).

** Brewer, J., retired June 30, 2017, and did not participate in the decision of this case. Landau, J., retired December 31, 2017, and did not participate in the decision of this case.

NAKAMOTO, J.

In this criminal case arising out of allegations of child sexual abuse, the issue is whether the expert testimony that the trial court allowed about "grooming" children for later sexual activity is "scientific" evidence that requires a foundational showing of scientific validity under OEC 702. At trial, over defendant's objection, the trial court permitted a forensic interviewer to testify about defendant's behavior that may have constituted "grooming" of the victim for sexual abuse if defendant had the requisite intent, without the state first establishing that the testimony about grooming was scientifically valid and reliable.

Defendant was convicted of first-degree sexual abuse and attempted first-degree sodomy. On defendant's appeal, the Court of Appeals held that the testimony was not scientific evidence for which a foundation was required. *State v. Henley*, 281 Or App 825, 386 P3d 126 (2016). For the reasons that follow, we conclude that the testimony was scientific evidence and that the trial court erred in admitting it without a proper foundation. Given the record, we decline to decide the validity and reliability of the expert testimony on review. We also conclude that the admission of the testimony was not harmless. Therefore, we reverse the decision of the Court of Appeals and the judgment of the trial court and remand to the trial court for further proceedings.

I. FACTS

A. *The Alleged Abuse*

Defendant's trial centered on whether he had sexually abused his stepdaughter, M, during a family camping trip. As to that specific event, the state presented the following evidence.

At the time of the alleged abuse, defendant had been married to M's mother for nine years. M, who was then 11 years old, lived with her mother and defendant in Idaho. One summer weekend, defendant, M, her mother, two of M's siblings, and an adult male friend of the family went camping in eastern Oregon. They all slept in a camper—a pop-up tent trailer with fold-out beds on either end of a middle living space. Defendant and M's mother slept in one fold-out

bed and M's siblings slept in the other. M slept on a mattress in the middle area, next to her mother and defendant. The family friend slept on another mattress in the middle area.

Defendant and the friend stayed up late and went into the camper after the others were already in bed. M's mother woke up and tried to persuade defendant to come into bed with her. Instead, defendant sat down next to M on M's bed, and M's mother went back to sleep. M awoke briefly while defendant was lying on her bed, and then she fell back to sleep.

M was awakened again early the next morning, when defendant, who was lying beside her, pulled down his own pants and pulled M's sweatpants and underwear to her ankles. He inserted his fingers into her vagina. In an effort to stop him from touching her, M rolled over onto her stomach and then onto her side. Defendant put his hands on M's sides, attempted to spread her buttocks with his thumbs, and put his penis in her "butt crack." Defendant rubbed against her, ejaculated, and said, "Ahh."

M then sat up. Defendant also sat up and asked her if she was okay. M's mother then woke up, and defendant lay back down in M's bed. M's mother asked M if anything was wrong, but M answered no. M's mother asked M to come up into her bed, and M complied and fell asleep. When M woke up, defendant was not in the camper.

Later that day, M told her mother what had happened. M's mother replied that she did not know what to say, but that she would arrange a mattress to make a barrier to prevent defendant from getting into bed with her again that night. Sometime later, M's mother told defendant that M had said he had touched her and rubbed his penis against her buttocks. Defendant responded that he did not know what had happened, as he had been asleep.

B. *The Investigation and Charges*

The police became involved later that month. M's father and his fiancée also lived in Idaho. When the camping trip was over, M, as previously planned, went to stay with her father and his fiancée for a month. M did not immediately tell her father what had happened on the camping

trip. M eventually told her father's fiancée about massages that defendant had given her, and she relayed that information to M's father. M's father asked M to tell him if any adult had ever touched her inappropriately. Later that day, M told her father and his fiancée about the abuse in the camper. M's father called the local police in his community, where the investigation began.

Courtney Palfreyman, a forensic interviewer for Children at Risk Evaluation Services (CARES) at St. Luke's Hospital in Boise, Idaho, interviewed M. Palfreyman's interview of M was video-recorded. During the interview, M told Palfreyman about the recent camping incident. In addition, she described massages that defendant had given her that made her uncomfortable. M also said that, when she was five or six years old, defendant had crawled into bed with her one night and asked her to touch his penis. M explained that she did not comply and instead told defendant that she needed to go to the bathroom and went to find her mother.

Because the camping incident occurred in Oregon, the case was transferred to Malheur County, Oregon. Defendant was charged with one count of first-degree sexual abuse and one count of first-degree sodomy based on his conduct in the camper.

C. *Trial*

Citing OEC 403 and 404(3), defendant filed a motion *in limine* seeking to exclude evidence from his impending jury trial, including testimony that defendant had massaged M inappropriately. The state responded that evidence of inappropriate massages was admissible to demonstrate defendant's "grooming behavior as part of [his] planning or preparation for the later sexual assault" of M. The trial court denied defendant's motion.

At trial, M testified in conformance with the recorded CARES interview. M testified regarding the camping incident, the incident from years earlier,[1] and the

[1] As for the incident when she was five or six years old, M recounted that defendant wanted her to touch his "wiener" and that her mother responded to M's report of that conduct by assuring her that defendant would not go into her room

massages defendant had given her. The massages were the subject of the expert's grooming testimony at issue. During M's direct examination, she testified that defendant had been giving her massages from time to time, at her request. M explained that defendant had massaged her shoulders but also "down [her] legs and "up by [her] chest." M did not like when defendant massaged her chest, though, because she "thought he was going too far into [her] other areas." M also testified that she told her mother that defendant was massaging "too close into other areas [she] didn't like."

Palfreyman also testified for the state. She told the jury that she has a bachelor's and a master's degree in social work and received specialized training in forensic interviewing, both basic and advanced, with the American Professional Society on the Abuse of Children. She stated that she had over ten years of experience working in child welfare and protection and as a forensic interviewer. She had worked for the State of Idaho from 1999 and then had been a forensic interviewer with CARES since 2005. At the time of the trial in 2009, she had completed over 600 forensic interviews.

During Palfreyman's testimony, the prosecutor played for the jury the video recording of her interview of M at CARES, pausing it at various points to ask Palfreyman clarifying questions. In the recorded interview, M said that she had told her father's fiancée about several massages from defendant and described the massages to Palfreyman:

> "When I'm sore, he'll massage me, but he won't get where I need him to. He'll go all over the place [gesturing and putting her hands palms down in the middle of her chest]. And, like last month, I asked him to massage my neck 'cause I had a neck ache. I'm never gonna do that again because of what happened, because I'm so scared of him—with the camping. But, I was asking him to massage my neck. He was massaging it, and he was going down here [putting her hands in the middle of her chest], and then I asked him to

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again and telling M to sleep the rest of the night with her. Later during the trial, one of M's friends testified that M initially had said that defendant asked M to touch his penis, but that M later recanted, telling the friend that she had lied and made up the incident.

> stop going down here [putting her hands to her chest]. And he was all, okay; then he went down here [gesturing toward her lower back]."

In the recording, Palfreyman confirmed that M was pointing to her lower back, and M described that defendant had also massaged her on the back of her upper legs that time.

After the conclusion of the video, the prosecutor asked Palfreyman the following question about her training on grooming: "In terms of this particular interview or in general, have you had any training regarding a concept called grooming?" Palfreyman answered in the affirmative. Defendant objected to Palfreyman's qualification to testify as an expert on grooming behavior. In response, the prosecutor requested an opportunity to qualify Palfreyman as an expert and asked her several other questions about her training on grooming:

> "[PROSECUTOR]: So you've actually had training in the area of grooming is that correct?
>
> "A: Yes.
>
> "[PROSECUTOR]: Okay. But you're—you're not a psychologist or anything like that?
>
> "A: No.
>
> "[PROSECUTOR]: Okay. What sort of training have you had?
>
> "A: Um, just due to my forensic interview training we talk about grooming (INAUDIBLE) leading up to offending, and through my college courses, different trainings that I've had."

When the prosecutor proceeded to ask Palfreyman to describe what she had been taught to look for in terms of grooming behavior, defendant again objected, on the ground that the prosecutor had not laid a proper foundation for that testimony—that is, that Palfreyman was not an expert and had had no special training with regard to grooming. The prosecutor responded that he was asking Palfreyman about her "training and experience" with regard to grooming. At that point, defense counsel suggested that the matter should be argued without the jury present.

Outside the presence of the jury, the court asked the prosecutor whether he would go beyond asking Palfreyman to define grooming and her training, by asking whether she saw signs of grooming. The prosecutor told the court that Palfreyman had "been taught to recognize certain behaviors which could be considered grooming" and argued that, although he would ask if she saw any signs of grooming in this case, he was not asking for a scientific, medical, or expert opinion. Defendant argued that testimony about grooming was similar to testimony about syndrome evidence or a diagnosis of sexual abuse and that, like evidence on those topics, "there has to be some sort of scientific validity" to it, which had not been shown in this case.

The trial court overruled the objection. It permitted Palfreyman to define what grooming behavior is and to describe behaviors by defendant that concerned her. The court also granted defendant a continuing objection to evidence concerning sexual grooming.

Once the jury was recalled to the courtroom, the prosecutor continued to question Palfreyman about grooming behavior in general:

> "[PROSECUTOR]: So in terms of grooming can you just briefly describe some of the activities that you're familiar with that might be considered grooming?
>
> "A: Some of the activities would include spending time together, sometimes allowing the child to do things the parents wouldn't allow like video games when it's not allowed or alcohol use. It would include things like giving them money for things, tickling, massaging, that sort of thing.
>
> "[PROSECUTOR]: *So the grooming's done by the offender to sort of lay the groundwork for later abuse?*
>
> "A: *Yeah, to build trust and weaken defense[s] of the child.*"

(Emphasis added.)

The prosecutor then moved to a question about defendant's behavior, asking whether Palfreyman had seen "anything in this case which you might consider or might be considered grooming?" Defense counsel objected, and the

court directed the prosecutor to rephrase the question. The prosecutor resumed:

> "[PROSECUTOR]: In this particular interview was there any behavior which could be considered grooming?
>
> "A: Um, when she just talked about the massaging where she wanted it on her neck but he would go lower into her chest area."

The prosecutor ended his examination there.

On cross-examination, Palfreyman acknowledged that an adult who spent time with a child was not necessarily grooming the child for sexual abuse and that she had not spoken with defendant about his intentions. Defendant elicited the following testimony:

> "[DEFENSE COUNSEL]: Now you mentioned spending time with—spending time together.
>
> "A: Mmm hmm (INDICATING YES).
>
> "[DEFENSE COUNSEL]: Surely you're not saying that anytime an adult spends time with a child that they're grooming them for sexual abuse.
>
> "A: No, not every time.
>
> "[DEFENSE COUNSEL]: So I'm reading to my child at night, in bed, I'm grooming them for sexual abuse in the future? That not true is it?
>
> "A: No.
>
> "[DEFENSE COUNSEL]: Okay. If I decide to take my child out for an ice cream cone I'm grooming them to abuse them sexually later?
>
> "A: It depends on your motives. I mean if, as a parent, um, that's not what I'm saying. I'm saying as an outsider looking to build trust and weaken defenses; if that's your motive for getting into this child's circle of trust, then that could be potential grooming.
>
> "[DEFENSE COUNSEL]: Okay, so if you do anything as a parent with an evil intent that is what you call grooming?
>
> "A: Potential.
>
> "[DEFENSE COUNSEL]: Okay, but you don't know anybody's intents. You didn't talk to [defendant] did you?

"A: No."

In addition to M and Palfreyman, among other witnesses, the state called M's father to testify. He explained that, while he was at the police station talking with the police, defendant called him on his cell phone and left a voicemail message, which the police listened to and then recorded. The recording was received in evidence and played in the courtroom. In it, defendant told M's father:

> "I really wish you would talk to me about it. Because if I did do something, I didn't mean anything—I don't even know what I did. I know for a fact that I was not naked in bed. I, I wasn't. Please call me and talk to me about this because it—yeah, this is really, really messing with me, man, and I know it's messing with you too. Thanks, bye."

In closing argument, the prosecutor highlighted Palfreyman's testimony about grooming behavior. The prosecutor argued that defendant's massages of M constituted "classic grooming behavior" that makes it easier for the offender to commit a future "offense":

> "The massaging is important because it's grooming behavior. Courtney Palfreyman talked to you about offenders trying to get children accustom[ed] to touching. The reason they do that, folks, is to get them to a point where when later touching comes about they don't get the kind of reaction where the child walks out of the room, after he asks to touch his thing, and they go tell mom. The child gets accustomed to the behavior, the barriers get broken down, and it makes it easier for an offense in the future. It's classic grooming behavior."

In his closing argument, defense counsel argued that the state's grooming argument should raise concerns with the jury, because "common sense would tell you that just about anything that the parent does for or with the child can be construed as grooming." He provided examples: "If you take your child out for an ice cream cone by themselves are you grooming them for something later? If you decide you're going to go play catch with them, are you grooming them to let their sexual guard down? *** If you tickle *** your child are you grooming them so that they can *** not be sensitive sexually to you later?" But in rebuttal argument, the prosecutor reprised his argument that defendant's

massages of M mattered because defendant "was grooming [M]."

The jury convicted defendant of first-degree sexual abuse. And although it acquitted him on the charge of first-degree sodomy, the jury convicted defendant of the lesser included offense of attempted first-degree sodomy.

D. *Appeal*

Defendant appealed his convictions to the Court of Appeals, arguing, among other things, that the trial court erred in allowing Palfreyman's testimony about grooming techniques used on children. Defendant asserted that the testimony was scientific evidence that required a foundational showing of scientific validity, which the state had failed to establish. Defendant contended that the testimony concerned scientific knowledge because (1) the concept of grooming was grounded in behavioral science and (2) a jury, informed of Palfreyman's experience and her training on grooming, would assume that grooming was well-established in the social sciences.

As noted, the Court of Appeals rejected defendant's argument and affirmed defendant's convictions. The court explained that Palfreyman's testimony "did not purport to draw its convincing force from principles of science," *Henley*, 281 Or App at 833, which the court viewed as the key factor in determining whether evidence is "scientific," *id.* at 832. The court concluded that Palfreyman had specialized knowledge about grooming, a subject area outside "the average person's common knowledge," *id.* at 831, and that her expert testimony was admissible on that basis.

II. ANALYSIS

A. *"Scientific" Evidence Under OEC 702*

We accepted review to address whether the evidence presented concerning the grooming of children for sexual abuse is "scientific" evidence under OEC 702. As relevant, OEC 702 provides that, if "scientific" knowledge

> "will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

> by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

And as this court explained in *State v. O'Key*, 321 Or 285, 293, 899 P2d 663 (1995), scientific knowledge cannot assist the trier of fact if it is not "scientifically valid." Thus, if the evidence was "scientific," the state was required to comply with the standards for admission of scientific evidence set out in *O'Key* and in *State v. Brown*, 297 Or 404, 687 P2d 751 (1984).

The standard by which courts determine whether evidence is properly considered as "scientific" is not found in the Oregon Evidence Code. This court has observed that the term "scientific" is not defined in the Oregon Evidence Code or its commentary, and, instead, the legislature left the standard to be determined by judicial decision. *O'Key*, 321 Or at 290. Although this court has not "precisely defined what makes evidence 'scientific,'" *State v. Marrington*, 335 Or 555, 561, 73 P3d 911 (2003), through *Brown* and *O'Key*, the court has identified some markers for determining whether evidence is "scientific" and therefore requires a foundational showing of scientific validity before it may be admitted.

In *Brown*, which involved whether polygraph test results were admissible in the defendant's rape trial, this court stated that evidence is "scientific" under OEC 702 if it "draws its convincing force from some principle of science, mathematics and the like." *Brown*, 297 Or at 407. The court observed that, "[t]ypically, but not necessarily, scientific evidence is presented by an expert witness who can explain data or test results and, if necessary, explain the scientific principles which are said to give the evidence its reliability or accuracy." *Id.* at 407-08.

The court in *Brown* appears to have addressed how polygraph test results draw their convincing force from a principle of science by describing the premises of the polygraph technique: "'an individual's conscious attempt to deceive engenders various involuntary physiological changes due to an acute reaction in the sympathetic parts of the autonomic nervous system'" and the "'polygraph machine is an electromechanical instrument which measures and records these physiological fluctuations.'" *Id.* at 419 (quoting with

approval *United States v. Alexander*, 526 F2d 161, 163 (8th Cir 1975)). That the *Brown* court implicitly concluded that the polygraph evidence was scientific is apparent in that it proceeded to develop and to apply a multifactor test—factors that are not exclusive—for determining whether scientific evidence is admissible based on its probative value and reliability. 297 Or at 417-18. In developing that test, the court declined to adopt the test for admissibility of scientific evidence derived from *Frye v. United States*, 293 F 1013, 1014 (DC Cir 1923) (holding that scientific evidence is admissible only if the scientific principle is "sufficiently established to have gained general acceptance in the particular field in which it belongs"). 297 Or at 408.

In *O'Key*, this court expounded on the defining characteristics of "scientific" evidence first stated in *Brown*. In *O'Key*, which concerned the horizontal gaze nystagmus (HGN) test used by police officers in the field to determine whether someone is driving under the influence of alcohol, the court looked at the term both in a technical way and in a practical way.

For its technical approach to understanding what "scientific" evidence is, this court found the United States Supreme Court's discussion of the term "scientific" as used in FRE 702 helpful in construing that term as it is used in OEC 702. This court observed that, in *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579, 590, 113 S Ct 2786, 125 L Ed 2d 469 (1993), the Supreme Court had explained that "scientific" as an adjective "implies a grounding in the methods and procedures of science" and that "scientific knowledge" is "'an inference or assertion [that] must be derived from the scientific method.'" *O'Key*, 321 Or at 292. However, the court explained that it was not attempting "precisely to distinguish 'scientific' from other types of expert testimony under the Oregon Evidence Code." *Id.* at 293.

And from a practical standpoint, this court recognized that much expert testimony "'rests at least partly on science,'" *id.* at 291 (quoting Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence* § 7.8, 990 (1995), and stated that evidence is "scientific" if it is likely to be perceived by jurors as grounded in science:

> "Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. The function of the court is to ensure that the persuasive appeal is legitimate. The value of proffered expert scientific testimony critically depends on the scientific validity of the general propositions utilized by the expert. Propositions that a court finds possess significantly increased potential to influence the trier of fact as scientific assertions, therefore, should be supported by the appropriate scientific validation. This approach ensure[s] that expert testimony does not enjoy the persuasive appeal of science without subjecting its propositions to the verification processes of science."

O'Key, 321 Or at 291-92 (footnote and quotation and citations omitted). *Accord Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 304, 14 P3d 596 (2000) ("A jury is likely to believe that a doctor's testimony about [his opinion that silicone caused the plaintiff's neurological condition] is a scientific assertion and, therefore, the proponent of the testimony must show that it is scientifically valid.").

This court's ultimate conclusion in *O'Key* rested primarily on the technical understanding of "scientific" knowledge. During the HGN test, which is part of a battery of field sobriety tests for determining whether a person is under the influence of alcohol, a police officer looks for nystagmus, an involuntary rapid or jerky movement of the eyeball as the eye tracks a steadily moving object, such as a finger, pencil, or pen light. 321 Or at 287. The court concluded that evidence of the HGN test result was scientific because the value of the result depended on the scientific validity of the causal relationship between the result and alcohol consumption inherent in the test:

> "The HGN test provides evidence that purports to draw its convincing force from a principle of science, namely, the asserted scientific proposition that there is a causal relationship between consumption of alcohol and the type of nystagmus measured by the HGN test. The value of HGN testing depends critically on the demonstrated scientific validity of that proposition."

Id. at 296 (citation omitted).

But this court also considered, at least implicitly, how jurors would perceive evidence concerning the result of the HGN test. The court explained that the HGN test evidence "rests on a manifestation of alcohol consumption not easily recognized or understood by most people"—namely, a "relationship between the effects of alcohol on the central nervous system, the nystagmus phenomenon, and the HGN test" that is "not within the realm of common knowledge of the average person." *Id*. at 297. The court contrasted the HGN test with other field sobriety tests, which it concluded were not "scientific." The one-leg stand test, the walk-and-turn test, and the finger-to-nose test, for example, are not scientific evidence, because they "obtain their legitimacy from effects of intoxication based on propositions of common knowledge" and not from scientific principles. *Id*.

Since *O'Key*, this court has continued to consider whether lay people would consider evidence to rest on science—and therefore accord it significant persuasive value—in determining whether expert testimony should be viewed as scientific evidence for purposes of OEC 702. This court's decision in *Marrington* illustrates the significant role that the jury's perception plays when the proponent of the expert testimony features the expert's familiarity with—and explicit reliance on—scientific research and literature to provide information to the jury.

In *Marrington*, the state presented the testimony of an expert, a counselor working for a nonprofit organization specializing in the treatment of sexually abused children, who stated that delay in reporting is a predominant feature in a child's disclosure of sexual abuse. 335 Or at 563. The expert explained that there was a "body of literature" and a significant study conducted by a psychiatrist affiliated with UCLA supporting that assertion. *Id.* at 559.

As to the question of whether the delayed-reporting testimony was scientific evidence and therefore required an appropriate scientific foundation, the court stated that whether the evidence is scientific "depends primarily on whether the trier of fact will perceive the evidence as such," 335 Or at 561, and that a court's inquiry should focus on whether the expert's assertions "'possess significantly

increased potential to influence the trier of fact as scientific assertions.'" 335 Or at 562 (quoting *O'Key*, 321 Or at 292). In that regard, this court observed that the witness had stated that she had degrees in psychology, that she was a certified counselor, that she estimated that she had spoken to over 200 children who complained about having been sexually abused, and that she had testified that she was familiar with recent literature and research in the area of sexual abuse of children. *Id.* at 562-63. Given that context, this court concluded that "[t]he reference to 'research' implies a scientific foundation with the results published in the 'literature' of the area of study." *Id.* at 563. The court also noted that, in the witness's testimony, she referred to "the characteristics of sexually abused children," which, the court explained, implied that there was "a well-defined, empirically verified set of characteristics that a significant percentage of sexually abused children display." *Id.* Additionally, the court stated, the witness's use of terms such as "study," "body of literature," and "psychiatrist" in her testimony invoked "the vocabulary of scientific research." *Id.* Finally, the witness testified that the theory that she had espoused had been confirmed empirically, insofar as researchers had found that delayed reporting was prevalent in cases in which sexual abuse had been substantiated by confession of the perpetrator or in some other way. *Id.*

The court concluded that an expert "who has a background in behavioral sciences and who claims that her knowledge is based on studies, research, and the literature in the field, announces to the factfinder that the basis of her testimony is 'scientific,' *i.e.*, is grounded on conclusions that have been reached through application of a scientific method to collected data." *Marrington*, 335 Or at 563-64. And "[b]ecause that is how the factfinder would understand it, a court has a duty to ensure that such information possesses the necessary indices of scientific validity" by requiring the proponent to "show that that asserted rule of behavior was scientifically valid under the standards established in *Brown* and *O'Key*." *Id.* at 564.

It appears that courts in other jurisdictions have largely avoided answering the question whether testimony of

an expert about grooming behaviors is scientific.[2] Although the parties have cited cases that involve grooming testimony from other jurisdictions, many of those cases involve other issues and are not on point. *E.g.*, *State v. Akins*, 298 Kan 592, 315 P3d 868 (2014) (deciding whether the prosecutor had improperly asserted personal knowledge of the evidence and argued facts not in evidence when she referred to defendant's behaviors as grooming, though she did not present any evidence—expert or otherwise—that the described behaviors were grooming); *People v. Ackerman*, 257 Mich App 434, 441, 669 NW2d 818 (2003), *rev den*, 469 Mich 1012, 677 NW2d 24 (2004) (concerning admissibility of "other acts" evidence, specifically, lay witness testimony describing the defendant's grooming-type behaviors). We now proceed to apply Oregon law to the circumstances of this case.

B. *Application*

We recognize that, in this case, Palfreyman did not purport to establish that sexual grooming has been studied by social scientists or that her assertions about grooming have been scientifically verified phenomena. Instead, in contrast to *Marrington*, this case involves expert testimony as to which the proponent disclaimed a scientific connection.

In the trial court, the prosecutor argued that Palfreyman had been trained to recognize certain behaviors as grooming but disclaimed that he was asking her for

[2] Although the New Mexico Supreme Court has suggested in *dicta* that whether a defendant's conduct constituted grooming according to a scientific or specialized definition would require an expert to explain the theory, *State v. Sena*, 144 NM 821, 827, 192 P3d 1198 (2008), a number of other jurisdictions proceed on the assumption that grooming testimony is scientific or at least some kind of specialized expert testimony, and then move on to determine whether the testimony is reliable and helpful to the jury. *See, e.g.*, *Morris v. State*, 351 SW3d 649, 667 (Tex Crim App 2011) (concluding that grooming as a phenomenon exists, that a law enforcement official with a significant amount of experience with child sex abuse cases may be qualified to talk about it, and that it involves matters beyond the understanding of the jury and therefore is useful to the jury); *United States v. Romero*, 189 F3d 576, 584-85 (7th Cir 1999) (noting different standards under *Daubert* and *Kumho Tire Co, Ltd v. Carmichael*, 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238 (1999), for scientific and nonscientific evidence, holding that FBI agent's expert testimony concerning grooming was reliable and helpful without determining whether it was scientific or nonscientific); *United States v. Hayward*, 359 F3d 631, 636 (3d Cir 2004) (holding that grooming testimony was not inadmissible under FRE 704(b), which prohibits an expert from testifying about the defendant's mental state).

a scientific opinion. Distinguishing *Marrington*, the state argued to the Court of Appeals that Palfreyman did not couch her opinion in the "vocabulary of science" and the jury would not have viewed Palfreyman as presenting a scientific opinion. Therefore, the state urged, her testimony did not need the support of a scientific foundation. And on review, the state again contends that nothing in Palfreyman's testimony about the nature of grooming would have suggested to the jury that "grooming" was a scientific concept and that no aspects of Palfreyman's testimony would have led the jury to believe that she was making a scientific assertion. The state points out that Palfreyman is not a psychologist and did not testify about the existence of research, studies, or literature on the topic of sexual grooming. Thus, the state argues, unlike the expert in *Marrington*, Palfreyman gave limited testimony that did not make any "scientific assertion" to the jury. Rather, according to the state, Palfreyman's testimony was merely descriptive of some activities that she herself was familiar with in her experience as a forensic interviewer.

But the fact that the proponent of expert evidence at trial disclaims that the evidence is scientifically grounded does not obviate the possibility that it nevertheless constitutes "scientific" evidence under OEC 702. Expert evidence is "scientific" under OEC 702 when it is expressly presented to the jury as scientifically grounded, as in *Marrington*. Expert evidence also is "scientific" under OEC 702 when it "draws its convincing force from some principle of science," as in *Brown*, 297 Or at 407, or "implies a grounding in the methods and procedures of science" and would likely be perceived by the jury as imbued with the "persuasive appeal of science," *O'Key*, 321 Or at 292. In this case, we conclude that Palfreyman's testimony about grooming, in the context of her testimony overall, was "scientific" evidence, because, as in *O'Key*, the evidence implied that it was grounded in science and the jury likely would have viewed the evidence that way.

First, Palfreyman's testmony implied a grounding in behavioral science. Palfreyman was presented as an expert in child sexual abuse. She had a bachelor's degree and a master's degree in social work, with over ten years of

experience in child protection and forensic interviewing with the State of Idaho and CARES. She also told the jury that she had specialized training in forensic interviewing and had training on the subject of grooming behavior by child sexual abuse offenders, both through her college coursework and in her forensic interview training. Given that context, her testimony about her training implied that its substance was authoritative and grounded in some sort of behavioral science.

The prosecution treated Palfreyman's training on grooming as authoritative. As noted, the state sought Palfreyman's testimony on grooming in aid of establishing that, by massaging M inappropriately, defendant was grooming M and planning or preparing for his later sexual abuse of M. And as intended, the state used Palfreyman's expert testimony at trial as substantive evidence that defendant had groomed and then sexually abused M. In short, Palfreyman told the jury on direct examination that she knows from her training on grooming that an offender engages in grooming conduct, such as massaging, as the prelude to his future abuse of a child: (1) a child-abuse offender grooms a child before sexually abusing the child, (2) the offender engages in grooming to build trust and weaken the child's defenses, and (3) defendant's massaging of M could be considered a grooming behavior.[3]

And as Palfreyman suggested in describing her training on grooming as a social worker in the child welfare and protection field and a forensic interviewer of child sexual abuse victims, both parties agree that grooming behavior has been the subject of research in behavioral science, the

[3] To recap her specific expert testimony on grooming, Palfreyman began by giving examples of grooming conduct: "spending time together"; "sometimes allowing the child to do things the parents wouldn't allow like video games when it's not allowed, or alcohol use"; giving the child "money for things"; and "tickling, massaging, that sort of thing." In terms of defining grooming, Palfreyman agreed with the prosecutor that grooming is "done by the offender" to "lay the groundwork for later abuse." She added that an offender engages in grooming to "build trust and weaken defense[s] of the child." When asked whether any of defendant's behavior that M described in the CARES interview "could be considered grooming," Palfreyman identified defendant's massaging of M. She acknowledged on cross-examination that whether any particular behavior by a person is grooming depends on the person's intent.

study of human behavior. This court has frequently stated that, for the purposes of OEC 702, "scientific" evidence need not necessarily be based on the "hard" sciences in which experiments to control a host of variables can be designed and run to test hypotheses. Rather, the court has held that expert testimony in the realm of the "soft" sciences—that is, social and behavioral sciences, which rely on observation and interpretation of human behavior rather than on controlled experiments or mathematical models—also possess "the increased potential to influence the trier of fact as scientific assertion" and, therefore, must be subjected to the crucible of scientific validation. *Marrington*, 335 Or at 561. Thus, in *Jennings*, this court held that a doctor's testimony based on clinical diagnoses "bear[s] the mark of science" and was subject to the foundational requirements of *Brown* and *O'Key*, even though the science involved was not "hard" science. *Jennings*, 331 Or at 304. *See also State v. Milbradt*, 305 Or 621, 630-31, 756 P2d 620 (1988) (suggesting that an expert's testimony about "how normal children usually react to sexual abuse," if it was relevant at all, was scientific evidence that was subject to the *Brown* foundational requirements). In light of her credentials and training, which the prosecution highlighted, Palfreyman's expert testimony implied that the training she had received on grooming, and the information about grooming from that training that she conveyed to the jury, was accepted and grounded in behavioral science.

Second, even though the prosecution did not highlight the scientific nature of Palfreyman's testimony or focus its examination on studies, research, and literature in the field that supported her testimony, as was the case in *Marrington*, lay jurors likely would have accorded the testimony the persuasive value of scientific principle. A number of circumstances surrounding Palfreyman's testimony convince us that that is so.

Palfreyman appeared to the jury as an expert on identifying child sexual abuse. She described her educational background and experience in child protection and forensic interviewing, and she stated that she had conducted over 600 forensic interviews of children. As presented to the jury, Palfreyman also appeared to have specialized training

about grooming by sexual offenders. She testified about her "forensic interview training" and "college courses" in which she had learned about the grooming behaviors "leading up to offending" and what "offenders" did when grooming children and why.

And as an expert, Palfreyman conveyed information about grooming of children for sexual abuse by offenders that, like the delayed-reporting evidence in *Marrington*, was not common knowledge. She first testified about "some of the activities that [she is] familiar with that might be considered grooming," describing massaging by an offender as one of several examples. Then, Palfreyman explained to the jury that the offender engages in grooming to "lay the ground work for later abuse" and "to build trust and weaken defense[s] of the child." Through that testimony, Palfreyman, appearing as an expert concerning child sexual abuse, conveyed that a child-abuse offender grooms a child before sexually abusing the child, that the grooming is for the purpose of building trust and weakening the child's defenses, and that massaging is an example of a grooming activity. The prosecutor then asked for Palfreyman's penultimate expert conclusion: given M's description of defendant massaging into her chest area, defendant's behavior "could be considered grooming."

For the reasons above, we conclude that Palfreyman's testimony about grooming was "scientific" evidence under OEC 702. It follows, therefore, that the trial court erred in permitting Palfreyman to define the phenomenon of grooming—and her conclusion that defendant had engaged in behavior that could be considered grooming of M for sexual abuse—without first requiring the state to establish its scientific validity.

C. *Request for Judicial Notice and Disposition*

According to the state, even if the trial court erred when it ruled that testimony concerning grooming behavior is not scientific evidence, this court may affirm the trial court's ruling on the ground that sexual grooming possesses a sufficient minimum level of scientific validity to be admissible as scientific evidence under OEC 702. That is, the state contends, the "validity of proffered scientific evidence * * * is

a question of law," *O'Key*, 321 Or at 309 n 35, and this court may take judicial notice of facts supporting the admissibility of proffered scientific evidence, *Brown*, 297 Or at 420 n 7. And in this case, the state argues, the articles and other research materials cited in defendant's own briefing filed with this court readily establish that the concept of sexual grooming possesses a sufficient minimum level of scientific validity to be admissible as scientific evidence under OEC 702. Thus, the state urges, this court should resolve issues of scientific validity, even though the materials on which the court would rely in doing so were not presented to the trial court.

To decide the matter of scientific validity and reliability for the first time on review, we would be required to decide based on judicial notice of legislative facts—that is, nonadjudicative facts—used to determine the foundational basis for admission of evidence.[4] Although we have taken judicial notice of settled social science data to supply legislative facts for purposes of the test for admission of eye-witness identifications in *State v. Lawson/James*, 352 Or 724, 740, 291 P3d 673 (2012), and to describe the techniques used to administer a polygraph test and their reliability and validity in *Brown*, 297 Or at 420-38, we have two concerns with taking judicial notice in this case.

Significantly, the parties have not been given a full opportunity to adduce evidence, including expert testimony, and to provide behavioral science or other pertinent literature on that topic. Although the state notes that defendant provided citations to social science research papers, defendant did so to establish that grooming has been studied by behavioral scientists, in support of his argument that, because grooming is a "recognized concept" in behavioral science, then, as in *Brown*, Palfreyman's testimony was

[4] Adjudicative facts are "'the facts of the particular case.'" *Chartrand v. Coos Bay Tavern*, 298 Or 689, 693, 696 P2d 513 (1985) (quoting commentary to OEC 201(a)). Judicially noticed adjudicative facts must be either generally known in the jurisdiction, OEC 201(b)(1), or "[c]apable of accurate and ready determination," OEC 201(b)(2). In other words, adjudicative facts must have a "high degree of indisputability." *Chartrand*, 298 Or at 693. We do not decide whether any part of Palfreyman's testimony about grooming in this case constituted an adjudicative fact.

grounded on a scientific principle that required validation as a foundation before its admission.[5] Defendant was not specifically attempting to undercut the foundation for Palfreyman's testimony that offenders will first groom a child by engaging in certain behaviors as a lead-in to future sexual conduct with the child.

Second, and relatedly, we are uncertain regarding whether we have been advised of the full scope and nature of the research on sexual grooming of children and whether there is any dispute in the behavioral science disciplines regarding the validity and reliability of the assertions in Palfreyman's testimony. *See* John E.B. Myers *et al*. *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb L Rev 1, 143 (1989) (stating that "the clinical and scientific literature does not support the existence of a profile of a 'typical' child sexual abuser" and that profile-like evidence in "the form of testimony describing the 'typical' techniques employed by child molesters to get close to their victims" is similarly suspect as a violation of the rule against character evidence). Accordingly, we decline to address, for the first time on appeal, the scientific validity and reliability of the sexual grooming evidence admitted at trial.

This court faced a similar situation in *Marrington* and remanded the case to the trial court. As in this case, the trial court in *Marrington* had overruled the defendant's objection that the proffered expert testimony was untested scientific evidence and admitted the evidence. This court held that the expert's testimony was scientific evidence and that the trial court had erred in admitting it without requiring the state first to establish its scientific validity. This court determined that the error was prejudicial and remanded the case to the trial court for further proceedings, without determining for the first time on appeal that delayed reporting evidence was scientifically valid. *Marrington*, 335 Or at 566.[6] As this court has stated, "in the absence of a clear case,

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[5] We do not view that statement as a concession that the clinical and scientific literature supports the existence of a profile of offenders that includes typical grooming techniques employed by sexual offenders against children.

[6] In *State v. Perry*, 347 Or 110, 218 P3d 95 (2009), this court subsequently concluded that evidence concerning the phenomenon of delayed reporting was scientifically valid.

a case for judicial notice, or a case of *prima facie* legislative recognition, trial courts have an obligation to ensure that proffered expert scientific testimony that a court finds possesses significantly increased potential to influence a trier of fact as 'scientific' assertions is scientifically valid." *O'Key*, 321 Or at 293 (footnote omitted). This is not such a clear case, and the trial court is best suited for the development of the evidentiary record concerning admissibility.

D. *Prejudicial Error*

Having concluded that the trial court erred in failing to determine whether sexual grooming evidence possesses the requisite level of scientific validity and reliability for admissibility under OEC 702, and having declined to make that determination ourselves, we turn to the question whether the error was prejudicial and requires reversal. It is axiomatic that evidentiary error does not require reversal if it is harmless—that is, if it had little likelihood of affecting the verdict. *State v. Newman*, 353 Or 632, 647, 302 P3d 435 (2013); *State v. Davis*, 336 Or 19, 28, 77 P3d 1111 (2003).

In making a determination of harmlessness, the court does not ask whether the evidence of guilt is substantial or compelling, but rather whether the trial court's error was likely to have influenced the verdict. *Davis*, 336 Or at 32. If erroneously admitted evidence relates to a "central factual issue" in the case, it is more likely to have affected the verdict than evidence relating to a tangential issue. *Marrington*, 335 Or at 566. And, as we have said, scientific evidence or evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. *O'Key*, 321 Or at 291; *see also State v. Willis*, 348 Or 566, 573, 236 P3d 714 (2010) ("Any juror would wish to have the scientific answer, and could be expected to give it weight.").

The state argues that, in this case, any error in admitting evidence about sexual grooming was harmless, because other evidence tending to show defendant's sexual purpose toward M was admitted unchallenged. That is, the jury heard evidence about defendant massaging M in ways that made her uncomfortable and about the incident that

occurred when M was five or six years old, when defendant asked M to touch his penis. Therefore, according to the state, the jury would have been expressly called upon by the evidentiary record to consider whether defendant's prior conduct toward M suggested a nefarious sexual purpose, even if Palfreyman's testimony about the grooming behaviors of sexual offenders had not drawn the jury's attention in that direction.

We do not think that the matter is so clear-cut. That is so for at least three reasons: (1) the credibility of M and defendant was a central issue at trial; (2) the expert testimony on grooming appeared to be grounded in science; and (3) the prosecution's use of the grooming evidence was not as limited as the state's argument suggests.

Other than M, there were no witnesses to the claimed sexual abuse or to the incident that occurred when M was five or six years old, and there was no physical evidence corroborating the alleged abuse. There was evidence that M's mother did not think that defendant had behaved inappropriately when massaging M, and there was evidence that, at one point, M had recanted her story about defendant asking her to touch his penis when she was five or six years old. Defendant's recorded voicemail message for M's father could be viewed by jurors as indicating that he had engaged in some improper conduct on the camping trip (defendant said, "Because if I did do something, I didn't mean anything—I don't even know what I did. I know for a fact that I was not naked in bed."), but defendant denied abusing M. Therefore, the credibility of defendant and M was a "central factual issue," and the grooming evidence bolstered M's testimony.

Further, as we have held, Palfreyman's testimony was "scientific" evidence and, as such, possessed a high degree of persuasive power. The prosecutor recognized that power and, pointing to Palfreyman's testimony about massaging as a grooming behavior, made a syllogistic argument in closing. He reminded the jury, "Courtney Palfreyman talked to you about offenders trying to get children accustom[ed] to touching" through grooming. He argued that defendant's "massaging is important because it's grooming

behavior." Indeed, he said, defendant's massaging was "classic grooming behavior." The logic of the prosecutor's argument was that, because (1) offenders groom children by massaging and (2) defendant groomed M by massaging her, it follows that defendant was an offender—that he sexually abused M. Stated another way, the prosecutor was able to argue that, because "offenders" act in certain ways to groom a child as a lead-in to sexual abuse of the child, and defendant also acted in one of those ways, he groomed M and was an offender.

Finally, the jury likely viewed Palfreyman's testimony about grooming as substantive evidence that defendant had sexually abused M in the camper as charged. The availability of Palfreyman's grooming testimony made it easy for the jury to draw the same inference that this court criticized in *State v. Hansen*, 304 Or 169, 174, 743 P2d 157 (1987): that defendant had sexually abused M because he had engaged in massaging, an act that sexual abusers of children also engage in. *Hansen* concerned an objection to a police detective's experience-based testimony concerning grooming based on the considerations in OEC 403. This court explained that testimony concerning grooming techniques that a child abuser may use—such as "physical and psychological 'testing' of the child, giving gifts, showing affection, praising, making the child feel comfortable in the abuser's presence, etc."—had almost no relevance as evidence that the defendant committed sexual abuse of the child. *Id.* at 176. The court stated: "That child abusers use these techniques has no bearing on whether a person who does these things is a child abuser." *Id.* This court then concluded that, under the balancing test required by OEC 403, "the danger of unfair prejudice to defendant from the unwarranted inference that, because defendant engaged in acts that sexual child abusers engage in, she, too, is a sexual child abuser is simply too great." *Id.*

Without Palfreyman's testimony, the prosecutor would have been left with a much weaker argument to the jury that defendant had appeared sexually interested in M, based on her testimony concerning the massages and the earlier incident when she was five or six years old. The

prosecution could not have argued that defendant—like other offenders, according to Palfreyman's testimony—groomed his child victim for later sexual conduct. Contrary to the dissent, we conclude that the expert testimony and the prosecutor's argument were likely influential in the jury's deliberations and verdict.

For those reasons, we cannot say that there was "little likelihood" that the jury resolved the credibility dispute between defendant and M by relying on Palfreyman's testimony that defendant's behavior—specifically, massaging M's chest—is recognized as grooming behavior in sexual offenders. It follows that this court must reverse defendant's conviction and remand the case to the trial court for further proceedings.

The decision of the Court of Appeals and the judgment of the circuit court are reversed, and the case is remanded to the circuit court for further proceedings.

KISTLER, J., dissenting.

The majority reverses defendant's convictions for sex abuse and attempted sodomy because it concludes that the admission of testimony about grooming was both erroneous and prejudicial. In my view, this case can and should be decided on a narrow ground. Even if the admission of the testimony were erroneous, it was not prejudicial. The testimony that defendant had sexually abused and attempted to sodomize his 11-year-old stepdaughter was largely undisputed. Moreover, the conduct that a witness testified "could be considered grooming" consisted of defendant's going from massaging his stepdaughter's neck to massaging her chest and, when she objected, to massaging her lower back and upper thighs. If the jury found that defendant engaged in that conduct, the witness's testimony that the conduct "could be considered grooming" added nothing of substance to the mix. For that reason, I would affirm the Court of Appeals decision and the trial court's judgment.

Beyond that, this court held in *State v. Marrington*, 335 Or 555, 73 P3d 911 (2003), that an expert's testimony will be "scientific evidence" and thus subject to greater limitations on its admission whenever the "expert's assertions

possess significantly increased potential to influence the trier of fact as scientific assertions." *See id.* at 562 (stating that standard; internal quotation marks omitted). As the majority's application of *Marrington* makes clear, the standard announced in *Marrington* has a broad reach. It depends on an assessment of the testimony's "potential" effect on the jury as scientific evidence and, under today's decision, can apply whenever the witness's expertise on grooming consist of nothing more than a discussion of that concept in college and in her training on interview techniques. If scientific expert testimony sweeps that broadly, we should recognize, as the federal courts have, that the test for determining minimum reliability that such testimony must meet will vary depending on the nature of the testimony. *See Kumho Tire Co. v. Carmichael*, 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238 (1999). However, because I would hold that any error in admitting the witness's testimony was harmless, I need not reach that issue to resolve this case. I respectfully dissent.

This opinion begins with the question of harmless error. It sets out the evidence in this case, which was largely undisputed. It then discusses the challenged testimony about grooming, which was, in context, minor. Finally, it explains why, in light of defendant's concession on review, his argument that the challenged testimony prejudiced him should fail. Not only does defendant's argument rest on a misperception of what the witness said, but it also fails to recognize that, in the context of the other evidence in this case, the testimony that defendant identifies as prejudicial had little likelihood of affecting the verdict.

The facts in this case are not complicated. The child at the center of this case was 11 years old when she testified at trial. She had lived with her mother and stepfather (defendant) since she was two years old.[1] At trial, she testified to

[1] To preserve the child's anonymity, the majority refers to her as M. However, referring to her in that clinical fashion can obscure both her young age when these events allegedly occurred and the conflicting relationships in which she found herself, with a stepfather who reportedly was abusing her and a mother who, the jury could find, repeatedly sided with defendant and failed to protect her daughter. This opinion accordingly refers to her primarily as the child; when the context makes it appropriate, the opinion refers to the child as defendant's stepdaughter or her mother's daughter.

two incidents in which defendant had either sexually abused her or attempted to do so: one when she was five or six years old and asleep in her bedroom, the other when she was 11 years old on a family camping trip. The latter incident gave rise to the charges in this case. The child also testified about massages that defendant had given her between those two incidents. In setting out the evidence, this opinion focuses, as the evidence at trial did, on those two incidents and the massages, as well as the events that occurred after the child disclosed defendant's abuse.

The child testified that, when she was five or six years old, she was in her bed in her own bedroom. Defendant got into bed with her and asked her "to touch his thing." She told him that she had to go to the bathroom, left her room, and got in her mother's bed. At trial, the child's mother testified that, after she learned of defendant's reported behavior, she asked defendant (her husband) what had happened. "He said he didn't know."[2] However, defendant admitted to his wife that he had been sleeping with the child (his five- to six-year-old stepdaughter) in her bed when he allegedly asked her to touch him. When the child's mother was asked at trial whether she had sought to clarify what had happened, she said, "Um, I believe I did, yes." She testified that, in response to her questions, defendant had said that "[u]m, he was sleeping. He is a hard sleeper and that's when I [told my daughter] I won't let it happen again."[3]

Between the incident in the bedroom when the child was five or six years old and the incident on the camping trip when she was 11, defendant gave her massages "once in a while." Occasionally, she asked him to massage her

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[2] Defendant did not testify at trial. His statements that are set out in this opinion are taken from his wife's account at trial of what he told her, a statement that defendant filed with the police after his abuse was reported, and a voicemail message that he left for the child's father.

[3] The mother testified that she first heard about the incident from a neighbor, that she "confronted" her five- to six-year-old daughter about saying such things to the neighbors, and that afterwards her daughter told the neighbors that the incident had not occurred. Other than that "recantation," no evidence directly contradicted the evidence set out above. The only evidence that indirectly contradicted that testimony was testimony that the child did not have a reputation for honesty and a weak suggestion that her initial failure to disclose the abuse to her biological father called her later report of that abuse into question.

shoulders, but defendant did not always stop there. The child testified at trial that at times defendant "would massage down my legs and up by my chest." When he massaged "up by her chest," it made her feel "sad" because "he was going too far into [her] other areas." She told her mother how she felt, but her mother told her "that he probably didn't mean it because he does it to me all the time."[4]

Later, the child told a CARES interviewer about one massage that occurred shortly before the camping trip. She said that defendant started massaging her neck but then began massaging her chest. She said, "I asked him to stop going down here [gestures toward her chest] and he was all 'okay,' and then he went down here [gestures toward her lower back and upper thighs]."[5]

Shortly after that massage, the family went on a camping trip. At that point, the child was 11 years old. The first night was marked by heavy rain, and most of the family were inside a small camper. Defendant and his wife had a bed at one end of the camper. A younger brother and half-brother had a bed at the other end of the camper. The child slept on a "really skinny" couch that ran along the side of the camper and was closer to her mother and defendant's bed. The child went to sleep first, then her younger brothers, and finally her mother. Defendant and a friend stayed outside until the "wee hours of the morning, around 3:00ish." After defendant and his friend came inside the camper, the child's mother woke up and realized that defendant was not in bed with her. He was sitting on the child's bed, and his wife began "trying [unsuccessfully] to pull him up" to their bed. Defendant's wife testified that she "couldn't [say] if [defendant] was still sitting [on the child's bed] or he was laying [on the child's bed]" when she went back to sleep. As she put it, "I rolled over and went back to bed."

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[4] The child's mother testified that she had seen defendant give her daughter a massage once when her daughter's neck was sore and that, as far as she saw, defendant's massage had been appropriate. The mother acknowledged that defendant could have massaged her daughter other times that she had not seen.

[5] There is a video recording of the CARES interview, which was played for the jury and made part of the record. The description of the child's gestures, indicated in brackets, is taken from the video.

The child testified that, when defendant initially lay down beside her, she woke up. However, "he was just laying there and [she] went back to bed."[6] The next morning, as the sun was coming up, the child woke up and realized that defendant was "touching [her] in spots he shouldn't have." He had pulled down her sweat pants and underwear, and his hands were "between [her] legs and between [her] crotch." She rolled over on her stomach and then her side, turning her back to him. Then, she felt defendant putting his penis on her "butt cheeks" and "in [her] butt crack." Although there was no penetration, she heard him say "ahh" and testified that "[i]t felt wet." The child sat up, and defendant asked if she was okay.

The child's mother testified that, when she woke up, the child was sitting up in her bed, and defendant was asleep beside her. The mother asked her daughter to come up and get in bed with her, in the spot "where [defendant] was suppose[d] to be sleeping." The child got in the bed with her mother and went to sleep.

Later that day, the child told her mother that defendant "had rubbed up against her." When her mother asked what she meant, the child said that defendant had "rubbed up against her butt crack." Afterwards, the mother asked defendant whether he had rubbed up against the child's "butt crack," as she had reported. According to the child's mother, "[h]e's like, I don't know. I was asleep, I don't know." The mother testified that she understood that defendant "was sleeping, he rolled over and rubbed up against her. I didn't think any intent was behind there." At that point, the mother told her daughter that "we would, um, prop the bed

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[6] Later, defendant submitted a statement to the police, which was admitted into evidence. In his statement, he said that, when he came into the camper, he began massaging his stepdaughter's neck and fell asleep. Defendant's statement does not expressly say that he went to sleep in the bed with his 11-year-old stepdaughter, but that is the most reasonable, if not the only reasonable, inference from his statement.

At trial, the friend who had been outside with defendant and who had come into the camper with him testified that he saw defendant get into his wife's bed. The wife, however, testified otherwise, and defense counsel explained in his closing argument that the friend had been mistaken because, later that morning, the victim got into bed with her mother where defendant ordinarily would have been.

up so he wouldn't be able to get in there the next night," which they did.

After the camping trip, the child and her older sister went to stay with their father, his fiancée (Tina), and Tina's children. While they were there, the older sister received a midnight text from defendant saying that he missed her, which struck Tina as odd. Later, while she was driving in the car with the child, Tina asked her, "[Y]ou know is [defendant] weird or is it just me[?]" The child responded, "[N]o, I don't like him." When Tina asked why, the child told her about the massages, that she had talked to her mother about the massages, and that her mother had told her that it was up to her to make defendant stop. Tina told the child's father about the massages, which led to the child's disclosing the abuse during the camping trip and the attempted abuse when she was five or six years old.

After hearing those disclosures, Tina and the child's father went to the police station. Although they had not contacted defendant,[7] defendant called the child's father while he was at the police station and left the following voice message:

> "I really wish you would talk to me about it. Because, if I did do something, I didn't mean anything. I don't even know what I did. I know for a fact that I was not naked in bed. I, I wasn't. Please call me and talk to me about this because it—yeah, this is really, really messing with me man. And I know it's messing with you too. Thanks. Bye."

In addition to that testimony, the state called a CARES interviewer, Palfreyman, who had spoken with the child after her father and Tina told the police about the reported abuse. Palfreyman testified that she is a social worker who conducts forensic interviews for CARES. She told the jury that she had worked for CARES for four years and that she had had training as a forensic interviewer. Before that, she had worked for approximately six years for the State of Idaho in welfare and child protection. She said that her forensic training allowed her to talk to children as

[7] Apparently, Tina's older daughter had texted the child's older sister that Tina and the child's father were going to the police station, and the older sister relayed that information to defendant.

a "neutral fact finde[r]"; that is, her training taught her how to speak with children at their developmental level and ask them "open-ended, non-leading questions."

Most of Palfreyman's testimony focused on her interview with the child, which she had recorded on video. The prosecutor played the video for the jury and asked Palfreyman questions about why she had done certain things. In the video, the child recounted the incident of attempted sexual abuse when she was five or six years old and the sexual abuse and attempted sodomy during the camping trip when she was 11 years old. She also told Palfreyman about the massage, discussed above, where defendant went from massaging her neck to massaging her chest and, when she objected, to massaging her lower back and upper thighs.

After showing the jury the video, the prosecutor asked Palfreyman whether she had any training regarding grooming. Over defendant's objection, Palfreyman said "Yes." The prosecutor clarified that Palfreyman was "not a psychologist or anything like that," and she agreed. When asked what sort of training she had had on grooming, Palfreyman said: "Um, just due to my forensic interview training we talk about grooming (INAUDIBLE) leading up to offending, and through my college courses, different trainings I've had." At that point, defendant objected again and asked that the jury be excused. The parties had a colloquy with the court outside the presence of the jury. When the jury returned, the prosecutor asked the witness three questions: (1) what activities "might be considered grooming"; (2) why a person would engage in grooming; and (3) whether "[i]n this particular interview was there any behavior that could be considered grooming."

In response to the first question regarding acts that "might be considered grooming," Palfreyman stated:

> "spending time together, sometimes allowing the child to do things parents wouldn't allow like video games when it's not allowed or alcohol use. It would include things like giving them money for things, tickling, massaging, that sort of thing."

Palfreyman clarified on cross-examination that those acts could be completely innocent. Whether they constituted

grooming depended on the actor's motive. She testified that, if the acts were done to "build trust and weaken defenses; if that's your motive for getting into this child's circle of trust, then that could be potential grooming."

The second question focused on why, if there were grooming, it would occur. The prosecutor asked, "So the grooming's done by the offender to sort of lay the ground work for later abuse?" Palfreyman answered, "Yeah, to build trust and weaken [the] defense[s] of the child."

Finally, in response to the question whether, "[i]n this particular interview was there any behavior which could be considered grooming," Palfreyman answered, "Um, when she just talked about the massaging where she wanted it on her neck but he would go lower into her chest area."

In arguing on review that Palfreyman's testimony prejudiced him, defendant focuses on one part of that testimony. Specifically, defendant admitted in his reply brief that he "does not contest" "that the behavioral science concept of grooming by offenders is well-established." Accordingly, he argued that "the issue is not whether behavioral science has validly established that nonviolent sexual offenders engage in certain behavior—it has." The problem in defendant's view was that "Palfreyman testified that defendant had engaged in particular behavior—specifically, massaging [his stepdaughter's] chest—that is recognized as grooming behavior by sexual offenders."

It is important to note that defendant is not challenging the effect on the jury of Palfreyman's generalized description of grooming—*i.e.*, her statement that grooming is a recognized type of behavior, her description of some activities that "might be considered grooming," or her explanation that, if a person engages in grooming, it is done to "build trust and weaken [the] defense[s] of the child." Rather, defendant's prejudice argument turns on one statement that Palfreyman made: when asked whether anything "[i]n this particular interview *** could be considered grooming," Palfreyman replied, "[W]hen [the child] just talked about the massaging where she wanted it on her neck but he would go lower into her chest area."

It is also important to note that, in arguing that that statement prejudiced him, defendant recasts what Palfreyman actually said. Specifically, defendant contends that "Palfreyman testified that defendant had engaged in particular behavior—specifically, massaging [the child's] chest—that is recognized as grooming behavior by sexual offenders." Palfreyman, however, did not testify that defendant had in fact engaged in the behavior that the child reported to her. She did not testify that the reported behavior is recognized as grooming, nor did she testify that defendant was a "sexual offender." Rather, what Palfreyman testified was that, in the "particular interview" that she had with the child, the child had reported behavior—defendant's massage that went from the child's neck to her chest—that "could be considered" grooming.

With that factual issue in mind, I turn to the applicable legal standard. OEC 103 provides that "[e]vidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits *** evidence unless a substantial right of the party is affected." As this court explained in *Dept. of Human Services v. G.D.W.*, 353 Or 25, 292 P3d 548 (2012), "[e]videntiary error is considered harmless and is not a basis for reversal if there is little likelihood that the particular error affected the verdict." *Id.* at 39 (internal quotation marks omitted); *see also State v. Davis*, 351 Or 35, 60-61, 261 P3d 1197 (2011) (explaining that the question is whether there is little likelihood that the erroneous admission of evidence affected the verdict).

In making that assessment, the question is not whether there is persuasive evidence of a defendant's guilt. *Davis*, 351 Or at 60-61 (citing *State v. Davis*, 336 Or 19, 30, 77 P3d 1111 (2003)). Rather, the question is whether there is little likelihood that the erroneously admitted evidence, considered in light of the other evidence in the case, affected the verdict. *See State v. Hansen*, 304 Or 169, 180, 743 P3d 157 (1987) (explaining that, "the less substantial the evidence of guilt, the more likely it is that an error affected the result").

In this case, the statement that defendant challenges was both limited and conditional. The challenged statement applied only to the single massage that the child

had described to Palfreyman in her CARES interview. Palfreyman did not testify that defendant had, in fact, massaged the child in the way that the child described during her CARES interview, nor did Palfreyman testify that, if defendant had done so, his acts would be "grooming." Rather, in response to the question whether, "[i]n this particular interview was there any behavior which *could be considered grooming*," Palfreyman responded, "Um, when she just talked about the massaging where she wanted it on her neck but he would go lower into her chest area." (Emphasis added.)

Before the jury could decide whether the reported behavior constituted grooming, the jury first had to find that defendant had in fact engaged in the behavior; that is, the jury had to find that defendant went from massaging his 11-year-old stepdaughter's neck to massaging her chest and, when she objected, to massaging her lower back and upper thighs. If the jury found that defendant had massaged his stepdaughter's chest, lower back, and upper thighs over her objection, the ability to label that behavior grooming added nothing to the facts that the jury found. Defendant's invasive behavior spoke for itself.

Moreover, Palfreyman testified only that the reported behavior "could be considered grooming." Even if the jury found that defendant had engaged in the reported behavior, it could not conclude that his behavior constituted grooming, as Palfreyman described the concept, without also finding that defendant had massaged the victim for an improper motive—to weaken her defenses and to lay the groundwork for later abuse. After all, not all massages constitute grooming. If the jury made that finding, the fact that Palfreyman's testimony permitted the jury to label defendant's behavior "grooming" added nothing of significance to the predicate facts (both the behavior and the motive) that the jury had to find before it could conclude that defendant's behavior constituted grooming.

For that reason alone, I would hold that there was little likelihood that Palfreyman's testimony prejudiced defendant. Beyond that, both *Hansen* and *Davis* make clear that we also should consider the other evidence in the case

because the likelihood that the erroneous admission of evidence affected the jury's verdict will vary depending on the strength or weakness of other evidence of guilt. In this case, the evidence of guilt was largely undisputed. No evidence contradicted the child's testimony about defendant's massage shortly before the camping trip. Nor was there any dispute that defendant had difficulty finding his own bed. It was undisputed that he ended up sleeping with his stepdaughter in her bed when she was five or six years old, and it was also undisputed that he ended up sleeping in his stepdaughter's bed again on the camping trip, even though his wife had tried to get him to come into their bed and even though the couch that defendant shared with his stepdaughter was "really skinny."

Moreover, in response to the child's report that defendant's fingers had penetrated her vagina and that he had attempted to penetrate her "butt crack" with his penis, defendant's only responses were that he did not know what had happened; that he had been sleeping; that if he did do anything, he did not mean to; and that, in any event, he had not been naked. Defendant's shifting and equivocal responses provide no viable basis for questioning the child's report.

The point of reciting that evidence is not simply to show that the evidence of guilt was overwhelming. Rather, the point is that, when the evidence is as one-sided as it was in this case and when defendant's denials are either nonexistent or strain credulity, any error in admitting Palfreyman's conditional testimony that defendant's reported behavior—massaging an 11-year-old child's chest, lower back and upper thighs over her objection—could be considered grooming is not likely to have affected the jury's verdict. The majority errs in concluding otherwise.

In reaching a contrary conclusion, the majority relies on what it describes as the "high degree of persuasive power" of scientific evidence and the extent to which the prosecutor "highlighted" grooming in his closing argument. On the first point, even if Palfreyman's testimony were scientific evidence, it was barely so. Palfreyman did not hold herself out as a learned expert. She testified only that she

had learned about the concept of grooming when she was at college and as part of her training in forensic interviewing, which she described as teaching how to ask neutral, age-appropriate questions to children. Palfreyman did not testify that she had had extensive training in grooming, that grooming had been the subject of multiple studies, that she was an expert in identifying grooming behavior, or that defendant was a sexual offender because he had engaged in grooming. *Cf. Marrington*, 335 Or at 562-63 (concluding that the jury would view a witness's testimony on delayed reporting as being based on scientific principles because she told the jury that she was a "nationally certified counselor" who taught classes on child sexual abuse, testified frequently as an expert on delayed reporting, and was familiar with an established body of literature on that subject).

Not all scientific evidence is equally persuasive. Given Palfreyman's limited credentials and her conditional testimony, the persuasive power of her testimony cannot be compared to that of an Einstein, an Edison, a Curie, or even a local physician identifying the cause of a patient's symptoms. Even if Palfreyman's testimony constituted "scientific evidence," we should not conclude that, because some scientific evidence has a high degree of persuasive power, Palfreyman's testimony did.

The majority also relies on the use that the prosecutor made of Palfreyman's testimony in closing. The majority states that, "[i]n closing argument, the prosecutor highlighted Palfreyman's testimony about grooming behavior." It then reconstructs the prosecutor's closing argument to draw the following syllogism from it. People who groom children are sexual offenders. Defendant was grooming his stepdaughter. Therefore, he was a sexual offender.

The prosecutor's closing argument covers 21 pages of transcript. Only one paragraph in those 21 pages addresses "grooming." Most of the prosecutor's closing arguments focused on the camping trip. He also discussed the incident when the child was five or six years old, the child's statements to her mother and later to her father, defendant's shifting and equivocal responses to questions about what had happened when he was sleeping in his stepdaughter's

bed (both when she was five or six years old and later when she was 11 years old), the mother's limited responses to her daughter's reports of abuse, and why, given her mother's previous failure to protect her, an 11-year-old child may not have told her mother everything that happened. The prosecutor also asked, not surprisingly, why and how defendant ended up sleeping in his 11-year-old stepdaughter's bed on the camping trip, especially when he knew that the last time he slept with his stepdaughter she reported that he asked her to "touch his thing."

Within that 21 pages, the prosecutor spent two paragraphs discussing defendant's massages. The first paragraph discussed the significance of defendant's massages without any reference to grooming. The prosecutor asked:

> "Why is massaging in this case important? Why is the previous request to touch his thing important? For two reasons: one, it shows the fact that this defendant has a sexual inclination toward this child. It makes it less likely that he accidentally fell asleep next to her and just happened to rub up against her. It shows that he views this child as a sexual object."

The first and primary reason that the prosecutor told the jury that defendant's massages mattered was because they showed that defendant had "a sexual inclination toward this child," without any reference to grooming or Palfreyman's testimony. That is, the prosecutor argued that, if the jury found that defendant had engaged in the reported massages, it should infer that he had done so for a sexual purpose and that defendant's contact with her on the camping trip had not been inadvertent as he claimed. And, if the jury found that defendant's massages were sexually motivated—an inference that seems fairly obvious—the reference to grooming that follows, on which defendant and the majority rely, becomes surplusage.

The prosecutor then made a subsidiary argument about massages to the jury, which referred to grooming. He said:

> "The massaging is important because it's grooming behavior. Courtney Palfreyman talked to you about

> offenders trying to get children accustomized (sic) to touching. The reason that they do that, folks, is to get them to a point where when later touching comes about they don't get the kind of reaction where the child walks out of the room, after he asks [her] to touch his thing, and they go tell mom. The child gets accustomed to the behavior, the barriers get broken down, and it makes it easier for an offense in the future. It's classic grooming behavior."

In that paragraph, the prosecutor argued that the massages were also important because they were "grooming behavior." While the prosecutor argued that defendant's massages constituted grooming and that they were done for the purpose of breaking down the child's resistance to his touching, the prosecutor did not ask the jury to infer that, because defendant had engaged in "grooming," he was a sexual offender.[8] The prosecutor's point was narrower. He used the concept of grooming to explain that what might be seen as innocent behavior—massaging a child's sore neck—can mask a darker purpose.

The prosecutor's reference to grooming was no different from using an officer's testimony that a defendant's possession of kitchen scales and small plastic baggies can evidence drug sales as well as innocent uses. The point is not that every person who possesses those items sells drugs. Rather, the point is to allow the jury to understand the significance of evidence that might not otherwise be apparent. And, as discussed above, the jury could not credit the prosecutor's argument unless and until it found that defendant had engaged in the reported behavior for the purpose of breaking down the child's resistance. Palfreyman's testimony provided a label for the behavior but attaching that label to defendant's behavior would not have affected, in any material way, the jury's resolution of defendant's guilt.

Because I would hold that there was little likelihood that Palfreyman's statement affected the jury's verdict, I would not reach the questions whether her testimony was

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[8] In his rebuttal argument, the prosecutor returned to grooming to explain that the state was not taking the position that, if a parent does anything for a child they're grooming that child and to counter defendant's argument that, because the child had reported that defendant abused her, the massages could not have been grooming.

"scientific" evidence and, if it were, whether it was sufficiently reliable to be admitted. If those questions were properly before us, they raise a more substantial issue.

OEC 702 authorizes the admission of expert testimony based on "scientific, technical, or other specialized knowledge." This court has held that expert testimony based on "scientific" knowledge must meet a minimum standard of reliability. *State v. O'Key*, 321 Or 285, 290, 899 P2d 663 (1995) (explaining that, if expert testimony based on the correlation between rapid eye movement and intoxication "is 'scientific' evidence," it "must comply with the standard for admission of 'scientific evidence; otherwise, it need not"). It follows that, under *O'Key* and our other decisions, the distinction between expert testimony based on "scientific" knowledge and expert testimony based on "technical, or other specialized knowledge" is key to determining its admissibility.

This court has defined what constitutes scientific evidence in three cases. The first case posited that "scientific" evidence is "evidence that draws its convincing force from some principle of science, mathematics and the like." *State v. Brown*, 297 Or 404, 407, 687 P2d 751 (1984). Eleven years later, the court recognized that it can be difficult to distinguish expert testimony based on "scientific evidence" from expert testimony based on "technical and other specialized knowledge." *O'Key*, 321 Or at 291. As the court recognized in *O'Key*, "'[m]ost expert testimony rests at least partly on science.'" *Id.* (quoting Christopher B. Mueller and Laird C. Kirkpatrick, *Modern Evidence* § 7.8, 900 (1995)). The court also observed that the greater the possibility that the jury will see the expert's testimony as resting on scientific assertions, the greater the court's responsibility for ensuring that the testimony is reliable. *Id.* at 291-92. However, the court concluded that the expert's testimony in that case was "scientific evidence" on the same ground that *Brown* had noted: The testimony drew its convincing force from a principle of science. *Id.* at 296-97.

Finally, in *Marrington*, the court went from asking whether the expert's testimony draws its convincing force from science to asking whether the "expert's assertions

'possess significantly increased potential to influence the trier of fact as scientific assertions.'" 335 Or at 562 (quoting *O'Key*, 321 Or at 292). The court concluded that the testimony in that case on delayed reporting had that potential because the witness had post-graduate degrees in psychology, she was a "nationally certified counselor," she had taught classes on child abuse, she was familiar with recent literature on delayed reporting, and she referred to a body of literature on the subject in her testimony. *Id.* at 562-63.

In this case, the majority applies *Marrington* and concludes from the fact that Palfreyman graduated from college, had a master's degree in social work, and had learned about grooming in her interview training that her testimony possessed a significantly increased potential to influence the trier of fact as scientific assertions. One might question whether, in light of Palfreyman's limited credentials, her conditional assertions about grooming posed a significantly increased potential to be seen as scientific assertions. However, the more troubling aspect of the majority's application of *Marrington* is that, if Palfreyman's testimony is scientific evidence, it is difficult to imagine much expert testimony that will not also be viewed as scientific. After all, virtually every expert's testimony can be seen as resting on scientific assertions, *see O'Key*, 321 Or at 291, and presumably most experts will have graduated from college and had some training in the subject on which they are testifying.

It follows that, after the majority's decision, the question ordinarily will not be whether the expert's testimony is "scientific." Rather, the question will be how much the proponent of the testimony must show to establish that the expert's testimony meets the minimum threshold of reliability. On that issue, the United States Supreme Court's decision in *Kumho Tire* provides helpful guidance. In *Kumho Tire*, the Court unanimously agreed that the gatekeeping function it previously had recognized for scientific testimony—ensuring that that testimony is "reliable"—cannot be limited to "scientific" evidence. The Court explained that not only does the text of FRE 702 apply, as the text of OEC 702 does, to "scientific, technical, [and] other specialized knowledge," but it "would prove difficult, if not

impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." 526 US at 147-48. The Court reasoned that "conceptual efforts to distinguish [scientific knowledge from other subjects of expert testimony] are unlikely to produce clear legal lines capable of application in particular cases." *Id.* It followed, the Court concluded, that all expert testimony subject to FRE 702 should meet a minimum standard of reliability. *Id.* at 148.

Having reached that conclusion, the Court recognized that the factors used to identify the reliability of expert testimony will vary depending on the expert testimony at issue. *Id.* at 150 (agreeing that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his [or her] testimony'"; internal quotation marks omitted). That is, the Court recognized, as it previously had suggested, that a single set of factors for measuring reliability will not apply invariably to all expert testimony. *Id.* In my view, if we apply the concept of "scientific" evidence as broadly as the majority does, we also should recognize, as the Court did in *Kumho Tire*, that the test for measuring reliability will vary with the particular testimony at issue. However, we need not reach and resolve those issues to decide this case. As explained above, even if the trial court erred in admitting Palfreyman's testimony about grooming, any error was harmless. For that reason, I would affirm the trial court's judgment and the Court of Appeals decision.

Balmer, J., joins this dissenting opinion.