

PRIOR BAD ACTS LIST

Baughman and *Mazziotti* are the most recent in a growing number of cases that have been decided since *State v. Williams* (2015) changed the way we analyzed “Other Acts” evidence *as it applies to defendants*.

These cases don’t change the current (*Williams*) analysis. That is, in terms of evidence of Defendant’s “other acts,” **404(4) controls**. The court must do a 403 balancing analysis. Technically, the Defendant has to request 403 balancing, but it seems like best practice for the State to urge the court to always perform this balancing, and to put it on the record, regardless if Defendant requests it. And, in order for the court to do the analysis correctly, the State needs to be clear about *why* it is offering the evidence. In the notes on *Baughman*, the Appellate division urges prosecutors to try and be specific about why we are offering the evidence, *don’t* just argue all potential, possible, maybe-viable reasons, for example. And, if we are arguing that the evidence is relevant to prove intent, we still have to go through the *Johns* analysis so that we (and the court) can properly include that analysis in its 403 reasoning. To this point, however, it should be noted that there are cases pending in the Court of Appeals where the State is arguing evidence offered to prove intent need not always meet the *Johns* factors.

State v. Baughman, 276 Or App 754, __ P3d __ (2016) (Clatsop) (AAG Patrick Ebbett). Defendant sexually abused his girlfriend’s daughter over a period of years, when they lived in Clatsop and Umatilla counties. He was charged in Clatsop County with multiple counts of sex crimes. Before the trial, the state moved to introduce evidence of uncharged acts of abuse defendant committed against the victim in Umatilla County, and similar acts of abuse he had committed against A, the daughter of his former girlfriend. After conducting analyses under OEC 404(3) and OEC 403, the trial court (Judge Cindee Matyas) admitted the evidence of defendant’s abuse of A as relevant to three “non-propensity theories”—to prove identity, to prove intent, and to bolster the credibility of the victim. The court also admitted his uncharged acts of abuse against the victim for the same reasons. The jury found defendant guilty on some charges and acquitted him on others.

Held: Reversed and remanded (Sercombe, P.J.). [1] Under OEC 404(4) as interpreted in *State v. Williams*, 357 Or 1 (2015), due process requires a trial court to conduct OEC 403 balancing before admitting other-acts evidence. [2] In evaluating the trial court’s application of OEC 403, the purposes for which the court admitted the evidence must be examined; here, the court was incorrect as to two of its three stated “non-propensity” purposes for admitting the evidence. [4] As to identity, although the acts were similar to the charged acts, they did not show that “defendant operated in a novel or distinctive manner” that would identify him as the perpetrator. [5] As to bolstering the victim’s credibility, “the admission of prior misconduct evidence to bolster the victim’s credibility simply amounts to the admission of evidence for a propensity purpose.” [6] Given the similarity of the charged and uncharged acts, the evidence was admissible to prove intent under the *Johns* factors. [7] Having erred on two of the three grounds for admissibility, when the trial court applied OEC 403 balancing it “did not correctly consider the quantum of probative value of the evidence.” [8] Because “under *Williams*, a failure to perform the requisite balancing test is violation of defendant’s due process rights under the United States Constitution, the court applies the federal “harmless beyond a reasonable doubt” harmless error test. [9] The error was not harmless beyond a reasonable doubt. <http://www.publications.ojd.state.or.us/docs/A152531.pdf>

Note: The trial court in this case did not purport to admit the evidence under a propensity theory of relevance, and thus did not consider that theory in conducting OEC 403 balancing. Therefore, the

Court of Appeals did not address whether the evidence might have been admissible under a propensity theory, as suggested by the Supreme Court in *Williams*.

Practice Tip: Often, prosecutors will argue for the admissibility of prior-acts evidence under every possible non-propensity theory of relevance to see what will “stick.” This case demonstrates the need for caution in proposing multiple theories of admissibility, because they affect the calculus in balancing probative value against the potential for unfair prejudice—in other words, when it comes to theories of admissibility, more is not always better. Be sure to check the case law concerning the various theories before offering them to the court, and if you have questions about whether evidence should be admitted under a particular theory, please give us a call.

State v. Mazziotti, 276 Or App 773, __ P3d __ (2016) (Lane) (AAG Dave Thompson). Defendant was in a traffic accident involving a motorcycle he was driving; his passenger was injured in the accident. He was charged with failure to perform the duties of a driver when property is damaged, failure to perform the duties of a driver to injured persons, reckless endangerment, and reckless driving. At trial, the state offered evidence of defendant’s prior convictions for eluding and reckless driving, including the facts underlying those convictions, under OEC 404(3). The state asserted that the evidence was relevant to prove his “criminal intent” and his “awareness and disregard ... the recklessness.” Defendant objected to the evidence, arguing that it was not relevant for any permissible purpose and that, even if it was relevant, its probative value was outweighed by the danger of unfair prejudice. The trial court (Judge Josephine Mooney) ruled that the evidence would “be allowed under the rule, because it sounds like [the evidence goes] to knowledge with respect to” reckless endangerment and reckless driving. Defendant was convicted.

Held: Reversed and remanded for a new trial (Sercombe, P.J.). [1] The trial court made its evidentiary ruling before *State v. Williams*, 357 Or 1 (2015), which held that OEC 404(4) supersedes OEC 404(3). [2] Under *Williams*, a trial court may admit evidence of a criminal defendant’s other crimes, wrongs, or acts if (1) it is relevant under OEC 401, and if (2) as required by the Due Process Clause of the Fourteenth Amendment to the United States, the trial court has determined that the risk of unfair prejudice posed by the evidence does not outweigh its probative value under OEC 403. [3] Here, the trial court failed to conduct OEC 403 balancing, which defendant had requested. The court did not state on the record that it had conducted the 403 balancing, nor was it apparent from the record that the court had considered the factors for such balancing set forth in *State v. Mayfield*, 302 Or 631 (1987). In sum, the court could not “conclude, on this record, that the trial court implicitly balanced the relevant factors and concluded that the probative value of the prior acts evidence was not substantially outweighed by the danger of unfair prejudice.” Because the trial court admitted the prior-act evidence without first conducting the requested OEC 403 balancing, that was error under *Williams*. [4] Because the error was not harmless, defendant’s convictions are reversed and the case is remanded for a new trial. <http://www.publications.ojd.state.or.us/docs/A153713.pdf>

State v. Zavala, 276 Or App 612, __ P3d __ (2016) (Lincoln) (AAG Michael Shin). Defendant was charged with sexually abusing his ex-girlfriend’s two daughters. At trial, the state called a former coworker of the ex-girlfriend, who testified that prior to the alleged abuse, she had observed defendant inappropriately touching one of the victims and that she had told the ex-girlfriend about the incident. Defendant asked the trial court to strike the evidence as “an inadmissible prior bad act.” The trial court (Judge Thomas Branford) admitted the evidence to show defendant’s sexual predisposition toward the victim under *State v. McKay*, 309 Or 305 (1990). Defendant did not ask the court to conduct OEC 403 balancing. The jury found defendant guilty. On appeal, he argued that the trial court should have excluded the evidence under OEC 404(3) or, alternatively, under OEC 403.

The state argued that those claims were not preserved, and the evidence was properly admitted under *McKay*. The Court of Appeals affirmed without opinion. After the Oregon Supreme Court issued its decision in *State v. Williams*, 357 Or 1 (2015), defendant moved for reconsideration, arguing that the trial court plainly erred in admitting the coworker's testimony without conducting OEC 403 balancing as required by the Due Process Clause. The state argued that that claim was not preserved and the trial court did not plainly err because *Williams* held that for the admission of evidence under OEC 404(4), due process requires OEC 403 balancing only "upon request."

Held: Reconsideration allowed; former disposition withdrawn; judgment vacated and remanded (Ortega, P.J.). [1] *Williams* establishes that due process requires the trial court to engage in OEC 403 balancing for the admission of evidence of uncharged sexual conduct. The trial court's admission of the evidence concerning defendant's uncharged abuse of the victim without conducting a balancing was therefore plain error and exercise of the court's discretion to review the error is appropriate. Although *Williams* makes clear that OEC 403 balancing must be requested by a defendant in child sexual-abuse cases, before that decision, the role of OEC 403 balancing was not manifest prior to *Williams*. [2] Because the failure to conduct OEC 403 balancing was an unpreserved federal constitutional error, the federal harmless-error analysis does not apply; instead, the court applies state-law rules to determine "whether an unpreserved error is one that can and should be reversed." [3] Because in this case it is speculative whether defendant was harmed by the trial court's failure to conduct OEC 403 balancing, "it is not clear that an outright reversal is permitted or appropriate, but it is also not clear that affirmance is appropriate." Accordingly, the court ordered a conditional remand to the trial court to conduct OEC 403 balancing. If, after conducting the balancing, the trial court finds that the disputed evidence should not have been admitted, it must order a new trial; if it finds that the evidence was properly admitted, it should reinstate the judgment of conviction.

<http://www.publications.ojd.state.or.us/docs/A154491A.pdf>

State v. Corbin, 275 Or App 609, __ P3d __ (2015) (Coos) (AAG Peenesh Shah).

Defendant challenged a judgment convicting him of two counts of menacing and two counts of criminal mischief in the second degree, and a judgment convicting him of one count of unauthorized use of a vehicle and two lesser-included counts of criminal trespass in the first and second degree. Those convictions all involve defendant's conduct towards his long-term girlfriend. Specifically, in the course of a series of arguments spanning a few days, he scratched words into his girlfriend's car, broke her car window, threw an object at her, poured gasoline on the porch of their house, and threatened to burn the house down. Months later, in the course of another argument, defendant drove off in his girlfriend's truck without her permission.

In both cases, the trial court (Judge Michael Gillespie) allowed the state to present evidence of defendant's previous violence towards his girlfriend. It did not provide a limiting instruction under *State v. Leistiko*, 352 Or 172, *modified on recons*, 352 Or 622 (2012), but it concluded that the evidence was more probative than prejudicial. Challenging the admission of the prior-bad-acts evidence, defendant argued on appeal that the evidence was inadmissible without a limiting instruction and that the trial court abused its discretion in failing to properly engage in the OEC 403 balancing analysis described in *State v. Mayfield*. **Held:** Affirmed (Lagesen, P.J.). [1] Defendant's argument that the trial court erred by admitting the evidence without providing the jury with an instruction under *Leistiko* is not preserved and does not qualify for plain error review. Defendant did not request a *Leistiko* limiting instruction or object to the absence of such an instruction and, consequently, did not give the trial court the opportunity to consider and correct the error. And, in light of the Supreme Court's decision in *Williams*, any error by a trial court in failing to provide a *Leistiko* instruction, absent a request by a party, is not plain. [2] Even if the trial court erred by failing to adhere to the analytical framework for OEC 403 discussed in *State v. Mayfield*, 302 Or 531 (1987), the error is not plain. The method of analysis under *Mayfield* "is a matter of substance,

not form or litany.” Even if a trial court does not expressly follow the *Mayfield* analysis, it nonetheless meets the requirements of *Mayfield* if the record establishes that, in deciding to admit the evidence, the trial court considered the matters prescribed in *Mayfield*. Here, the trial court made specific findings concerning the probative value and prejudicial effect of evidence, and it directed the state to “narrow” its presentation of the evidence in order to reduce prejudicial effect. Under those circumstances, the deficiencies in the trial court’s *Mayfield* analysis—if any—are not obvious ones, and any error by the trial court is not plain.

<http://www.publications.ojd.state.or.us/docs/A154001.pdf>

State v. Haugen, 274 Or App 127, __ P3d __ (2015) (Josephine) (AAIC Jamie Contreras). The victim went to a bar in Grants Pass where he saw several men whose dress identified them as members of the Vagos motorcycle gang. One of the men approached the victim and asked him if he knew a man named Moore. The victim said that he did, and the man started to rant that Moore was a “low-life” and “snitch” who didn’t deserve to live. When the victim left the bar two hours later, one of the Vagos—later identified as defendant—told the victim “have a good fucking night.” In the parking lot, defendant and another Vagos member, Rives, assaulted the victim. The victim was able to get to his truck and drive away. He called 911, and was unable to provide very much information to police about his attackers other than the fact that they were Vagos members. Five days later, the victim described his attackers to a detective, and the detective showed him several photographs of known Vagos members. Defendant identified defendant and Rives from that lineup. Defendant was charged with third degree assault, and moved to suppress the identification. The trial court (Judge Pat Wolke) denied the motion, noting that nothing about the lineup was unduly suggestive.

Defendant also moved to exclude two categories of evidence about the Vagos gang: (1) images that the state had obtained from the Internet that demonstrated the Vagos creed (e.g., “SNITCHES are a DYING BREED” and “Whenever your brother bleeds you bleed”); and (2) photographs taken of Rives’s home of Vagos-festooned clothing and home décor. Defendant argued that the evidence was irrelevant, inadmissible character evidence that was unfairly prejudicial under OEC 403. The trial court denied the motion to exclude that evidence, ruling that, although it was character evidence, it was relevant to demonstrate motive and the high probative value outweighed any risk of unfair prejudice. **Held:** Affirmed (Garrett, J.). [1] The eyewitness identification was properly admitted under the framework set forth in *State v. Lawson/James*, 352 Or 724 (2012), which was decided after the trial court decided the motion. The Court of Appeals walked through the *Lawson/James* factors in detail and concluded that the state demonstrated the threshold requirements for admissibility.

Because defendant did not make an OEC 403 argument on appeal, the Court of Appeals did not address OEC 403. [2] The trial court correctly denied the motion to exclude the Vagos evidence from the Internet, because the evidence was relevant to establish defendant’s motive for the assault. [a] The evidence is character evidence because the state offered it “to convince the jury that defendant’s behavior on a specific occasion conformed to a set of beliefs or values that defendant held.”

Accordingly, OEC 404(4) and the framework set out in *State v. Williams*, 357 Or

1 (2015), govern the admissibility of the evidence. [b] The evidence was relevant for the nonpropensity purpose of establishing defendant’s motive. The evidence “is illustrative of the Vagos belief system, including the importance of being loyal to gang ‘brothers’ and taking violent action against ‘snitches.’” It therefore “tends to explain why defendant, a self-described Vagos member, would have felt justified in assaulting the victim, who was a friend of a ‘snitch.’” The trial court did not abuse its discretion in concluding that the probative value outweighed the risk of unfair prejudice under OEC403. [3] The trial court should have excluded the photographs taken in Rives’s house as irrelevant, because it was not probative of *defendant’s* motive. However, the error was harmless because it was cumulative and not qualitatively different from the Vagos evidence that the trial court properly admitted.

<http://www.publications.ojd.state.or.us/docs/A151535.pdf>

State v. Logan, 273 Or App 323, __ P3d __ (2015) (Marion) (AAG Dave Thompson). Defendant was convicted of strangulation and fourth-degree assault, constituting domestic violence, based on an incident involving a woman with whom he had had an on-again-off-again relationship for five or six years. Before trial, the state moved *in limine* to introduce evidence of defendant's earlier abuse of the same victim.

Specifically, the state sought a ruling on the admissibility of evidence of defendant's prior convictions for strangulation and fourth-degree assault. Defendant stipulated to those prior convictions but argued that they were inadmissible under OEC 404(3) because that prior bad acts evidence amounted to pure propensity evidence. Much of the parties' arguments on that issue focused on *State v. Pitt*, 352 Or 566 (2012), which had issued two weeks prior to the *in limine* hearing, and *State v. Leistiko*, 352 Or 172, *adh'd to as modified on recons*, 352 Or 622 (2012), which had issued three months prior to the hearing. *Pitt* and *Leistiko* construed the prior bad acts rule contained in OEC 404(3).

The state argued that the evidence of defendant's prior convictions was admissible under OEC 404(3) as construed in *Pitt* and *Leistiko* because that evidence—offered under the “doctrine of chances” theory—met the test for such evidence set forth in *State v. Johns*, 301 Or 535 (1986), and was relevant to prove defendant's intent or to show that there was an absence of mistake or accident in his strangulation of the victim. The trial court (Judge Vance Day) agreed with the state and ruled that the prior-conviction evidence was admissible. After that evidence came in at trial, the court instructed the jury that it “may not use this evidence for the purpose of drawing the inference that because the defendant was convicted of a previous crime the defendant may be guilty of the crime charged in this case.” Defendant did not object to that limiting instruction, nor did he request any additional limiting instruction. On appeal, defendant argued that the trial court committed reversible error by failing to give a *Leistiko* instruction with respect to the prior-conviction evidence. **Held:** Affirmed (DeVore, J.). [1] Defendant failed to preserve his claim that the trial court erroneously failed to give a *Leistiko* instruction. “In this case, defendant did not request a *Leistiko* instruction, object to the absence of such an instruction, or object to the different form of the limiting instruction given by the court.” “Although defendant argued that the court was required to comply with *Pitt*, the record demonstrates that defendant's arguments were that the evidence was simply not admissible as propensity evidence and that, if it was admissible, the state was required to prove sequentially the *actus reus* of the charged offenses before introducing prior acts evidence.” That argument did not alert the court to the purported need for a *Leistiko* instruction. [2] The error was not plain, in light of *State v. Brown*, 272 Or App 424 (2015) (failure to give *Leistiko* instruction is not plain error under OEC 404(4)), and *State v. Horner*, 272 Or App 355 (2015) (unpreserved argument regarding *Leistiko* analysis is not plain error in light of *State v. Williams*, 357 Or 1 (2015)).

<http://www.publications.ojd.state.or.us/docs/A153874.pdf>

State v. Brown, 272 Or App 424, __ P3d __ (2015) (Washington) (AAG Dave Thompson). Defendant cashed a number of forged checks. He was charged with first degree theft, first-degree forgery, and first-degree criminal possession of a forged instrument. At trial, defendant denied knowing that the checks were “bad” and contended that he had been unwittingly induced to cash them. In response to that defense theory, the state offered evidence of defendant's six prior convictions for theft, forgery, identity theft, and possession of a forged instrument to show that defendant knew that the checks he had cashed were forged. Defendant objected to that evidence under OEC 404(3), requesting a hearing to determine its admissibility under *State v. Johns*, 301 Or

535 (1986). The trial court (Judge Andrew Irwin) admitted the prior-conviction evidence for the purpose the state identified without applying *Johns*. The court deemed a *Johns* hearing unnecessary, ruling that the evidence was admissible to establish defendant's "guilty knowledge." The court stated that it had applied OEC 403 and determined that the probative value of the evidence was not substantially outweighed by unfair prejudice. Further, the court gave the jury a limiting instruction telling them that (1) they should not infer that the prior convictions made it "more likely than not" that defendant was guilty of the charged crimes, and (2) the prior-conviction evidence had been admitted "only as it applies to [defendant's] guilty knowledge in this particular case." The jury found defendant guilty on all counts. At sentencing, the court merged defendant's Class C felony convictions and sentenced him to a 60-month prison term and 12 months of post-prison supervision (PPS). Defendant appealed, arguing that the trial court had erred in the following ways: (1) improperly admitting the prior-conviction evidence under OEC 404(3), (2) improperly admitting that evidence without conducting OEC 403 balancing as defined in *State v. Mayfield*, 302 Or 631 (1987), and without *sua sponte* giving the jury the limiting instruction prescribed in *State v. Leistiko*, 352 Or 172, *adh'd to as modified on recons*, 352 Or 622 (2012) (i.e., that the jury could not consider defendant's prior convictions as evidence of his mental state until first finding that he had committed the *actus reus* of forgery), and (3) unlawfully imposing a sentence in excess of the statutory maximum.

Held: Remanded for resentencing; otherwise affirmed (DeVore, J.). **Other bad acts evidence:** [1] The trial court properly admitted the evidence of defendant's prior convictions under OEC 404(4). In *State v. Williams*, 375 Or 1 (2015), the Supreme Court held that the controlling rule for evidence of a criminal defendant's "other acts" is OEC 404(4), not OEC 404(3). Other-acts evidence is admissible under OEC 404(4) "if that evidence is relevant under OEC 401 and survives scrutiny when comparing probative value and unfair prejudice under OEC 403." Here, the prior-conviction evidence "was relevant to show that defendant had not made a mistake or otherwise lacked knowledge of the status of the checks at the time he attempted to cash them," and "the trial court did not err in its application of OEC 403 in light of *Williams*. ...[T]he evidence of defendant's prior convictions was offered for a non-propensity purpose" and, although the evidence "was potentially prejudicial to the extent that it demonstrated a pattern of similar offenses and presented a risk that jurors would conclude that defendant had acted in accordance with his past acts," it was highly probative to prove defendant's intent.

Moreover, the risk of prejudice was mitigated by the court's limiting instruction to the jury. Although the court did not recite *Mayfield*'s four-step OEC 403 analysis, the record shows that the court considered the matters prescribed in *Mayfield*. "Because *Mayfield* is a matter of substance, not form or litany, the trial court's ruling comported with *Mayfield*." The court did not abuse its discretion in conducting "traditional" OEC 403 balancing. [2] The trial court did not plainly err by not giving a *Leistiko* limiting instruction *sua sponte*, because "there was no dispute that defendant committed the *actus reus* of the offenses at issue and, therefore, defendant lacked a basis for the instruction in the first place."

<http://www.publications.ojd.state.or.us/docs/A154684.pdf>

Note: The Court of Appeals declined to decide whether *Williams* requires "traditional" OEC 403 balancing or more narrow "due process" balancing, leaving that question for another day.

Notes: [a] The Court of Appeals noted that if this error had been preserved, the court would not have ordered a limited remand for the trial court to conduct OEC 403 balancing; rather, it would have ordered a new trial, as it did in *State v. Brumbach*, 273 Or App 552 (2015), a case in which the state has petitioned for review. According to the Court of Appeals, the federal harmless-error standard compels a new trial in such cases. [b] It appears that this "plain error" ruling applies only to cases

that were tried *before* the Supreme Court issued its decision in *Williams* and in which the trial court admitted evidence of prior bad acts under OEC 404(3) or (4) without conducting balancing under OEC 403. For a case tried after *Williams*, the trial court should not be required

State v. Horner, 272 Or App 355, __ P3d __ (2015) (Lane) (AAG Susan Howe).

Defendant was a prodigious criminal who, one morning, broke into a bunch of vehicles on a residential street and stole whatever he could find in them. He stole a pickup truck and police saw him driving it, leading to a high-speed chase through Eugene during rush hour. Defendant got boxed in by the police, wrecked the truck, and tried to take off on foot but was caught. The police recovered many of the items stolen from the other vehicles, including pieces of identification. Defendant was charged with dozens of crimes, including two counts of identity theft. To prove that he had the intent to use the stolen identification to deceive or defraud, the state introduced evidence of his nine prior convictions for identity theft, including the factual bases for each conviction. Defendant objected on the grounds that the prior convictions should be excluded under OEC 404(3) and OEC 403. The trial court (Judge Charles Carlson) admitted the evidence, gave the jury a cautionary instruction that defendant approved, and the jury found him guilty on all counts. The sentences in the written judgment varied somewhat from the court had imposed orally; the court later entered an amended judgment that fixed some but not all of those discrepancies.

While this case was on appeal, the Oregon Supreme Court issued *State v. Leistiko*, 352 Or 172 (2012), and then *State v. Pitt*, 352 Or 566 (2012), which addressed the admissibility of evidence of prior bad acts to prove, under a doctrine-of-chances theory, that defendant acted with the same intent that he did when he committed the prior acts.

But then the Supreme Court decided *State v. Williams*, 357 Or 1 (2015), in which it held that OEC 404(4), not OEC 403(4), governs to the admissibility of evidence of prior bad acts of a defendant in criminal cases, and bars admission of such evidence only if doing so would violate the defendant's right to a fair trial under the Due Process Clause.

Held: Remanded for resentencing; otherwise affirmed (Sercombe, J.). [1] The argument that defendant asserts on appeal—that the trial court violated OEC 404(3) by admitting the evidence of his prior convictions—is not preserved because it “is categorically different from the one he advanced in the trial court. [2] In light of *Williams*, it is no longer “apparent on the face of the record” that the trial court erred by admitting evidence of defendant's prior identity-theft convictions without also providing a sufficient limiting instruction. Because defendant's claim of error was not preserved and not “obvious,” it could not be reviewed as plain error. [3] Because the alleged error in the judgment first became apparent when the judgment was issued, defendant was not required to raise an objection at that time to preserve the error. The judgment includes a sentence that effectively modifies the sentence that was announced in open court.

Because that modification is discretionary, rather than a change required by operation of law, defendant had a right to be present for that modification.

<http://www.publications.ojd.state.or.us/docs/A152003.pdf>

Note: This case illustrates how matters that do not seem to be in dispute at trial can become dispositive on appeal—in this case, the introduction of prior bad acts and the interplay between *Leistiko/Pitt* and *State v. Williams*. *Leistiko*, *Pitt*, and *Williams* all came out after defendant's trial. Those cases all apply to defendant's case because of *State v. Jury*, 185 Or App 132 (2002), where the Oregon Court of Appeals held that it will apply the law existing at the time the appeal to any criminal case, so that if it is “obvious” that the trial court erred under the new legal landscape, the Court of Appeals would reverse the conviction.

***State v. Williams*, 357 Or 1, __ P3d __ (2015) (Josephine) (AAG Dave**

Thompson). Defendant was charged with first-degree sexual abuse for conduct involving a five-year-old girl: touching her vaginal area and having her touch his clothed penis. At trial, defendant denied committing either act. The state offered evidence that he possessed two pairs of little girls' underwear that his landlord had found in his residence after he vacated the property; one pair was stuffed between the mattress and box spring on his bed, and another pair was in a duffel bag. The state offered that evidence to prove that he had touched the victim with a sexual purpose, rather than accidentally. Defendant objected to the evidence as irrelevant under OEC 401 and unfairly prejudicial under OEC 403. The trial court (Judge Pat Wolke) admitted the evidence under OEC 404(3), concluding that the evidence was logically relevant under OEC 401 and that, under OEC 403, its probative value was not substantially outweighed by the danger of unfair prejudice. A jury found defendant guilty.

On appeal, the Court of Appeals reversed and remanded, holding that the underwear evidence was not logically relevant to any disputed issue and thus was inadmissible under OEC 401. The court explained that the evidence was not relevant to a contested issue in the case (1) because defendant had not argued that, if he had touched the victim as alleged, he did so without criminal intent, and (2) because if he had committed the charged acts, the acts themselves strongly suggest a sexual purpose.

HELD: Decision of the Court of Appeals reversed, and the case remanded to that court for consideration of defendant's remaining assignments of error (Walters, J.). The Court of Appeal erred in holding that the underwear evidence was not admissible under OEC 404(3). [1] In criminal cases, OEC 404(4), not OEC 404(3), governs the admissibility of a defendant's "other acts." OEC 404(4) provides that evidence of a criminal defendant's "other crimes, wrongs or acts" is admissible "if relevant" under OEC 401 and if not excluded by OEC 403 "to the extent required by the United States Constitution or the Oregon Constitution. "Before the legislature enacted OEC 404(4), 'other acts' evidence to prove a defendant's character and propensity to act accordingly was categorically inadmissible under OEC 404(3). That is no longer the rule. Now, in a prosecution for child sexual abuse, the admission of [logically relevant] '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." [2] In determining the admissibility of other-acts evidence under OEC 404(4), a trial court first determines whether the evidence is logically relevant under OEC 401, then determines, under OEC 403, whether the probative value of the logically relevant evidence is substantially outweighed by the danger of unfair prejudice. The application of OEC 403 in this context is compelled by the federal Due Process Clause.

Does this decision apply in a case that is not a prosecution on a charge of child sexual abuse?

Although the court's holding that OEC 404(4) supersedes OEC 404(3) necessarily applies in any criminal case in which the state offers evidence of a defendant's other acts—not just in cases involving sexual abuse of a child—it is unclear whether the Due Process Clause will allow the admission of such evidence *to prove character and propensity to act accordingly* in cases outside the sexual-abuse category. Indeed, the court cautioned: "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 incorporates th[e] historical practice [prohibiting the use of 'other acts' to prove the *actus reus* of the charged crime] and therefore not only requires the application of OEC 403, but also precludes the admission of 'other acts' evidence to prove propensity

State v. Ardizzone, 270 Or App 666, __ P3d __ (2015) (Umatilla) (AIC Jennifer Lloyd). Defendant was charged with solicitation to commit aggravated murder. He previously had been convicted of soliciting the murder of the same victim. The prior incident involved his arrangements with an informant to kidnap and murder of the victim: he had paid the informant \$13,000, and a search of his car revealed a gun with the serial number removed, a large black cloth bag, and a roll of black garbage bags. Based on that evidence, he was convicted and sentenced to prison. In prison, he solicited a cellmate to act as a middleman for another abduction attempt, and the cellmate reported him to authorities. Ultimately, the cellmate wore a body wire and recorded defendant asking him to “take the victim out.” In questioning, defendant told police that he was paying the cellmate for legal work in the prison, and that any statements about killing the victim were made in jest. Before trial, the state sought to offer the prior solicitation as evidence of defendant’s intent. Defendant agreed that the evidence was relevant, but argued that its probative value would be substantially outweighed by the risk of undue prejudice. The trial court (Judge Lynn Hampton) applied the *Johns* test and concluded that the evidence was relevant to intent, and that OEC 403 did not bar its admission. At trial, defendant generally renewed his argument and asked the court to instruct the jury not to consider the evidence for propensity purposes. The trial court gave the requested instruction, and the jury found defendant guilty. On appeal, defendant argued under *State v. Leistiko*, 352 Or 172 (2012), that the evidence was inadmissible because he had not stipulated to the conduct and because the trial court had not instructed the jury not to consider the evidence unless it found that defendant committed the charged conduct. He also argued that the admission of the evidence violated his due-process rights.

HELD: Affirmed (Ortega, P.J.). The trial court correctly admitted the evidence at issue. [1] Defendant’s claim of error based on *Leistiko* is not preserved, and because he did not ask the appellate court to review it as plain error, the court declined to do so. [2] To the extent that defendant makes a due-process argument that extends beyond the argument he made at trial, it is not preserved and hence not reviewable. [3] Defendant’s argument based on OEC 403 fails, because the evidence was relevant and the risk of prejudice from any “propensity” inference was mitigated by the limiting instruction that the court gave. <http://www.publications.ojd.state.or.us/docs/A150918.pdf>

Note: This is the first Court of Appeals decision that purports to apply the holding in *State v. Williams*, 357 Or 1 (2015), in which the Supreme Court held that OEC 404(4) supplants OEC 404(3), but that due-process balancing is nonetheless required to avoid any unfair risk of prejudice from the admission of evidence for propensity purposes. In a footnote, the Court of Appeals states that, after *Williams*, balancing under OEC 403 is still required notwithstanding OEC 404(4). We disagree with that interpretation of *Williams*, and read *Williams* as holding that, although some sort of balancing is required, it is only required by the Due Process Clause, not by OEC 403. In other words, we do not believe that *Williams* requires OEC balancing, and to the extent that the Court of Appeals applied OEC 403 balancing in this case, it was incorrect. The state is considering whether to seek reconsideration

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>

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).

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 *Leistikio* 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. Leistikio*, 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 *Leistikio*. **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 *Leistikio*, the trial court committed plain error when it admitted the prior-crimes evidence: "Here, as in *Leistikio*,

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.”