



ADMISSION OF A DEFENDANT’S OTHER ACTS: OEC 404(4) AFTER *STATE V. WILLIAMS*

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In *State v. Williams*, 357 Or 1 (2015), the Oregon Supreme Court held that OEC 404(4) supersedes OEC 404(3) as the operative rule when the state offers evidence of a defendant’s “other acts” in a criminal trial. The court held that OEC 404(4) requires a trial court to address two questions: (1) whether the evidence is relevant under OEC 401, and (2) whether admission of the evidence violates due process. Applying that test, the court held that evidence of a defendant’s character and propensity is no longer categorically inadmissible in child sexual abuse prosecutions. 357 Or at 20. The court’s decision changes the analytical framework for the admission of “other acts” evidence in *all* criminal prosecutions and significantly changes the landscape for the admission of such evidence in child sexual abuse prosecutions. Unfortunately, the court’s opinion leaves several important questions unanswered. This bulletin summarizes *Williams*’ key holdings, and identifies the big questions the opinion leaves unanswered, finishing with an outline of the key points to remember whenever you’re seeking to admit prior acts evidence in a criminal trial.

A. OEC 404(4) is the controlling rule when offering evidence of a defendant’s prior misconduct.

The significance of *Williams* rests on the distinction between OEC 404(3) and OEC 404(4), and what the court explains about the manner in which those two rules operate. OEC 404(3) is a general rule governing the admissibility of

evidence of any person's prior bad acts. It categorically prohibits the use of such evidence for a propensity purpose – *i.e.*, to prove that a person has a bad character in order to show that the person acted in conformity with that character:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

OEC 404(4), however, is a narrower rule that governs the admissibility of “other acts” evidence when it is offered against a criminal defendant. That rule specifically allows the admission of evidence of a defendant's other acts as long as it is “relevant,” subject only to OEC 403 balancing—*i.e.*, weighing the probative value of the evidence against the risk of unfair prejudice—to the extent that such balancing is constitutionally required:

In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by [OEC 405 to 412] and, *to the extent required by the United States Constitution or the Oregon Constitution*, [OEC 403].

Before *Williams*, the Court of Appeals assumed that evidence of a defendant's other acts was “relevant” for purposes of OEC 404(4) only if it was admissible under OEC 404(3). In other words, the court assumed that *both* rules applied in determining the admissibility of evidence of a defendant's other bad acts. But, in *Williams*, the Supreme Court expressly rejected that interpretation, explaining that the legislature intended OEC 404(4) to “supersede” OEC 404(3) when “other acts” evidence is offered against a defendant in a criminal trial. *Williams*, 357 Or at 15.

Williams was a child sexual abuse case in which the state offered as an exhibit children's underwear found in the defendant's home. The underwear was not directly connected to the charged offenses, but the state offered it to prove that defendant was sexually interested in young girls, and thus that his inappropriate touching of the victim was not an accident. *Id.* at 4. The court held that the underwear evidence was admissible under OEC 404(4). *Id.* at 24.

In reaching that conclusion, the court explained that OEC 404(4) eliminates OEC 404(3)'s categorical ban on the use of other bad acts for a “propensity”

purpose. Under OEC 404(4), evidence a defendant's "other acts" is generally admissible for any purpose, so long as (1) it is logically relevant under OEC 401, and (2) it does not violate due process. 357 Or at 18-20. As a matter of due process, a trial court must balance the risk of unfair prejudice against probative value if the defendant requests it. *Id.* In other words, if a defendant objects that admission of relevant "other acts" evidence would be unduly prejudicial, the trial court must weigh the risk of unfair prejudice against the evidence's probative value. *Id.* at 19.

Given the low barrier that evidence must clear to be relevant under OEC 401, **all of the action in litigating the admissibility of a defendant's other acts now centers on balancing the risk of unfair prejudice against probative value under the Due Process Clause.** *Williams* provides some guidance as to how that analysis might work in child sexual abuse cases, but leaves a number of questions unanswered, including the nature of the balancing that OEC 404(4) requires, and the extent to which propensity evidence may be admissible in non-child-sexual-abuse cases.

B. Key Holdings from *Williams*

1. "Propensity evidence" is no longer categorically excluded in child sexual abuse prosecutions.

"Propensity evidence is evidence offered to prove the *character* of a person in order to show that the person acted in conformity therewith." *State v. Johns*, 301 Or 535, 548-49 (1986). In other words, the fact that defendant did it before makes it more likely that he did it again. After *Williams*, propensity evidence is admissible in child sexual abuse cases, subject to balancing probative value and prejudice.¹ Under OEC 404(4):

¹ The court emphasized that, historically, courts have excluded other acts evidence to prove propensity due to the risk that the defendant would be convicted because of his or her past acts or evil character rather than for the charged offense. 357 Or at 8-10. It noted, however, that propensity evidence has historically been admissible in sex crime prosecutions, particularly child sexual abuse cases. *Id.* at 17, n 16. For that reason, it concluded that admission of propensity evidence in such cases may not violate due process, provided that the

[I]n a prosecution for child sexual abuse, the admission of “other acts” evidence to prove character and propensity under OEC 404(4) depends on whether the risk of unfair prejudice outweighs the probative value of the evidence under OEC 403. That determination must be made on a case-by-case basis. *See, e.g., [United States v. LeMay, 260 F3d at 1018,1028 (9th Cir 2001)]* (setting out list of nonexclusive factors that trial courts may consider in weighing the risk of prejudice presented by “other acts” evidence offered under FRE 413 and 414).

Williams, 357 Or at 20.

The Ninth Circuit in *LeMay* ruled that evidence of the defendant’s prior sexual abuse of different victims offered for propensity purposes did not violate due process so long as the trial court applied FRE 403 to balance the probative value of the evidence against its prejudicial effect. 260 F3d at 1026-27. The factors the court must consider when balancing include:

- the similarity between the charged acts and the other acts,
- the temporal proximity between the acts,
- the frequency of the prior acts, and
- the necessity of the evidence to the state’s case.

LeMay, 260 F3d at 1028. Before offering the other-acts evidence for a propensity purpose in a child sexual abuse prosecution, prosecutors should evaluate the evidence with an eye toward those factors.

Even after *Williams*, offering evidence for a propensity purpose in child sexual abuse cases carries some risks. Among other things, constitutional questions remain. Although *Williams* endorsed the *LeMay* analysis discussed above for due-process purposes, the United States Supreme Court has not ruled on the issue. And the court in *Williams* was not asked to decide whether propensity evidence is admissible under the Oregon Constitution, because the defendant did not make a state constitutional argument.

risk of unfair prejudice does not outweigh the probative value of the evidence. *Id.* at 20.

Practice Tip: Consider, when offering prior acts to prove propensity, proposing a limiting instruction that cautions the jury not to use the evidence for improper purposes—*i.e.*, to convict the defendant for past behavior rather than charged behavior, or for being a bad or evil person. *See Williams*, 357 Or at 8-9. To address that concern, consider proposing an instruction that reminds the jury that: (1) the other acts evidence is not sufficient to find the defendant guilty of the crimes charged, (2) the defendant is not on trial for any uncharged acts, and (3) the state has the burden of proving each element of the charged offense. Even if defendant rejects that instruction, having him or her do so in the record could prevent plain-error reversal on appeal.

2. Whether propensity evidence is admissible in non-child sexual abuse prosecutions remains an open question.

Although OEC 404(3) no longer controls with respect to evidence of a criminal defendant's other acts, ***Williams* suggests that the risk of unfair prejudice from propensity evidence is so great that the Due Process Clause may require its exclusion in non-child-sex-abuse cases:**

If this were a case in which defendant had been charged with crimes other than child sexual abuse, we might be persuaded that due process * * * not only requires application of OEC 403, but also precludes the admission of "other acts" evidence to prove propensity.

Id. at 7-9, 17 n 16 (emphasis added). That said, federal courts have held that due process does not categorically require the exclusion of propensity evidence in cases involving sex offenses against adult victims.² And other courts have rejected due process challenges to propensity evidence in domestic violence cases.³ DOJ is prepared to defend the use of relevant propensity evidence in such cases, but prosecutors should proceed with caution in *any* non-child-sex-abuse case, given the court's warning about propensity evidence.

3. If a defendant requests it, a trial court must balance the probative value of other-acts evidence against the risk of unfair prejudice.

² *See, e.g., United States v. Enjady*, 134 F3d 1427, 1433 (10th Cir 1998).

³ *See, e.g., State v. Dabbs*, 239 Ill 2d 277, 294, 940 NE 2d 1088 (Ill 2010).

Due process requires that “[w]hen a party objects, under OEC 403, to ‘other acts’ evidence offered under OEC 404(4), a trial court must engage in the balancing anticipated by OEC 403.” *Williams*, 357 Or at 19. Accordingly, upon request, a trial court must balance the risk of unfair prejudice against probative value. But is the balancing required by due process the same thing as ordinary OEC 403 balancing? The Supreme Court expressly declined to answer that question in *Williams*. *Id.* at 19 n 17. We are currently litigating that issue in the Court of Appeals.⁴ Until we get an answer to question of what kind of balancing is required—ordinary OEC 403 balancing or more narrow, “due process” balancing (*i.e.*, to determine whether admission of other-acts evidence would violate due process)—prosecutors should ensure that the trial court conducts ordinary OEC 403 balancing when a defendant requests it.

Practice Tip: Prosecutors should not rely on Court of Appeals decisions that have suggested that a trial court need not conduct OEC 403 balancing, because those cases may no longer be good law. *See, e.g., State v. Jones*, 246 Or App 412, 418 (2011) (holding that OEC 404(4) “effectively removed” OEC 403 balancing from the six-part test in *State v. Johns*, 301 Or 535 (1986), for admitting “other acts” evidence to prove intent under the doctrine of chances); *State v. Wyant*, 217 Or App 199, 204, *rev den*, 344 Or 558 (2008) (holding that a trial court lacks authority under OEC 404(4) to exclude under OEC 403 evidence of prior DUII convictions to prove recklessness).

CONCLUSION

To summarize, after *Williams*, prosecutors should keep the following things in mind when offering other-acts evidence against a criminal defendant:

- OEC 404(4), not OEC 404(3), governs admissibility of other-acts evidence in criminal cases.

⁴ In DOJ’s view, the due process balancing that OEC 404(4) permits is narrower than ordinary OEC 403 balancing. OEC 403 gives trial courts *discretion* to exclude evidence when its probative value is substantially outweighed by the “danger” of unfair prejudice or other considerations. By contrast, due process balancing under OEC 404(4) permits a trial court to exclude evidence *only* when its admission would, as a matter of law, render the trial fundamentally unfair.

- The trial court must balance the risk of unfair prejudice against probative value when the defendant asks.
- In child sexual abuse cases, propensity evidence is admissible—*i.e.*, that because the defendant did it before, he or she is more likely to have done it again. But if the evidence is admissible for a non-propensity purpose, be sure to make that argument to the trial court.
- We do not know whether propensity evidence is admissible in cases that do not involve child sexual abuse. Federal courts have allowed in other sexual misconduct cases, and some states have allowed it in domestic violence cases.
- The Oregon Supreme Court did not address whether admission of propensity evidence violates the *Oregon* Constitution, because the defendant in Williams did not make a state constitutional argument.
- **Although OEC 404(4) is broader than OEC 404(3), it is not a free pass for offering other-acts evidence. Always consider whether the evidence justifies the risk of reversal on appeal.** To minimize the risks:
 - Whenever possible, identify a relevant non-propensity purpose.
 - If you offer propensity evidence, consider proposing a limiting instruction.

We encourage prosecutors to contact the Appellate Division with any questions on this difficult and developing area of the law. We can be reached at (503) 378-4402.