

PRIOR BAD ACTS LIST

EVIDENCE—PRIOR BAD ACTS/IMPEACHMENT: Because defendant's prior act of threatening someone with a knife did not directly contradict his testimony that he had never stabbed anyone before, the prior act was inadmissible character evidence rather than relevant impeachment by contradiction.

APPEALS—HARMLESS ERROR: Given the dispositive issue at trial and the state's other evidence on that issue, the erroneous admission of defendant's prior act did not prejudice him.

State v. Stapp, 266 Or App __, __ P3d __ (October 29, 2014) (Marion). During a night of drinking and playful roughhousing, the victim put defendant in a headlock. Defendant got mad, broke free, grabbed a large knife, and stabbed the victim repeatedly. He was charged with first-degree assault, and claimed self-defense at trial. During cross-examination and in response to a statement that defendant made about the circumstances of the stabbing, the prosecutor commented to defendant that the prosecutor had never stabbed anyone before, and defendant responded that he had never stabbed anyone either. Over defendant's objection, the trial court (Judge Susan Tripp) allowed the state to briefly question defendant about a prior incident in which defendant had threatened, but not stabbed, a bicyclist with a knife. The jury convicted defendant.

Held: Affirmed (Nakamoto, J.). The trial court incorrectly allowed the state to question defendant about the prior incident, but the error was harmless. [1] OEC 404(3) prohibits evidence of other acts to prove a person's character and that the person acted in conformity with that character. But the rule allows "other act" evidence if it is relevant for a non-character purpose such as impeachment by contradiction. [2] "Evidence that defendant had, in a prior incident, threatened someone with a knife was not relevant to discredit his testimony that he had not stabbed anyone." [3] Defendant's testimony was with regard to a "precise fact"—that he had never stabbed anyone before. "That precise statement of fact is only susceptible to impeachment by contradiction with evidence that contradicts the same precise fact, that is, only by evidence that showed defendant had stabbed someone before." [4] But the error was harmless. The dispositive issue as to defendant's self-defense claim was whether defendant acted with a reasonable amount of force. "Given the undisputed evidence that what defendant feared was being hit by [the victim] again and that he reacted by stabbing [the victim] eight times, including in the back of the legs, the error at issue here had little likelihood of affecting the jury's verdict as to the 'reasonable use of force' issue."

<http://www.publications.ojd.state.or.us/docs/A151287.pdf>

EVIDENCE—PRIOR BAD ACTS: In case of murder-by-stabbing, trial court correctly admitted evidence that defendant was convicted of assault for stabbing the victim nine months earlier.

State v. Olson, 263 Or App __, __ P3d __ (May 29, 2014) (Marion). Defendant stabbed her husband to death, and was charged with murder. At trial, the state filed a motion asking to introduce evidence that, nine months earlier, defendant had pleaded guilty to assault for stabbing the victim; the state argued that evidence was relevant to her intent to murder the victim. Defendant argued that the prior-act Repealed by Or Laws 2013, ch 431, § 1. Evidence was inadmissible because the two events were insufficiently similar. The trial court (Judge Claudia Burton) allowed the state to introduce the prior-acts evidence under OEC 404(3), and instructed the jury that it could consider that evidence "only for the purpose of deciding whether the defendant acted with the mental state, intentionally, that is alleged in the murder charge in this case." The jury found defendant guilty.

Held: Affirmed (Sercombe, J.). The trial court correctly admitted the prior-acts evidence.

[1] The two incidents were “extremely similar” and therefore were relevant under *State v. Johns*, 301 Or 535 (1986). [2] Admission of the prior-acts evidence did not violate due process, because it was relevant to proof of defendant’s intent, an element of the crime charged.

<http://www.publications.ojd.state.or.us/docs/A150290.pdf>

Note: The heightened relevancy showing required under *Johns* might not apply to prior acts of the defendant, which arguably need only be relevant under OEC 401 to be admissible under OEC 404(4).

EVIDENCE—PRIOR BAD ACTS: In prosecution for sexual assaults on child, trial court erred under *Leistiko* in admitting evidence that defendant had physically and sexually assaulted the victim’s older sister, too, in order to prove victim’s lack of consent.

State v. Cruz-Rojas, 263 Or App __, __ P3d __ (May 29, 2014) (per curiam) (Marion).

Defendant was charged with assault and numerous sexual offenses, including first-degree rape and sodomy. At trial, the state offered evidence that he had sexually and physically assaulted the victim’s older sister, too. The trial court (Judge Dennis Graves) admitted the evidence as relevant to rebut defendant’s assertion that the victim had consented to sexual activity with him. The jury found him guilty.

Held: Reversed and remanded. [1] In light of *State v. Leistiko*, 352 US 622 (2012), the trial court erred by admitting the evidence to prove “the victim’s lack of consent.” [2] The record was not sufficient to affirm on the alternative ground that the evidence was relevant to prove “defendant’s intent with respect to the forcible compulsion.”

<http://www.publications.ojd.state.or.us/docs/A150375.pdf>

Note: The court declined the state’s request to reform the convictions at issue to lesser-included offenses based on defendant’s stipulations, but noted “that the parties will have an opportunity on remand to litigate the consequences of defendant’s stipulations.”

State v. Goff: (10/19/13) DV case where state offered prior abuse to show D’s intent. D denied instant offense. **Holding:** Evidence of prior misconduct is relevant to prove intent only when the defendant admits the act or when trier of fact is instructed appropriately. On appeal, the State argued that the PBA information was relevant to show motive and plan. Sup. Ct. held that new theories may not be raised on appeal. **REMEMBER:** Argue ALL the ways in which the PBA evidence is relevant and put them on the record.

State v. Hutton: (10/9/13) DV case where D found guilty of Assault/Harassment for hitting V in the mouth and putting cigarette on her chest. At trial, the state offered PBA evidence. D denied instant offense. **Holding:** Reversed. PBA evidence can only be used to prove intent where D admits committing actus reus or the jury is instructed appropriately. Like *Goff*, the COA originally affirmed the convictions. But based on *Leistiko* and *Jones*, overturned.

State v. Roelle, (10/16/13) DV case where Defendant was convicted of strangling his GF. The D denied the incident happened. At trial, over Defendant's objection, a prior criminal conviction for assault against GF was introduced to show the Defendant's intent. Defendant appealed, arguing the trial court erred by admitting the prior conviction. **HOLDING:** Under OEC 404(3), evidence of a prior criminal conviction used to prove the intent element of a crime, when the defendant denies the act took place, requires a jury instruction limiting them to first find the defendant committed the act before considering the prior conviction for intent.

State v. Jones, 258 Or App __, __ P3d __ (August 14, 2013) (Lane). Defendant was prosecuted for numerous serious offenses for torturing, assaulting, strangling, and sodomizing his wife over the course of several weeks in 2009. According to the victim, he accused her of being unfaithful and told her he was making her less attractive to other men. At trial, the state presented evidence of similar crimes he had committed against JM, his previous girlfriend, two years before, based on the same motive. Defendant objected solely on the ground that the evidence did not meet the *Johns* requirements. The trial court (Judge Debra Vogt) overruled the objection. Defendant's defense was that he was not the one who assaulted the victim, and the jury found him guilty. He appealed and argued that the trial court erred by admitting the prior-crimes evidence involving JM. The Court of Appeals affirmed the convictions, concluding that defendant had failed to preserve the argument he raised on appeal. Meanwhile, the Oregon Supreme Court decided *State v. Leistiko*, 352 Or 172, modified on recons, 352 Or 622 (2012) (defendant's prior bad acts not admissible to prove intent unless the defendant concedes the actus reus or the jury is instructed that it cannot consider the evidence for proof of intent unless it first finds that the actus reus occurred). The Supreme Court then remanded this case for reconsideration in light of *Leistiko*. **Held:** Reversed and remanded (Haselton, C.J.). [1] The Court of Appeals reaffirmed its previous ruling that defendant's claim of error is not preserved. [2] But, light of *Leistiko*, the trial court committed plain error when it admitted the prior-crimes evidence: "Here, as in *Leistiko*, defendant did not concede that he had engaged in the *actus reus*; nor was the jury instructed to consider the uncharged misconduct evidence as evidence on the issue of intent only if they first found that defendant had committed the actus reus. Those circumstances are patent and uncontroverted, and the application of *Leistiko*'s principles on this record is not reasonably in dispute. Accordingly, in light of *Leistiko*, the error in admitting JM's testimony and submitting it to the jury without the requisite qualifying instruction was reviewable plain error." "Here, the gravity of the error and the nature of the case militate strongly in favor of reversal. In particular, we agree with defendant that the details of the prior assault on JM—and in particular the testimony that defendant used pliers on her nipples—was highly inflammatory." <http://www.publications.ojd.state.or.us/docs/A142958A.pdf>

State v. William Urcel Teitsworth, 257 Or App __, __ P3d __ (June 26, 2013): In this case, as in *Yong*, there was no dispute that defendant and the victim had a physical altercation on the night of the charged incident, nor was there any dispute that, at a minimum, defendant pushed the victim in the face and that, when the police arrived, the victim's face was bruised and bleeding. Thus, while defendant admitted that he acted intentionally or knowingly with respect to some conduct, his specific intent—whether he did so in self-defense—was a contested issue. Accordingly, under *Yong*, 206 Or App at 542, evidence of defendant's prior altercations with the victim was admissible to prove "the state's theory that defendant had, in fact, been the aggressor[.] "If evidence of uncharged misconduct is introduced to show a defendant's hostile

motive toward the victim, “which in turn is probative of intent,” *Moen*, 309 Or at 68, the evidence must meet the *Johns* test for admitting evidence of uncharged misconduct to show intent. *Johns*, 301 Or at 555-56; *see also State v. Pyle*, 155 Or App 74, 81-82, 963 P2d 721, *rev den*, 328 Or 115 (1998) (evidence of the defendant’s prior acts of punching the victim was not relevant to prove that he intentionally shot the victim). Here, the charged act requires proof of intent; the prior act also required intent; the victim was the same in both acts; and both acts involved defendant striking the victim in the context of a domestic dispute. Therefore, we conclude that the trial court did not err in admitting the evidence of uncharged misconduct to rebut defendant’s self-defense claim. Affirmed.

State v. Melissa Louise Stephens, (2/6/13): Child sex abuse where prior uncharged acts of alleged sex abuse by D against V were allowed. Appeals Ct. affirmed trial court's decision based on D's sexual propensity toward a specific child. In a case like this, involving charges of sexual abuse of a child where the reporting was significantly delayed, evidence of sexual contact that is not charged is relevant to explain that delay; the existence of a long-term “relationship” provides relevant context. *State v. Zybach*, 308 Or 96, 100, 775 P2d 318 (1989); *State v. Panduro*, 224 Or App 180, 187, 197 P3d 1111 (2008). Further, when the uncharged conduct and the charged crimes involve the same child, evidence of the uncharged conduct is relevant “to demonstrate the sexual predisposition this defendant had for this particular victim, that is, to show the sexual inclination of defendant toward the victim, not that [she] had a character trait or propensity to engage in sexual misconduct generally.” *State v. McKay*, 309 Or 305, 308, 787 P2d 479 (1990). Because the evidence was relevant for a non-character purpose, it was admissible. OEC 404(4).

<http://www.publications.ojd.state.or.us/docs/A146040.pdf>

State v. Ronald Marcus Leistiko (7/19/12): Use of force in face of resistance not similar enough to prove intent; therefore not similar enough to prove “plan.”