LEGAL UPDATE
BOOT CAMP VI
2015

I. Assault
II. Convictions
    a. Contempt
III. Constituting Domestic Violence
IV. Evidence
    a. Character Evidence
    b. Other Bad Acts Evidence
V. Expert Witnesses
VI. Hearsay
    a. Child Abuse Victim Exception
    b. Prior Consistent Statements
    c. Excited Utterances
    d. Right To Confrontation
VII. Homicide
VIII. Kidnapping
IX. Probation Violations
X. Restitution
XI. Sexual Offenses
    a. Forcible Compulsion
    b. Mental State
    c. Rape Shield rule
XII. Stalking (and Violation of Stalking Order)
XIII. U-Visa
XIV. Weapons

ASSAULT

ASSAULT: In prosecution for second-degree assault, ORS 163.175(1)(b), based on hitting victim with broomstick, trial court erred by not allowing defendant argue to jury that he did not know that the broomstick was a "dangerous weapon."
State v. Fletcher, 263 Or App __, __ P3d __ (June 18, 2014) (Lane) (AAG Susan Howe). While housed in the Lane County jail, defendant struck another inmate with a broom handle, chipping several of the victim's teeth. He was charged with second-degree assault, ORS 163.175(1)(b) ("knowingly causes physical injury to another by means of a… dangerous weapon"), as well as coercion and harassment. At trial, a fellow inmate testified that defendant merely "tapped" the victim's face with the broom handle. Defendant asked for an instruction that the state must prove that he "must have known that the broom's shaft was a dangerous or deadly weapon," but the trial court (Judge Maurice Merten) declined to give the instruction and precluded defendant from arguing to the jury that he did not know that the broomstick was a dangerous weapon. The jury found him guilty. On appeal, defendant argued that the trial court erred by precluding him from arguing to the jury that he did not know that the broomstick was a dangerous weapon.
Held: Conviction for assault reversed and remanded (Sercombe, J.); remanded for resentencing; otherwise affirmed. [1] Defendant adequately raised the issue for appeal by requesting the jury instruction on that point, because the trial court's ruling on that request prevented him from making that argument during his closing. [2] "The culpable mental state— intent or knowledge—applies to all of the elements of the crime. Therefore, intent or knowledge must be proven not simply with regard to physical injury, but with regard to the nature of the weapon employed as well." [3] "Absent abuse," the trial court has broad authority with respect to closing arguments. [4] The court abused its discretion when it prevented defendant from arguing that the state was required to prove that defendant knew that "the shaft of the broom, as used, has the characteristics of a dangerous weapon."
http://www.publications.ojd.state.or.us/docs/A150541.pdf

Note: Defendant did not argue on appeal that the trial court erred when it denied his request for a jury instruction.

ASSAULT: Evidence that defendant pulled out some of the victim's hair during a fight was not sufficient, of itself, to support a conviction for assault in the fourth degree, ORS 163.160(1)(a).
State v. Lewis, 266 Or App __, __ P3d __ (October 22, 2014) (Multnomah) (AAG Patrick Ebbett). Defendant and the victim, his wife, got into a fight during which he pulled out clumps of her hair. Defendant's 14-year-old son was in an adjoining bedroom and overheard the dispute. He heard the victim exclaim, "Ouch, stop it." The next morning, the victim appeared "beaten down" and told the son that defendant pulled out some of her hair, and pointed to clumps of hair on the floor. Among other offenses, defendant was charged with felony assault in the fourth degree, ORS 163.160(1)(a). At the close of the state's case, he moved for judgment of acquittal, contending that the evidence was insufficient to establish that the victim had suffered "physical injury," which is defined by ORS 161.015(7) as "impairment of physical condition or substantial

pain." The trial court (Judge John Wittmayer) denied the motion, and the jury found defendant guilty.
Held: Reversed in part and remanded (Tookey, J.). The evidence was not sufficient to show "physical injury." [1] The evidence was insufficient to show impairment of physical condition because there was no evidence that the act of pulling out the victim's hair caused any broken skin or bleeding, or otherwise impaired the physical function of the skin or hair, particularly given the lack of evidence of how much hair was pulled out. [2] The evidence also was not sufficient to prove that the victim suffered substantial pain because, while the evidence of hair-pulling was sufficient to show some pain, there was "no evidence in the record that the degree or duration of the pain sufficient to constitute substantial pain."
http://www.publications.ojd.state.or.us/docs/A152266.pdf

ASSAULT: Evidence that defendant smothered the victim with a pillow for five seconds, during which she could not breathe and feared for her survival, supported a conviction for fourth-degree assault, ORS 163.160(1).
COERCION: The evidence was insufficient to prove coercion, ORS 163.275(1)(a), because it failed to prove that defendant had the requisite intent and that his conduct in fact compelled the victim to abstain from any conduct that she was legally entitled to engage.
SENTENCING—MERGER: The sentencing court correctly declined to merge the assault conviction based on defendant's smothering of the victim into the conviction for strangulation, because each crime contains different mental state and result elements, ORS 161.067(1).
***State v. Hendricks*,** 273 Or App 1, __ P3d __ (2015) (Lane) (AAG Karla Ferrall).
During a domestic assault, while he was intoxicated, defendant struck the victim repeatedly with his fists and smothered her with a pillow for five seconds. He was charged with, among other offenses, three counts of fourth-degree assault
(ORS 163.160), strangulation (ORS 163.187), and coercion (ORS 163.275(1)(a)). At trial, he moved for a judgment of acquittal on one assault charge based on the smothering and the coercion charge. The trial court (Judge Suzanne Chanti) denied those motions.
The coercion charge went to the jury on a theory that defendant had compelled the victim "to abstain from engaging in conduct that [she] had a legal right to engage in." The jury found defendant guilty on those charges. At sentencing, the court denied defendant's request to merge the assault conviction based on the smothering into the strangulation conviction.
Held: Conviction for coercion reversed; remanded for resentencing; otherwise affirmed (Haselton, C.J.) [1] The trial court correctly denied defendant's motion for judgment of acquittal on the assault charge based on the smothering, because the evidence sufficiently established that the victim suffered "physical injury." The smothering caused her to be completely unable to breathe for a sufficient period that she feared for her survival, and a reasonable juror could find that the duration of the conduct was sufficient to materially impair her bodily function. [2] The trial court erred when it denied his motion for judgment of acquittal on the coercion count, because the evidence failed to prove that he had the requisite intent or that his conduct in fact compelled the victim to abstain from any conduct that she was legally entitled to engage. [3] The sentencing court correctly declined to merge the assault conviction based on the smothering into the conviction for strangulation, because each crime contains different mental-state and result elements, ORS 161.067(1). Moreover, defendant did not develop an argument that the physical-injury element of assault charge necessarily encompassed the result element of strangulation.
http://www.publications.ojd.state.or.us/docs/A148546.pdf

CONSTITUTING DOMESTIC VIOLENCE

State v. Pooyan Amini
Columbia County Circuit Court case 09-1219.
Defendant had history of abusing his wife and three children. During this incident, he was charged with one count of Assault and four counts of Harassment (wife was the victim in all counts). The prosecutor added "constituting DV" to the Harassment charges. Defendant was convicted of all Harassment charges with DV language. **COA AWOPS.**

State v. Sturgeon, 253 Or App 789, 291 P3d 808 (2012) (per curiam). Defendant was convicted of assault in the fourth degree "constituting a crime of domestic violence," ORS 132.586, for assaulting the adult son of his live-in girlfriend, and the court ordered defendant to repay $610 in fees for his court-appointed attorney. For the first time on appeal, he contended that the evidence did not prove the "domestic violence" allegation and that there was insufficient evidence to show that he had the ability to pay CAA fees. Held: Reversed and remanded to delete the "domestic violence" finding. [1] The evidence did not establish that defendant and the victim were "cohabitating" or were "family or household members" within the scope of ORS 135.230(3) and (4)(d). [2] The error warrants review and relief as "plain error."

In the Matter of C. M. C., a Youth, STATE ex rel JUVENILE DEPARTMENT OF WASHINGTON COUNTY, Respondent, v. C. M. C., Appellant. (6/1/2011)
"[p]ersons cohabiting with each other" refers to persons living in the same residence in a relationship akin to that of spouses."

CONVICTIONS

CONTEMPT OF COURT

Contempt judgment is not a "conviction" or an "offense" for purposes of determining eligibility for a set-aside order under ORS 137.225(6)(b).
State v. Coughlin, 258 Or App __, __ P3d __ (October 9, 2013) (Washington) (AIC Jennifer Lloyd). In 2011, defendant moved to set aside her 1990 conviction for forgery. The state objected on the ground that, in 2005, defendant was found in contempt for violating a restraining order. The state argued that the contempt finding made defendant ineligible to have her forgery conviction set aside under ORS 137.225(6)(b), which precludes a set-aside order for a defendant who has been "convicted … of any other offense" within the ten year period immediately preceding the filing of the motion. The trial court (Judge Suzanne Upton) denied defendant's motion.
Held: Reversed and remanded (Hadlock, J.). [1] A person who is found to have committed contempt has not been "convicted" of contempt. [2] Nor is contempt an "offense," within the meaning of the statutory definition of "offense" in ORS 137.225(6)(b). [3] The appropriate remedy is a remand to allow the trial court to allow it to exercise discretion under ORS 137.225(3), as to whether "the circumstances and behavior of [defendant] from the date of conviction"—including the violation of the restraining order—warrant setting aside the conviction. That subsection requires the trial court to examine whether the applicant has behaved "in conformity with or contrary to public law," and whether a violation warrants denial of the motion.

http://www.publications.ojd.state.or.us/docs/A151027.pdf

CONTEMPT OF COURT—VIOLATION OF FAPA ORDER: Defendant, who was prohibited from contacting his ex-wife under FAPA order, willfully violated the order by sending her personal messages under the guise of a *pro se* pleading in a separate pending divorce case. ***State v. Crombie***, 267 Or App __, __ P3d __ (December 24, 2014) (Clackamas) (AAG Michael Shin). Defendant was held in contempt for violating a restraining order issued under the Family Abuse Protection Act (FAPA) that prohibited him from contacting his ex-wife.
The trial court (Judge pro tem Kenneth Stewart) found that he violated the restraining order by sending his ex-wife a copy of an "Addendem [*sic*] to Response and Counterclaim," which he filed in a separate pending divorce proceeding, because the document contained his personal messages to his ex-wife. The trial court determined that although the document "seems to be a pleading," it constituted prohibited contact because it contained his direct communications to his ex-wife, including ending with: "Bye Baby. :) I will ALWAYS love you! Thank you for every second!." On appeal, defendant claimed that the trial court erred in denying his motion for judgment of acquittal because the restraining order contained an exception for serving documents "related to a court… case" and the addendum was a court filing that fit within the exception and, additionally, there was insufficient evidence for a finding that he violated the restraining order willfully. *Held*: Affirmed (Ortega, P.J.). The trial court correctly denied defendant's motion for judgment of acquittal. Defendant's interpretation of the exception in the restraining order for serving court documents "would allow defendant to easily subvert the intentions of the order, which are to prevent him from communicating with the victim." The addendum was directed at his ex-wife, not the divorce court, and there is little doubt that had he expressed the content of the addendum in a letter sent directly to his ex-wife that it would have violated the restraining order. "Defendant may not accomplish the same aim by expressing those contents in a pleading, including some statements addressed to the court, and filing it in the court proceeding."
http://www.publications.ojd.state.or.us/docs/A152462.pdf

EVIDENCE

CHARACTER EVIDENCE (of Victim)
CHARACTER EVIDENCE (OEC 608(1)): Trial court properly excluded a defense character witness's opinion about the victim's character for truthfulness.
State v. Paniagua, 268 Or App 284, __ P3d __ (December 31, 2014) (Washington) (AAG Erin Galli). Based on a domestic-violence incident, defendant was charged with misdemeanor assault and harassment. At trial, he and the victim offered different versions of the incident. Defendant then offered testimony from a witness, Shaw, about her opinion of the victim's character for truthfulness. Shaw testified that she met the victim four years ago, she had five or six brief contacts with the victim within the previous year, and she and the victim "just kind of saw" each other because they were in the same social circles. On one occasion, Shaw went to the victim's house and "hung out." The prosecutor objected to the "foundation" before Shaw offered her opinion, and the trial court (Judge Gayle Nachtigal) ruled that Shaw's contacts with the victim were not sufficient to establish the foundation necessary to admit her opinion of the victim's truthfulness under OEC 608(1). Defendant made an offer of proof in which Shaw testified that the victim had lied to Shaw and to people Shaw knew. Defendant was found guilty.
Held: Affirmed (Nakamoto, J.). The trial court properly excluded Shaw's testimony.

[1] To offer a witness's opinion of an individual's character for truthfulness under OEC 608(1), the proponent must establish that the witness has had "sufficient personal contact with the individual to have formed a personal opinion," and the contact must be "sufficiently recent so that there will be a current basis for the testimony." Thus, the admissibility of the evidence depends on whether, in the court's discretion, "the contacts on which the opinion is based are frequent enough and recent enough to have probative value." [2] Here, the trial court could conclude that "Shaw's own brief, recent contacts with [the victim]—the only permissible basis for Shaw's opinion testimony—were insufficient to permit her to testify about her opinion as to [the victim's] character for truthfulness."
http://www.publications.ojd.state.or.us/docs/A152638.pdf

OTHER BAD ACTS: Defendant's prior solicitation to murder the same victim was relevant to prove his intent in later solicitation; admission of the prior solicitation did not violate due process.
State v. Ardizzone, 270 Or App 666, __ P3d __ (2015) (Umatilla) (AIC Jennifer Lloyd). Defendant was charge with of 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

Earlier this year, the Oregon Supreme Court issued its ruling in *State v. Williams* (357 Or 1 (2015)). *Williams* is a child sex abuse case in which the prosecutor offered as a trial exhibit children's underwear from the defendant's home to prove that the defendant had a sexual interest in young girls and that his sexual touching of the victim was not accidental, as defendant was claiming. The trial court admitted the evidence. Defendant was convicted.

The Supreme Court upheld the conviction. The court's opinion sets forth an analysis of the rules governing the admissibility of "other acts" evidence. This ruling has significantly changed the ability of prosecutors to use "other acts" evidence in *all* criminal prosecutions, not just child sex abuse cases. Most notably, the court ruled that OEC 404(4) supersedes OEC 404(3) re: the admissibility of evidence of a *defendant's* "other acts" in a criminal trial. Evidence of a defendant's "other acts" is generally admissible so as long as the evidence is relevant and does not violate due process (which requires a balancing test if the evidence is objected to by the defendant.) Also, "propensity" evidence may be admissible in child sexual abuse cases, and possibly in adult sex abuse and DV cases. Finally, it is important to remember that "[p]rosecutors *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." (DOJ's Legal Bulletin: Admission of a Defendant's Other Acts: OEC 404(4) After State v. Williams, pp 6.)

DOJ's appellate division distributed an excellent summary of *Williams'* key holdings, identifies big questions left unanswered, and offers practice tips.

Recently, the Court of Appeals issued rulings on two cases, applying the *Williams'* holding:

State v. Horner:
http://www.publications.ojd.state.or.us/docs/A152003.pdf

State v. Brown:
http://www.publications.ojd.state.or.us/docs/A154684.pdf

Note: The Court of Appeals in *Brown* continues to decline to decide whether *Williams* requires "traditional" OEC 403 balancing or more narrow "due process" balancing.

The link below is a DV case out of Illinois. It stands for the proposition that sometimes propensity evidence in DV cases is admissible. The Appellate Division has said that they would be willing, based on *State v. Williams*, to defend on appeal a (good) Oregon case where such an argument was made. I figured the two of you could put this info to good use one of these days. The legal bulletin on Williams that I just sent out has some good practice tips on how to apply *Williams*—I'd check it out.

http://www.illinoiscourts.gov/opinions/supremecourt/2010/november/109698.pdf

OTHER BAD ACTS: In light of *State v. Williams*, trial court erred when it admitted other-crimes evidence without balancing under OEC 403.
State v. Brumbach, 273 Or App 552, __ P3d __ (2015) (Deschutes) (AAG Tim Sylwester). Defendant compelled his granddaughter to fondle his erect penis on three different occasions in 2004 and 2005, when she was between 6 and 8 years old, and he was charged with three counts of first-degree sexual abuse, ORS 163.427(1). At the time of trial, defendant already had been convicted attempted first-degree sexual abuse involving the same victim based on an incident in 2006 and three counts of third-degree sexual abuse for molesting three other children based on an incident in 1998. The state argued that those prior convictions would be admissible under OEC 404(3) and (4) to prove both his "sexual interest in the victim" and "intent." The trial court (Judge Stephen Forte) allowed in the evidence in a limited form, and the jury found him guilty. While the case was on appeal, the Supreme Court decided *State v. Williams*, 357 Or 1 (2015). *Held*: Reversed and remanded (Egan, J.). The trial court erred by admitting some of the other-bad-acts evidence. [1] Defendant's claim of error on appeal that the trial court erred under OEC 404(4) by admitting the evidence was sufficiently preserved by his argument below that the court was required to conduct balancing under OEC 403, even though he did not argue for balancing under the Due Process Clause, as is now required by *Williams*. [2] "In light of *Williams*, …OEC 403 balancing is the only way that a court can ensure that the admission of 'other acts' evidence is not unfairly prejudicial and a violation of fundamental concepts of justice. The trial court declined to subject evidence of the 2006 and 1998 incidents to OEC 403 balancing. Consequently, the court erred by admitting that evidence." [3] Admission of the challenged evidence was not harmless in the context of this case.
http://www.publications.ojd.state.or.us/docs/A151863.pdf

EXPERT WITNESS

EXPERT TESTIMONY: Expert testimony that "sexual consent and education assessment" showed that victim was incapable of consenting to sex was admissible under *Brown* and *O'Key*. Defendant's argument that insufficient foundation supported expert's opinion failed to preserve any argument based on OEC 403.
***State v. Reed*,** 268 Or App 734, __ P3d __ (2015) (Crook) (AAG Rolf Moan). A jury convicted defendant of a number of sex crimes involving his adult daughter, who suffered from severe disabilities that prevented her from speaking, reading, or using sign language. To prove the first-degree rape and first-degree sexual abuse charges, the state had to prove that the victim was incapable of consent due to a mental defect or physical helplessness. To do so, the state presented a psychologist's testimony that she had applied the "Sexual Consent and Education Assessment" (SCEA) protocol and had concluded that the victim was not competent to consent to sexual activity. In applying the SCEA, the psychologist had attempted to interview the victim, interviewed those who worked with the victim daily, and reviewed documentation about the victim. Defendant argued that the psychologist's testimony was "scientific" evidence, and that it failed to satisfy the foundational requirements articulated in *State v. Brown*, 297 Or 404 (1984), and *State v. O'Key*, 321 Or 285 (1995), for admitting scientific evidence under OEC 702 and OEC 401. The trial court (Judge Gary Williams) rejected that argument, and defendant was convicted.

Held: Affirmed (Sercombe, P.J.) The trial court correctly denied defendant's motion to exclude the psychologist's testimony. [1] Applying the multi-factor *Brown*/*O'Key* analysis in detail, the court concluded that the SCEA is scientifically valid. [2] Defendant failed to preserve his argument that, even if the expert's testimony was scientifically valid, its prejudicial impact substantially outweighed its probative value, and that OEC 403 thus required exclusion. *See*
State v. Sampson, 167 Or App 489, 500, *rev den* (2000) (under *Brown* and *O'Key*, if a court deems evidence scientifically valid and thus admissible under OEC 702 and 401, it must then assess—under OEC 403—whether any unfairly prejudicial impact substantially outweighs its probative value). In the trial court, defendant had argued "only that the evidence did not have an adequate *scientific foundation*," and he thus preserved arguments under OEC 401 and OEC 702 alone.
http://www.publications.ojd.state.or.us/docs/A151558.pdf

EXPERT TESTIMONY: In prosecution for domestic-assault offenses in which defendant claimed that he had taken numerous drugs and had no memory of the incident, the trial court committed reversible error when it precluded
Dr. Julien from testifying that defendant, due to his drug use, may have lacked an ability to form the charged "criminal intent" during the assaults.
State v. Hazlett, 269 Or App 483, __ P3d __ (2015) (Lane) (AAG Dave Thompson).
Based on defendant's violent assault and sexual abuse of the victim, a woman with whom he had an intimate relationship, he was charged with first-degree unlawful sexual penetration, first degree sexual abuse, fourth-degree assault constituting domestic violence, strangulation constituting domestic violence, unlawful use of a weapon, and harassment. At trial, defendant testified that he and the victim had had consensual sex the night before the incident and that the next day he had taken a number of drugs, including what he thought to be liquid morphine, Oxycodone, and Xanax. He testified that the drugs had caused him to pass out and that he had no memory of the incident, only partial memory of someone other than the victim being present, and no memory of the police or his arrest. Following defendant's testimony, defense counsel called Dr. Robert Julien, a retired anesthesiologist, to testify about the drugs that defendant had testified he took and their effects. The trial court (Judge Debra K. Vogt) held an OEC 104 hearing to determine Julien's qualifications as an expert. Julien stated that he held advanced degrees in pharmacology, which is the science of how drugs affect living organisms, and had done research in psychopharmacology, the study of how drugs affect the brain and behavior. He noted that he had testified in court as an expert in toxicology pharmacology around 60 times. Defense counsel asked Julien, hypothetically, what symptoms a person of defendant's size would show if the person had taken the drugs defendant said he had ingested with some amount of alcohol. Julien testified that he would expect the person to appear sedated, with slurred and garbled speech, glassy eyes, droopy eyelids, confusion, and trouble standing up. He also said that he would expect blackout, which he explained is a loss of memory and is "essentially drug induced dementia, very similar to what you would see in somebody who had organic dementia with a disease such as Alzheimer's." Julien cited an article he had written—"*To Intend or Not to Intend: That is the Question.*"—in which he had explained the difference between a person who is unconscious and a person who is in a state of drug-induced dementia. The latter person, according to Julien, is unable to form new memories and that affects the person's ability to form intent. Julien gave the following examples: "If you've had a Benzodiazepine for your colonoscopy and you don't remember your colonoscopy. If you've signed a contract during that time, that would be an invalid contract because you were drug demented as indexed by the fact

that you couldn't form memory." After hearing Julien's testimony, the court allowed him to testify in front of the jury about the drugs defendant had testified to taking, the symptoms they produce, and whether the description of defendant's behavior on the night of the alleged crimes was consistent with those symptoms. But the court prohibited Julien from testifying about defendant's ability to form criminal intent, concluding that he was not qualified to opine about that. The jury found defendant guilty on the charges. He appealed, contending that the court erred when it prohibit Julien from testifying about his ability to form criminal intent.
Held: Reversed and remanded (Nakamoto, J.). The trial court erred by excluding the proffered evidence. [1] Defendant sufficiently preserved the issue he raised on appeal:
Although Julien did not specifically testify during the OEC 104 hearing that a person suffering from drug-induced dementia is unable to form *criminal* intent and the defense made no offer of proof in that regard, "Julien's testimony, as well defense counsel's arguments, established that Julien had an opinion about the effect of dementia on a person's ability to form intent and what that opinion would be. … On the whole, the record demonstrates that the court understood the substance of the evidence that defendant sought to introduce through Julien's testimony."
[2] "The record demonstrates that Julien had education, experience, and knowledge that qualified him to testify about the effect of drug-induced dementia, or blackout, on a person's ability to form intent," despite the fact that Julien was not a psychologist or psychiatrist. Under OEC 702, "a witness is not assumed to be disqualified merely because the person lacks a particular educational or professional degree." [3] "As to the counts requiring the state to prove that defendant acted either knowingly or intentionally, the trial court's error was not harmless." But the court affirmed the one conviction that based on a "recklessly" culpable mental state.
http://www.publications.ojd.state.or.us/docs/A151569.pdf

EXPERT TESTIMOY: Trial court did not err in allowing a detective to testify that defendant's behaviors, as described by the victim, were consistent with "grooming."
State v. Swinney, 269 Or App 548, __ P3d __ (2015) (Josephine) (AIC Ryan Kahn).
Defendant was charged with committing various sexual crimes against a girl who viewed him as a father figure. The evidence showed that defendant engaged in a long progression of abuse over several years, over which time defendant slowly increased the degree of sexual contact from "peck" kisses to, ultimately, oral sodomy and penetration with defendant's penis. The state called a detective, who testified that the behaviors and progression that the victim described were "classic elements of grooming," and he also testified that offenders often choose victims whose parents are unstable and who do not have a male influence in their lives. (The state presented evidence that the victim's mother was nearly blind and took medications that caused her to sleep heavily.) Defendant objected to the detective's grooming testimony on relevance and foundational grounds, but the trial court (Judge Pat Wolke) overruled the objection, and defendant was convicted. On appeal, defendant argued the detective's grooming testimony was not relevant under OEC 401, did not assist the trier of fact under OEC 702, and should be excluded under OEC 403. He also argued that "grooming" testimony is scientific evidence, and that the detective's testimony did not satisfy the "*Brown/O'Key*" standard. *Held*: Affirmed (Ortega, P.J.). The trial court did not err in allowing the detective to testify. [1] The grooming evidence was relevant because it helped the jury understand the victim's testimony about the slow, progression of abuse "in the context of how familial sex abuse typically presents[,]" and that the acts were the "very kind of acts that formed the basis for the charges against

defendant[.]" Moreover, evidence about how offenders choose vulnerable children was relevant to understanding defendant's "plan" to abuse the victim. In so holding, the court distinguished this case from *State v. Hansen*, 304 Or 169 (1987), because the evidence was offered for a logically relevant purpose. [3] Defendant did not challenge the detective's general qualifications to testify about grooming, and to the extent that defendant argued that his testimony was "scientific," that argument was not preserved. [4] The detective's testimony was helpful to the jury under OEC 702 because it assisted the jury in understanding the evidence. To the extent that defendant argues that the detective's testimony was not helpful because it constituted evidence that the defendant acted in a particular way, he was incorrect. The detective testified only that "the events described by the victim constituted grooming, not that defendant groomed the victim." [5] The detective's testimony did not amount to "vouching" evidence because it "did not rely on an assessment of the victim's credibility." The detective "objectively described characteristics typical of grooming in family sex abuse cases, and then applied his knowledge to the case at hand." Thus, he couched his conclusions in terms that the victim described, but he did not comment on her credibility in describing what defendant had done.
http://www.publications.ojd.state.or.us/docs/A150015.pdf

Notes: The court focused several times on the fact that the detective framed his testimony not in terms of whether the defendant had *actually* groomed the victim, but rather, in terms of whether the victim's reports—if true—were consistent with grooming. That is an important distinction because a witness's definitive testimony that a defendant actually engaged in grooming will run afoul of the vouching rule. *State v. McCarthy,* 251 Or App 231 (2012).

EXPERT TESTIMONY: Trial court did not err by allowing detective to testify as an expert about delayed reporting, based on the detective's training and experience. ***State v. Althof,*** 273 Or App 342, __ P3d __ (2015) (Curry) (AAG Doug Petrina). Defendant was convicted of five counts of first-degree sexual abuse and one count of second-degree unlawful penetration. On appeal, he challenged: (1) the trial court's admission of uncharged misconduct evidence without adhering to the procedures established by *State v. Leistiko*, 352 Or 172 (2012), and *State v. Pitt*, 352 Or 566 (2012); (2) the trial court's determination that the investigating detective was qualified under OEC 702 to provide expert testimony about delayed reporting; and (3) the trial court's refusal to instruct the jury that it was required to reach unanimous verdicts on the charges, and its subsequent acceptance of non-unanimous verdicts. *Held*: Affirmed (Lagesen, P.J.). [1] Defendant's arguments related to the admission of uncharged misconduct evidence were not preserved and do not qualify as plain error. [2] The detective was qualified to prove his testimony about delayed reporting by virtue of his training and experience. [3] Defendant's challenge to the non-unanimous verdicts is foreclosed by *Apodaca v. Oregon*, 406 US 404 (1972).
http://www.publications.ojd.state.or.us/docs/A153292.pdf

HEARSAY

1. CHILD ABUSE VICTIM EXCEPTION

CHILD-ABUSE VICTIM EXCEPTION. If a child sex-abuse victim testifies and is subject to cross-examination, OEC 803(18a)(b) does not require the trial court to find her available before admitting her out-of-court statements.
State v. Lobo, 261 Or App __, __ P3d __ (March 26, 2014) (Washington) (AAG Rolf Moan). A jury convicted defendant of unlawful first-degree sexual penetration and first-degree sexual abuse for sexually abusing his five-year-old stepdaughter. Five days before trial, the state—pursuant to a court order—gave defendant the victim's clothing and bedspreads, among other things, so that defense experts could test them. On the morning of trial, defendant moved to postpone the trial because his experts needed more time to complete the testing. The trial court (Judge Rick Knapp) denied the motion, but told defendant that if testing revealed exculpatory evidence, defendant could move for a continuance mid-trial. At no time during or after trial, however, did defense counsel indicate that testing had revealed anything significant or request a continuance. Before trial, the state filed a notice of intent to offer the victim's out-of-court statements about defendant's abuse. Defendant argued that the out-of-court statements were admissible under OEC 803(18a)(b) only if the victim was found "available" to testify at trial; he requested a pretrial hearing—and an opportunity to cross-examine the victim at that hearing—to determine whether she qualified as available. The trial court declined to hold an availability hearing. At trial, the victim testified for the state and defendant cross-examined her. Defendant moved for a mistrial, arguing that the victim's testimony revealed that her memory of the abuse was suspect, that she thus was "unavailable" as a matter of law, and that admission of her out-of-court statements thus violated OEC 803(18a)(b). The trial court denied the motion. Held: Affirmed (Egan, J.). [1] The court did not address whether the trial court erred in denying the continuance, because any error was harmless given that defendant never identified any useful or exculpatory evidence that was eventually revealed by the testing conducted by his experts. Defendant's mere assertion that the ruling forced defense counsel to proceed to trial "without knowing what their independent investigation of the physical evidence might disclose" failed to identify prejudice that can require reversal. [2] Because the victim testified at trial and was subject to cross-examination, the trial court correctly denied defendant's request for an availability hearing. "OEC 803(18a)(b) does not require the trial court to hold an availability hearing where the hearsay declarant testifies and is subject to cross-examination." Nor does Art. I, § 11's confrontation clause entitle a defendant to cross-examine a victim at a pretrial availability hearing. [4] The trial court correctly denied defendant's mistrial motion. Because the victim testified at trial and was subject to cross-examination, a finding that she was "available" was not a prerequisite to admitting her out-of-court statements.
http://www.publications.ojd.state.or.us/docs/A146586.pdf

Child Abuse Victim Exception: In prosecution for sexual abuse of a child, when the victim testifies at trial subject to cross-examination, trial court need not determine under OEC 803(18a)(b) whether she is "unavailable."
State v. Bailey, 270 Or App 14, __ P3d __ (2015) (Lincoln) (AAG Jeff Payne). Defendant repeatedly sexually abused a five-year-old girl, and he was charged with numerous sex crimes. At trial, the state presented evidence of interviews of the victim

recounting that defendant subjected her to a series of digital penetrations and genital contacts. She testified and was cross-examined, but she could remember only one of those incidents. Defendant was found guilty. On appeal, he argued that trial court (Judge Thomas Branford) erred because, when the victim was unable to remember some incidents, the was required by OEC 803(18a)(b) to determine whether she was "available" as a witness, and it failed to do so.
Held: Affirmed (Ortega, P.J.). [1] OEC 803(18a)(b) permits admission of hearsay evidence if the declarant *either* (1) "testifies at the proceeding and is subject to cross-examination"
or (2) "is unavailable as a witness but was chronologically or mentally under 12 years of age when the statement was made." Under that exception, a hearsay declarant is "unavailable" if he or she "has a substantial lack of memory of the subject matter of the statement." [2] Under *State v. Lobo*, 261 Or App 741 (2014), if the declarant testifies at the proceeding and is subject to cross-examination, the question of unavailability becomes irrelevant. [3] Here, because the victim satisfied the first condition of OEC 803(18a)(b), she did not have to satisfy the second condition and court did not err by not determining her unavailability.
http://www.publications.ojd.state.or.us/docs/A153909.pdf

Note: The Court of Appeals summarily rejected defendant's argument that the victim's lack of memory prevented effective cross-examination and thus violated his constitutional right to confront the witnesses against him.

2. **EXCITED UTTERANCE**

EXCITED UTTERANCE:
State v. Underwood. For hearsay to qualify as an excited utterance, three requirements must be satisfied: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement must relate to the startling event or condition.

Defendant appealed his conviction for fourth-degree felony assault constituting domestic violence, coercion, strangulation, and menacing constituting domestic violence. Defendant and the victim, who was pregnant at the time, were in an intimate relationship and living together. The Defendant was extremely controlling over the victim. After an ultrasound appointment, the Defendant became angry, pushed the victim against a wall and squeezed her head. Defendant then threatened to kill the victim and also covered her mouth and nose so that she couldn't breathe. Victim was able to escape with her aunt. At trial, the State sought to admit, under the excited utterance hearsay exception, testimony from the victim's aunt recounting statements made by the victim 5 days after the incident about the domestic violence and threats to her life. The trial court allowed the testimony. Defendant appealed. The Court only considered the Defendants argument that the trial court erred in allowing the aunt's testimony. The Court held that the evidence presented was sufficient to meet all the requirements of the excited utterance exception and legally supported the trial court decision. The trial court did not err in admitting the victims statements under the excited utterance exception. Affirmed.
http://www.publications.ojd.state.or.us/docs/A152163.pdf

EXCITED UTTERANCE AND STATE OF MIND: Various statements by murder victim before her death were admissible statements of state of mind and excited utterances SENTENCING: Trial court lacked authority to impose "no contact" order as condition of incarceration.

State v. Blaylock, 267 Or App __, __ P3d __ (December 10, 2014) (Deschutes) (AIC Jennifer Lloyd). Defendant was charged with murdering his wife by strangulation; at trial, he claimed that he had accidentally caused her death while defending himself from an attack by her. To show that the victim was fearful of defendant during a period of time before her death, the state offered testimony from some of the victim's friends about statements she made during that time period. The statements reflected the victim's fear of defendant because of a strangulation incident, referred to the fact that defendant had guns, and stated her fear that her family would suffer if she reported the offense. Defendant objected to certain portions of those statements on relevance, hearsay, and "propensity" grounds, as described below. The trial court (Judge A. Michael Adler) admitted the proffered statements on various bases, and the jury found him guilty. At sentencing, the court ordered that defendant have no contact with two specific individuals and members of their families, apparently during the period of his incarceration.

Held: Remanded for entry of a corrected judgment omitting the challenged "no contact" provision; otherwise affirmed (Hadlock, J.). [1] Defendant's hearsay challenge to the victim's statement to a colleague, days before her death, that she "hope[d] he is not drunk when I get home" fails; the statement was admissible under OEC 803(3) to prove her then existing state of mind. The mere fact that the inference about her state of mind arose only if the jury believed the truth of her statement did not preclude admission under OEC 803(3). [2] Defendant's objections based on hearsay, relevance, and propensity to portions of the victim's statements to a friend, on two occasions months before her death, about her fear of defendant, fail. [a] The statements reflecting her fear were admissible under OEC 803(3), except to the extent that one of the statements consisted of a description of a past event of strangulation, which falls outside the scope of the rule. [b] Nevertheless, the trial court found that the statement about the prior act of strangulation was an excited utterance under OEC 803(2), and the evidence supports the findings underlying that conclusion. [c] And because the prior act of strangulation was relevant to defendant's hostile motive toward the victim, it was properly admitted under OEC 401.[3] Finally, even if some of the victim's statements to another colleague in the month before her death referring to an act of strangulation, making reference to defendant's possession of guns, and expressing fear, fell outside the scope of the state-of-mind exception—which was the sole basis for the trial court's ruling admitting the evidence—any error admitting the statements was harmless because the statements were cumulative to other, properly admitted evidence. [4] The trial court lacked authority to order defendant to have "no contact" with third parties during period of DOC custody. *See State v. Langmayer*, 239 Or App 500 (2010) (a court does not have authority to impose a condition of incarceration).

http://www.publications.ojd.state.or.us/docs/A150228.pdf

3. PRIOR CONSISTENT STATEMENT

PRIOR CONSISTENT STATEMENT: Trial court erred in admitting victim's out-of-court statements under the hearsay exception for prior consistent statements made to rebut a charge of recent fabrication, OEC 801(4)(a)(B).

State v. Villanueva-Villanueva, 262 Or App __, __ P3d __ (April 30, 2014) (Washington) (AAIC Jamie Contreras). Defendant was charged with committing sexual and assault offenses against his wife, among other things. At trial, he argued that he had not committed the crimes, and presented evidence that the victim had fabricated her story to get legal

immigration status (a U-Visa). To rehabilitate the victim, the state sought to introduce the victim's out-of-court statements under OEC 801(4)(a)(B), the exception for prior consistent statements made before an alleged motive to fabricate arises. Defendant objected that the victim's out-of-court statements were not made before the motive to fabricate arose, because the victim had talked about getting immigration papers before she made the statements in question. The trial court (Judge Steven Price) admitted the evidence under OEC 801(4)(a)(B) and, alternatively, because the statements were excited utterances admissible under OEC 803(2). The jury found defendant guilty, and defendant appealed. On appeal, the state conceded that the victim's statements were inadmissible hearsay, but argued that the error was harmless because the statements were consistent with the defense theory that the victim had fabricated the charges to obtain legal immigration status.
Held: Reversed and remanded in part (Nakamoto, J.). The trial court erred in admitting the victim's hearsay statements; the error was harmful as to all but one of the counts, felony fourth-degree assault. [1] Because the victim made the out-of-court statements after the alleged motive to fabricate arose, the statements did not fall within the hearsay exception for prior consistent statements. [2] The facts did not support the trial court's conclusion that the victim's statements were excited utterances. [3] The error was not harmless as to three of the four counts charged, because the state did not present overwhelming evidence of defendant's guilt, and the case turned largely on the victim's credibility. [4] But the error was harmless as to defendant's conviction for felony assault, given defense counsel's acknowledgment in opening and closing argument that he had hit the victim in the face, and had previously been convicted of assault.
http://www.publications.ojd.state.or.us/docs/A147918.pdf

Note: Given its disposition of the case on hearsay grounds, the court did not address defendant's other argument on appeal, that the trial court erred in allowing the prosecutor to comment during closing argument on defendant's in-court behavior—an issue of first impression in Oregon.

4. RIGHT TO CONFRONTATION

RIGHT TO CONFRONTATION: Admission of victim's out-of-court statements did not violate defendant's state or federal confrontation rights.
State v. Starr, 269 Or App 97, __ P3d __ (2015) (Lane) (AAG Jeff Payne). Defendant assaulted his wife at a motel. The victim called 911, giving the operator her location, then stating, "my husband pushed me down. I've been assaulted." An officer responded within minutes and found the victim sitting on a bench, sobbing and holding a rag to her bloodied face. When the officer asked the victim "what happened?," the victim said that "her boyfriend had beat her up." A second officer arrived five minutes later and spoke to the victim, who was still upset and "seemed frightened." When the second officer asked the victim to describe what had happened, the victim said that she and her husband had been arguing, then "he pushed her and she fell" against a cement curb. A witness told police that he did not see the assault, but saw the victim "slumped on the ground" with defendant standing over her; the witness asked defendant if he had hit the victim, and defendant admitted that he had. Defendant was charged with, among other things, fourth-degree assault. The victim did not appear for trial, despite the prosecutor's arrangements for her to do so and attempt to serve the victim with an out-of-state subpoena. Defendant moved to exclude the victim's statements during the 911 call and to police. The state argued that the statements were admissible under OEC 804(1)(e), an exception to the hearsay rule for statements of an unavailable declarant. Defendant argued that the state failed to establish

that the victim was unavailable, and argued that her statements to the police were testimonial, and their admission would violate her constitutional confrontation rights. The trial court (Judge Josephine Mooney) concluded that the victim was unavailable, and that the victim's statements were nontestimonial "excited utterances." Defendant was convicted. H
Held: Affirmed (DeVore, P.J). The trial court did not commit reversible error in admitting the victim's statements. [1] Under the confrontation clause in Art. I, § 11, out-of-court statements are admissible only if the state establishes that the declarant is unavailable and the statements bear sufficient indicia of reliability. State v. Stevens, 311 Or 119, 140-41 (1991).
The state met its burden to demonstrate that the victim was "unavailable," because the record reflected that the state made good-faith efforts to procure the victim's testimony for trial; "the facts of this case, when viewed in their entirety, do not suggest that the state 'acted with casual indifference, waited until the last minute to begin the search, or made a half-hearted perfunctory attempt' at procuring the witness." The statements were sufficiently reliable because they were "excited utterances," which fall within a firmly rooted exception to the hearsay rule.
Accordingly, the trial court's admission of the victim's hearsay statements under OEC 804(1)(e) did not violate the victim's right to confrontation under Art. I, § 11. [2] The Sixth Amendment bars admission of "testimonial" statements of an absent witness, unless the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 US 36 (2004). The victim's statements to the 911 operator were not "testimonial" because they were made to enable police to respond to an ongoing emergency. The court declined to consider whether the victim's subsequent statements to police were testimonial, because their admission was harmless beyond a reasonable doubt in light of the other evidence presented at trial: the victim's 911 call, the officers' testimony about the victim's injuries, and the witness's testimony that he saw the victim "slumped on the ground" with defendant standing over her and that defendant admitted to assaulting the victim."
http://www.publications.ojd.state.or.us/docs/A152960.pdf

RIGHT TO CONFRONTATION:
Ohio v. Clark *(2015)* Darius Clark sent his GF away to engage in 'prostitution' while he agreed to care for her 3-year old son, L.P., and 18-month old daughter, A.T. A day after the GF left, teachers at L.P.'s daycare discovered injuries on L.P. When questioned, the boy indicated that the Respondent/Defendant (Clark) had caused them. Clark was subsequently charged and tried on multiple counts related to the abuse of both children. At trial, the State introduced evidence of L.P.'s statements to his teachers. L.P., under Ohio rules of evidence, was deemed an "incompetent" witness and did not testify. At trial, Clark objected to the introduction of L.P.'s statements to his teachers. The trial court denied the objection and allowed in the evidence. Clark was convicted and sentenced to 28 years. Ohio State's Appellate Court reversed his conviction. Ohio's Supreme Court, on a 4-3 vote, affirmed the Appellate Court's ruling and held that under the 6th Amendment's Confrontation Clause, L.P.'s statements should not have been admitted. The US Supreme Court accepted the case and in this (unanimous) decision REVERSES the decision of the Ohio Supreme Court, reinstating the convictions.
The question in the case is whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing L.P's statements to his teachers when the child was not available to be cross-examined. Because neither the child nor his teachers had the "primary purpose" of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial.

For non-testifying witnesses, IF their statements are "testimonial": 1) the witness must be unavailable; and 2) the Defendant must have had a previous opportunity to cross-examine the witness.
To determine if statements are "testimonial," you must look at the "primary purpose" for the statement. A statement qualifies as "testimonial" if the "primary purpose" of the conversation was to "create an out-of-court substitute for trial testimony."
If the statement is NOT testimonial, state and federal rules of evidence (not the 6th Amendment) apply.
The Confrontation Clause does not bar every statement that satisfies the "primary purpose" test; it does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of founding.

http://www.supremecourt.gov/opinions/14pdf/13-1352_ed9l.pdf

HOMICIDE

HOMICIDE—MURDER BY ABUSE: In a prosecution for murder by abuse under ORS 163.115(1)(c), the term "physical disability," for purposes of the definition of "dependent person" in ORS 163.205(2)(b), need not be a permanent disability; the only requirement is that the disability rendered the person "dependent on another" for some period of time.
State v. Fitzhugh, 260 Or App __, __ P3d __ (December 26, 2013) (Clatsop) (AAIC Jamie Contreras). Defendant was charged with murder by abuse of a "dependent person," ORS 163.115(1)(c), and the case was tried on stipulated facts. The facts showed that he brutally assaulted the victim, ,his girlfriend with whom he lived, causing her severe injuries that left her entirely dependent on him for her basic needs for at least two days; his neglect of her ultimately resulted in her death. He argued that those facts did not prove, as a matter of law, that the victim had a "physical disability," within the meaning of the definition of "dependent person" in ORS 163.205(2)(b), at the time of her death. He argued that the victim was not a dependent person within the meaning of the law, based on his claim that the legislature contemplated that "physical disability" refer only to disabilities that are *permanent*. The trial court (Judge Philip Nelson) denied defendant's motion for judgment of acquittal, and found him guilty.
Held: Affirmed (Hadlock, J.). The trial court correctly denied the motion for judgment of acquittal. [1] "The term 'physical disability is not limited to disabilities that are permanent or enduring. Rather, the only temporal constraint in the definition of 'dependent person' is in the requirement that the person's mental or physical disability have rendered the person 'dependent upon another' for some period of time." [2] "In this case, a factfinder could infer from the stipulated facts that the victim had a physical disability that left her completely reliant on defendant for a period of at least two days before she died. Such a finding would establish that the victim was a 'dependent person' during that period of time."
http://www.publications.ojd.state.or.us/docs/A149719.pdf

KIDNAPPING

KIDNAPPING: In prosecution for armed, home-invasion robbery, the trial court should have acquitted defendant on the kidnapping charges, because the evidence was legally insufficient to show that he had moved the victims to a qualitatively different location. ***State v. Lunetta,*** 269 Or App 512, __ P3d __ (2015) (Multnomah) (AAG Becca Auten). Defendant and three accomplices broke in to the victims' home and robbed them at gunpoint, taking a gun safe, among other property. Within hours of the robbery, the girlfriend of one of the men saw them arrive at her residence with the gun safe and stolen property, which they then divided up. Defendant stayed at that residence occasionally. Months later, the police searched the residence and found the gun safe. Two of the accomplices cooperated with police, and defendant was charged with five counts of first-degree robbery and four counts of first-degree kidnapping. At trial, one of the accomplices testified that defendant participated in the robbery.
In addition, the state offered letters that defendant had written from jail encouraging witnesses to lie in court. The state also offered the testimony of the girlfriend. One of the victims also testified that defendant's build was consistent with the build of one of the robbers. Defendant moved for a judgment of acquittal, arguing that the state had failed to corroborate the testimony of the accomplice that he had participated in the robbery. He also argued that the state failed to prove that he had moved the victims from "one place to another," as is required by ORS 163.235.
The trial court (Judge John A. Wittmayer) denied the motion, and a jury found defendant guilty on all charges. *Held*: Kidnapping convictions reversed; remanded for resentencing. (Egan, J.).
[1] Evidence that corroborates accomplice testimony, for purposes of ORS 136.440(1), "must fairly and legitimately tend to connect the defendant with the crime, so that it can in truth be said that his conviction is not based entirely upon evidence of the accomplices." Here, "the totality the evidence readily corroborates the accomplice testimony." [2] The trial court should have acquitted defendant on the kidnapping charges, "because the evidence was legally insufficient to show that he had moved the victims to a qualitatively different location."
http://www.publications.ojd.state.or.us/docs/A155286.pdf

KIDNAPPING

State v. Kinslow, 257 Or App 295, __ P3d __ (2013). The victim was at defendant's house using methamphetamine with her when she called Warren to come over and assault the victim. When Warren arrived and directed him to empty his pockets, the victim placed his cell phone and some cash on the bed. Warren then assaulted the victim over the course of a day and a half, refusing to let him leave. During the assault, Warren moved the victim from room to room, including from the living room into the bathroom. Eventually, the victim awoke to find Warren gone and defendant asleep, and so he finally escaped. The following week, the police executed a search warrant at defendant's home and found drugs, packaging materials, drug paraphernalia, and drug records; they also found the victim's cell phone in her car. She was charged with numerous offenses, including first-degree kidnapping (as an accomplice) under ORS 163.225(1)(a) ("one place to another"). Defendant moved for judgment of acquittal on the kidnapping charge, arguing that the evidence was insufficient to show that Warren moved the victim from "one place to another," but the trial court denied the motion. The jury found defendant guilty. ***HELD:*** Conviction for first-degree kidnapping reversed. In light of *State v. Sierra*, 349 Or 506 (2010), and *State v. Opitz* , 256 Or App 521 (2013), the evidence "failed to prove that the victim was taken 'from one place another' for purposes of" ORS 137.225(1)(a). **The question is "whether, viewing the evidence in the light most favorable**

to the state, as a matter of situation and context, the victim's ending place [was] qualitatively different from the victim's starting place. … Given the situation and context—that is, a day-and-a-half-long assault in defendant's home—there were no qualitative differences between the various rooms of the small house. Whatever functional differences between the living room, kitchen, and bathroom, there was nothing about any one of those rooms that, on these particular facts, increased Warren's or defendant's control over the victim or further isolated the victim."
Note: Defendant was not charged with kidnapping under the "secretly confines" alternative in ORS 163.225(1)(b).
State v. Opitz, 256 Or App 521, 301 P3d 946 (2013). Defendant assaulted his girlfriend repeatedly over several hours inside her one-bedroom apartment, leaving her seriously injured. During the course of the extended assault, he moved her around between different rooms. For example, after beating the victim in the living room, he "pulled her by her hair into the bathroom and threw her headfirst into the shower." There, the victim's "face smashed into a metal bar in the shower, fracturing the orbital bone around her left eye." He then "turned cold water onto the victim to rinse off the blood." Even though she wanted to obtain medical treatment for her "substantial injuries," he forced her to remain in the apartment with him for the next three days. Eventually, her daughter called the police for a "welfare check," and the victim was rescued. Defendant was charged with numerous offenses, including a count of first-degree kidnapping based on an allegation that he took the victim "from one place to another." ORS 163.225(1)(a). The case was tried to the court, and defendant moved for a judgment of acquittal on that kidnapping charge, arguing that the evidence was insufficient to establish that he moved the victim "from one place to another." The trial court denied the motion, and found defendant guilty. ***HELD*:** Conviction for first-degree kidnapping reversed, otherwise affirmed; remanded for resentencing. The trial court should have granted defendant's motion for judgment of acquittal. [1] Defendant sufficiently preserved his argument concerning the asportation element of the kidnapping charge. Although his argument before the trial court "pertained primarily to the intent element of kidnapping," the state's response and the trial court's reasoning rejecting his argument "demonstrate that the parties and the court both understood that defendant's motion challenged the sufficiency of the evidence as to both the act and intent elements." [2] With respect to different room in the same residence, "generic functional distinctions do not establish the requisite 'qualitative difference' vis-à-vis the commission of the crime of kidnapping. **The hallmark of 'qualitative difference' is whether the difference between the starting and ending places promotes or effectuates a substantial interference 'with another's personal liberty.'** ORS 163.225(1). In the situation and context of this case, the functional differences among the rooms in the victim's apartment had no effect on the extent to which defendant interfered with the victim's personal liberty. In that respect, we also note that the state adduced no evidence that, in moving the victim between rooms of her apartment, defendant intended or accomplished transporting the victim to a place where he could exert greater control over the victim or increase her isolation." [3] The evidence was insufficient to prove asportation. To establish that element of a kidnapping offense, the state must prove that defendant "qualitatively changed the victim's location," and that any movement was not "incidental to the assaults." Under *State v. Sierra*, 349 Or 506, 518 n 9 (2010), defendant's movement of the victim from room to room around her apartment was incidental to the assault and no individual movement—including the movement from the living room to the bathroom where he cleaned her blood—constituted a "qualitative" change in her location.
State v. Gerlach, 255 Or App 614, 300 P3d 193, *rev den*, 353 Or 787 (2013). Defendant drove into and knocked a 10-year-old girl off her bicycle and he then forced her into his car, drove her to a remote area, parked, and sexually assaulted her. He then got back into the driver's seat and drove off, with the victim still in the car, heading toward a forested, mountainous area, possibly with an intent to murder her and dump her body. Fortunately, the police caught up with him and forced his car off

the road, and the victim was rescued. Defendant was charged with two counts of first-degree kidnapping, among other crimes. The state's theory was that his act of forcing the victim into his car and driving to the location of the sexual assault constituted one kidnapping, and his act of driving the victim from that location toward the mountainous area constituted the second kidnapping. Defendant stipulated that he committed all of the acts alleged in the indictment. At sentencing, he argued that the two kidnapping counts should merge. The sentencing court rejected that argument holding that, under ORS 161.067(3), the two counts did not merge because they constituted "repeated violations" of the kidnapping statute and were separated by a "sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent." ***HELD*:** Reversed and remanded. [1] Defendant's stipulation to the facts alleged in the indictment does not preclude review of his claim: "the scope and application of ORS 161.067 is a question of law that we review for errors of law." [2] **"Because kidnapping is the seizure of a person for the purpose of substantially interfering with the person's liberty, it is a continuing crime. It continues for as long as the seizure continues. Therefore, if defendant commits the crime of kidnapping by taking a person from one place to a second place, the defendant does not commit an additional kidnapping by moving the person from a second place to a third place."** [3] Because a single deprivation of the victim's personal liberty is a single violation of ORS 163.225, and, consequently, a single violation of ORS 163.235, merger of defendant's kidnapping counts is not prevented by ORS 161.067(3)."

KIDNAPPING: Moving victims from room to room during home-invasion robbery did not constitute kidnapping.

State v. Ibaboa, 270 Or App 508, __ P3d __ (2015) (Multnomah) (AAG Becca Auten). Defendant and three accomplices committed a home-invasion robbery. They broke into the home through an attached converted garage, where they encountered three of the victims. The robbers forced those victims at gunpoint into a bedroom in the house, where the fourth victim was sleeping. Later, they found the fifth victim in another bedroom and forced him at gunpoint into the bedroom where the others were. Defendant was charged with several counts of robbery, burglary, and first-degree kidnapping, ORS 163.225. At trial, he moved for a judgment of acquittal on the kidnapping charge, arguing that the state failed to prove that the allegation that he had moved the victims from "one place to another." The trial court (Judge John Wittmayer) denied the motion, and a jury found defendant guilty on all charges.

Held: Kidnapping convictions reversed; remanded for resentencing; otherwise affirmed (Egan, J.). The trial court erred by denying defendant's motion for judgment of acquittal on the kidnapping charges. In light of *State v. Opitz*, 256 Or App 521 (2013), and *State v. Kinslow*, 257 Or App 295 (2013), defendant's act of "moving the victims between the rooms does not constitute asportation, both because the victims' starting and ending places were not qualitatively different and because the movements were incidental to the robbery."

http://www.publications.ojd.state.or.us/docs/A155420.pdf

KIDNAPPING: Defendant confined victim in a place where she was "not likely to be found," despite the presences of others, because he took steps to ensure that she was unlikely to be found by anyone who could reasonably be expected to help her.

***State v. Kawamoto*, 273 Or App 241, __ P3d __ (2015) (Multnomah)**

Defendant held the victim in a bedroom at his home for approximately two days, during which time he severely beat her and committed a series of violent sex acts against her, including penetrating her anus with a baseball bat. Defendant was charged with first-degree kidnapping, ORS 163.235(1), and unlawful sexual penetration, ORS 163.411(1)(a), among other offenses. At trial, he moved for judgment of acquittal of both charges. As to kidnapping, defendant argued that he had not confined the victim in a place where she was "not likely to be found," because two of his friends knew where she was. As to unlawful sexual penetration, he argued that the state had failed to prove a sufficient causal connection between his physical violence and the act of penetration. The trial court (Judge Stephen K. Bushong) denied the motion, and a jury found defendant guilty.

Held: Affirmed (Garrett, J.). The trial court correctly denied defendant's motion for judgment of acquittal [1] "The text and context make it clear that the purpose of the [kidnapping] statute is to prohibit the confinement of a person in a place where she is not likely to be found by those who could reasonably be expected to assist her. ... Defendant's actions demonstrated a 'calculated effort' to ensure that the victim would not be found by any observer who would help her. Defendant had concealed the victim in a bedroom over the course of two days, covered her in bedding when police arrived, and drawn the curtains and locked the front door." [2] Despite "the victim's inability to reconstruct all that occurred in chronological detail, the record is sufficient to show that defendant committed the penetrative act in the course of an 'extended episode of violence,' in which the victim was threatened and severely beaten, and her freedom of movement was restrained. ... [A] rational factfinder could determine that the penetrative act was 'forcibly compelled' by either the physical violence that preceded it or the threat of more to come."

http://www.publications.ojd.state.or.us/docs/A151448.pdf

PROBATION VIOLATIONS

PROBATION VIOLATION: *State v. Bell*: The state can extend a defendant's probation sentence for failure to make payments conditional to the probation, regardless of the reason for the failure to pay.Defendant appealed his extended probation sentence arguing the state violated his rights under the Fourteenth Amendment to the United States Constitution by failing to demonstrate that his failure to pay fines and restitution resulted from circumstances beyond his control. Defendant was convicted of assault and sentenced to probation under the condition that he pays restitution, fines, and assessments. After failing to make these payments, a hearing was held for Defendant to show cause for his violation of the probation conditions. The state extended Defendant's probation as a result of the violation. Defendant appealed, arguing that the state failed to prove that his failure to make payments was willful and not a result of his poverty. Defendant relies on *Bearden v. Georgia*, 461 US 660 (1983), where the Supreme Court held that a state can not revoke probation and imprison a defendant for failure to make payments conditional to the probation unless the defendant had not made sufficient efforts to pay or alternative forms of punishment were not possible. The Court affirmed, holding that *Bearden*

does not apply where the violation of the probation results in a punishment less serious than imprisonment. Affirmed. http://www.publications.ojd.state.or.us/docs/A149112.pdf

RESTITUTION

RESTITUTION

State v. Pumphrey (11/5/14) Under ORS 137.106, a Defendant must pay restitution for economic damages incurred by violating a stalking protective order so long as there is a "but for" causal relationship between the criminal activity and the resulting the economic damages.

In 2010, the victim obtained the stalking protective order prohibiting Defendant from contacting, coming into visual presence of, or waiting outside work for the victim. In 2012, Defendant breached the SPO. Nearly a week later, the victim sought medical attention for "massive panic attacks" resulting in multiple physician visits and medicating treatment. The victim missed work for the doctor's appointments; attended group therapy and counseling; obtained police reports from other jurisdictions; rented a temporary residence; changed her phone number; and changed the locks on her front door. Defendant appealed a judgment requiring payment of $2,674.76 in restitution for victim's economic damages resulting from Defendant's two convicted counts of violation of a SPO. Defendant argued that there was insufficient evidence to show that the five items of restitution were "economic damages." The trial court held that all of these expenditures were incurred as a result of Defendant's violation of the SPO. Defendant argued on appeal that there was no direct connection between the expenditures and the harm. The Court found that all of the economic damages resulted from the Defendant's criminal activities, stemming from the victim's state of fear induced by Defendant's violation of the SPO. Affirmed. http://www.publications.ojd.state.or.us/docs/A153140.pdf

State v. Gerhardt (9/16/15): When determining whether restitution for a victim arising from criminal conduct of a defendant, the court should look to when the conduct causing restitution owed occurred and whether it is a direct result of the initial criminal conduct and not latter criminal conduct stemming from the initial criminal conduct.

Defendant appealed an amended judgment of conviction for domestic violence strangulation, wherein he was ordered to pay restitution of attorney's fees incurred by the victim. Defendant persistently violated a no-contact order entered by the court shortly after his arrest. Due to the continual violation of the no-contact order, the victim hired an attorney to assist her in obtaining a restraining order. The trial court awarded restitution, stating that the attorney's fees were incurred as a result of the underlying strangulation. Defendant argued that the trial court erred because the fees were incurred, instead, by his repetitive violation of the no-contact order. This Court agreed with Defendant, concluding that while the no-contact order stems from the strangulation crime, it is distinguished from the strangulation and therefore the attorney's fees are not from the defendant's initial criminal conduct but subsequent criminal conduct. The dissent contended that the established test for causation in restitution is a "but for" test and that "a defendant's criminal activities need not directly cause a victim's cost," arguing that the need for the victim to retain counsel would not have been necessary but for the defendant's strangulation

and the court order that arose from said conduct. Award of restitution reversed; otherwise affirmed. http://www.publications.ojd.state.or.us/docs/A152760.pdf

SEXUAL OFFENSES

FORCIBLE COMPULSION: To prove forcible compulsion, state need not prove that the defendant applied force directly to the victim's body; evidence that defendant used force to keep the victim from opening the door, and that force compelled the victim to submit to sexual touching, was sufficient.
***State v. Digesti*,** 267 Or App __, __ P3d __ (December 10, 2014) (Deschutes) (AIC Jennifer Lloyd). Defendant forcibly touched the teenaged victim after cornering her in a bathroom at her mother's house and using his foot to prevent her from opening the door. He was charged with two counts of first-degree sexual abuse by means of forcible compulsion. At trial, he moved for a judgment of acquittal on the forcible-compulsion element, arguing that his act of forcefully keeping the door closed to prevent the victim from leaving the bathroom is not "physical force" within the definition of forcible compulsion. The trial court (Judge Roger DeHoog) denied the motion and the jury convicted defendant on both counts. On appeal, defendant reasserted that claim, along with an unpreserved claim that the trial court committed "plain error" by not giving a jury instruction that would have informed the jurors that they needed to find that defendant acted "intentionally" with respect to the element of forcible compulsion.
Held: Affirmed (Tookey, J.) [1] ORS 163.305(2)(a) contains no requirement that the physical force applied by a defendant must be applied directly to the victim's body to constitute forcible compulsion. Rather, the state must establish that the defendant "subjected" the victim to physical force in a way that caused or compelled the victim to submit to the sexual contact, and a jury reasonably could conclude that that occurred in this case. [2] Even if the trial court committed plain error under State v. Nelson, 241 Or App 681 (2011), rev dismissed (2012), by not instructing the jury that defendant had to act intentionally with respect to the forcible compulsion element, the Court of Appeals declined to exercise its discretion to review the claim because any error was harmless: there was little likelihood that the jury would have found that defendant had engaged in the act of using the door to prevent the victim from leaving without having the "conscious objective" to do so.
http://www.publications.ojd.state.or.us/docs/A152522.pdf

FORCIBLE COMPULSION: Extended physical and sexual assault of victim allowed jury to find causal connection between physical assault and sexual penetration.
***State v. Kawamoto*, 273 Or App 241, __ P3d __ (2015) (Multnomah)**
Defendant held the victim in a bedroom at his home for approximately two days, during which time he severely beat her and committed a series of violent sex acts against her, including penetrating her anus with a baseball bat. Defendant was charged with first-degree kidnapping, ORS 163.235(1), and unlawful sexual penetration, ORS 163.411(1)(a), among other offenses. At trial, he moved for judgment of acquittal of both charges. As to kidnapping, defendant argued that he had not confined the victim in a place where she was "not likely to be found," because two of his friends knew where she was. As to unlawful sexual penetration, he argued that the state had failed to prove a sufficient causal connection between his physical violence and

the act of penetration. The trial court (Judge Stephen K. Bushong) denied the motion, and a jury found defendant guilty.
Held: Affirmed (Garrett, J.). The trial court correctly denied defendant's motion for judgment of acquittal [1] "The text and context make it clear that the purpose of the [kidnapping] statute is to prohibit the confinement of a person in a place where she is not likely to be found by those who could reasonably be expected to assist her. ... Defendant's actions demonstrated a 'calculated effort' to ensure that the victim would not be found by any observer who would help her. Defendant had concealed the victim in a bedroom over the course of two days, covered her in bedding when police arrived, and drawn the curtains and locked the front door." [2] Despite "the victim's inability to reconstruct all that occurred in chronological detail, the record is sufficient to show that defendant committed the penetrative act in the course of an 'extended episode of violence,' in which the victim was threatened and severely beaten, and her freedom of movement was restrained. ... [A] rational factfinder could determine that the penetrative act was 'forcibly compelled' by either the physical violence that preceded it or the threat of more to come."
http://www.publications.ojd.state.or.us/docs/A151448.pdf

MENTAL STATE
In prosecution for third-degree sexual abuse, trial court correctly refused to give defendant's requested instruction that the state had to prove that he "knew" the victim did not consent to the sexual contact.
State v. Anderson, 264 Or App __, __ P3d __ (July 30, 2014) (Multnomah) (AAIC Jamie Contreras). Defendant groped a stranger on a MAX train and was charged with third-degree sexual abuse. At trial, he requested a special jury instruction that "a knowing mens rea ought to attach" to the "lack of consent" element of the crime. The trial court (Judge Kelly Skye) refused to give that instruction, and the jury found defendant guilty. Held: Affirmed (Garrett, J.). The trial court correctly refused to give the instruction.
Although the state must prove that defendant had a culpable mental state with respect to the victim's lack of consent, the state need not prove that defendant acted "knowingly"—only that he "acted, at a minimum, with criminal negligence with respect to lack of consent." State v. Wier, 206 Or App 341, 352-53 (2013). Defendant's requested instruction was "precisely the instruction that [the court] rejected in *Wier,"* so the trial court correctly refused to give it.
http://www.publications.ojd.state.or.us/docs/A152945.pdf

The *Anderson* case follows *State v. Wier* from last year. In *Wier*, the Defendant appealed his convictions for first and third degree sexual abuse. The first degree charge was reversed/remanded. The third degree charge was affirmed. The court's reasoning: The first degree sex abuse statute does not ''explicity prescribe a culpable mental state…but a culpable mental state is nevertheless required by ORS 161.115(2)." ORS 161.095 outlines which elements of each crime require proof a culpable mental state. "Under ORS 161.095(2), unless the legislature expressly provides otherwise, a culpable mental state is required for all facts that the state must prove beyond a reasonable doubt to convict a defendant except those that relate solely to the statute of limitations, jurisdiction, venue, or other procedural prerequisites to conviction." The court relied upon an earlier case, *State v. Nelson* wherein it held that subjection of the victim to forcible compulsion (for Sex Abuse I) is such an element and requires a culpable mental state. The Nelson court determined that 'knowingly' or 'with knowledge' was the correct mental state

for that particular element. Wier affirmed the Anderson reasoning by concluding that "forcible compulsion" is a 'conduct' element of the (Sex Abuse I) crime and only the culpable mental states of "intentionally" or "knowingly" can apply to a conduct element. On the other hand, the court reasoned, the "lack of consent" element for the Sex Abuse III crime is a "circumstantial element of the crime," and thus only requires, at a minimum, criminal negligence.

State v. Wier, 260 Or App __, __ P3d __ (December 26, 2013) (Lane) (AAG Karla Ferrall).
For the first-degree charge, defendant requested a special jury instruction that would have instructed the jury that it had to find that he knowingly subjected the victim to forcible compulsion. On the third-degree charge, defendant requested a special jury instruction that would have instructed the jury that it had to find that he knew that the victim did not consent. The trial court (Judge Jack Billings) declined to give the special instructions, and defendant was found guilty.
Held: Conviction for first-degree sexual abuse reversed and remanded; remanded for resentencing; otherwise affirmed (Duncan, J.). [1] The trial court erred when it refused to give defendant's proposed instruction on first-degree sexual abuse, because the instruction would have correctly informed the jury that the state had to prove that he knowingly subjected the first victim to forcible compulsion. [2] The trial court did not err in refusing to give defendant's proposed instruction on third-degree sexual abuse because the instruction incorrectly stated that the state had to prove that he acted knowingly with respect to the second victim's lack of consent. ORS 163.415 requires the state to prove that he acted knowingly, recklessly, or with criminal negligence with respect to a victim's lack of consent, and the allegations in the indictment did not compel the state to prove "knowingly."
http://www.publications.ojd.state.or.us/docs/A147209.pdf

RAPE-SHIELD RULE: Trial court correctly excluded evidence of the victim's past sexual behavior because its minimal relevance was outweighed by substantial prejudice.
State v. Davis, 269 Or App 532, __ P3d __ (2015) (Lane) (AAG Peenesh Shah).
Defendant was charged with first-degree rape of a person "incapacitated by reason of physical helplessness," ORS 163.375. On the evening that the rape occurred, the victim and a friend, Shannon, had been celebrating the victim's birthday by drinking until the early hours of the morning. The two ended the evening by falling asleep on a mattress in the living room of an apartment belonging to another friend, Spriggs. At some point in the evening, Shannon woke up to use the bathroom and returned to observe defendant on top of the victim, penetrating her. Although the victim's eyes were "a little bit open," Shannon testified that she "couldn't honestly say [whether the victim] was sleeping or not" because she had seen the victim look like that before when the victim was awake but drunk. Shannon heard the victim moaning and initially thought that the victim was consenting to defendant's actions but, believing that the victim would not have had sex with defendant sober, Shannon pulled on the victim's arm to see if she was indeed aware of what was happening to her. The victim was unresponsive. Shannon testified that she did not believe that the victim was asleep or passed out but that the victim was "very, very out of it." When Shannon returned a short while later with another friend, defendant had fled, and the victim did not respond when Shannon slapped or lightly tapped her face. The victim testified that she could not recall the events of that night, but also testified that she had turned down defendant's advances before and never told him that he could have sex with her.

Defendant moved before trial to offer evidence of the victim's past sexual behavior, specifically that the victim had "engaged in sexual behavior with other men after drinking, and later claimed not to recall that sexual behavior." Defendant argued that the evidence was not "sexual behavior" under OEC 412 because it concerned the victim's inability to remember her sexual behavior, rather than the sexual behavior itself. Alternatively, defendant argued that the evidence was admissible under OEC 412 because it was necessary to rebut evidence offered by the state and because it was constitutionally required to be admitted. In an offer of proof, defendant presented evidence of a series of incidents that the victim could not remember the day after they happened: (1) an incident where the victim was drunk and "all over guys," went into a back room with a man, and swatted Shannon away when Shannon tried to intervene; (2) an incident where the victim went to a house with three men, awoke the next morning in some bushes in Washington Park, and could not remember how she got there; (3) an incident where the victim was visibly intoxicated, engaged in sexualized behavior with a man, and ultimately went to the bathroom for a period of time with him. Defendant also presented general evidence that the victim would sometimes fail to remember having sexual intercourse with men that she went home with, although no witnesses could testify whether the victim actually engaged in sexual intercourse on those occasions. Finally, defendant presented evidence of an incident of non-sexual behavior that the victim later could not remember, when she "flipped out" and kicked a police officer in the face. The trial court (Judge Debra Vogt) denied defendant's motion to allow evidence under OEC 412 and further ruled that evidence that the victim could not recall nonsexual behavior was inadmissible, as argued by the state, under OEC 403. Held: Affirmed (Ortega, P.J.). The trial court correctly excluded the evidence. [1] The trial court did not abuse its discretion in excluding, under OEC 403, the evidence of the victim's nonsexual behavior of "flipping out" and kicking a police officer in the face while intoxicated; that conduct occurred while she was clearly conscious, and was too dissimilar to the state of consciousness she was observed to be in during the charged conduct (moaning with half-opened eyes). [2] The remainder of the evidence was "past sexual behavior" for purposes of OEC 412.

The "gravamen of the proffered evidence was to demonstrate that the victim engaged in consensual sex while drunk and later did not remember," which defendant contended made it "less likely that she did not consent to the sexual conduct at issue." [3] The "past sexual behavior" evidence was relevant, if only marginally so, with the exception of evidence concerning the incident in Washington Park, which was not relevant because defendant offered no evidence that the victim was either conscious or consented to whatever had occurred before she woke up in the park and was unable to recall what had happened. [4] Defendant was not constitutionally entitled to introduce evidence of the prior sexual behavior because it was substantially prejudicial and that prejudice outweighed any marginal relevance. The probative value of the evidence was minimal "because the victim's conduct preceding the assault in this case has scant similarity to the proffered conduct described" in defendant's offer of proof. And the evidence was likely to have the prejudicial effect that OEC 412 is intended to avoid: "degrading or embarrassing disclosure of intimate details" about the victim's private life.
http://www.publications.ojd.state.or.us/docs/A150000.pdf

STALKING

CIVIL STALKING PROTECTIVE ORDER:
C.J.L. v. Langford (04-23-2014)
In order for an Stalking Protective Order to be issued, under ORS 30.866, a petitioner must show that speech-based contacts instill a fear of imminent and serious personal violence from the speaker, are unequivocal, and are objectively likely to be followed by unlawful acts, such that the addressee believes the actor intends and is able to carry them out. Threats that are hyperbole, rhetorical excesses, and impotent expressions of anger or frustration are insufficient, even if they alarm the addressee.

C.J.L. and Langford were in a relationship which produced a child. C.J.L. sought a Stalking Protective Order (SPO), under ORS 30.866, after Langford allegedly, on three occasions, yelled at C.J.L. and threatened to use the judicial process, contact police, and contact DHS regarding their child's welfare. Langford claimed that the contacts were not unwanted, but if unwanted, did not constitute the type of threat required to satisfy the statutory requirements for an SPO. The SPO was granted and Langford appealed. To obtain an SPO, C.J.L. had to show: (1) intentional, knowing, or reckless conduct by Langford against C.J.L. that constitutes repeated and unwanted contact; (2) the C.J.L. was subjectively alarmed or coerced and that the alarm or coercion was objectively reasonable for a person in C.J.L.'s situation; and (3) that the contact reasonably caused C.J.L. to fear for her personal safety. **For speech-based contact, the communication must instill fear in C.J.L. of imminent and personal violence from Langford which is unequivocal and objectively likely to be followed by unlawful acts.** The Court held that Langford's speech-based contacts with C.J.L. did not violate ORS 30.866 because Respondent did not threaten violence; the contacts were impotent expressions of anger or frustration or threats of lawful means of dispute resolution. Reversed.
http://www.publications.ojd.state.or.us/docs/A149753.pdf

VIOLATION OF A STALKING PROTECTIVE ORDER/CONTEMPT: Letter did not qualify as an "object" sent to complainant because it was a "written communication."
State v. Meek, 266 Or App __, __ P3d __ (October 29, 2014) (Lane) (AAG Becca Auten). The trial court issued a stalking protective order (SPO) against defendant, barring him from "any contacts" with his ex-girlfriend, M. Defendant then sent a letter to M, apologizing for any harm he had caused her. As a result, the state charged defendant with violating the SPO and contempt of court. The original charging instrument alleged that defendant had violated the SPO by sending a "written communication" to M. The state subsequently filed an amended charging instrument, alleging instead that defendant had sent an "object" to M's home. When an individual is charged with violating an SPO by way of written communication, the state must prove that the individual's conduct "created reasonable apprehension regarding the personal safety" of the complainant. When an individual is instead charged with violating an SPO by way of sending an object, there is no "reasonable apprehension" requirement. Here, the state did not allege or prove that defendant's conduct caused reasonable apprehension. Defendant filed a motion for judgment of acquittal, arguing that the letter was a "written communication" and that the state was therefore required to show

reasonable apprehension. The trial court (Judge Josephine Mooney) denied the motion. A jury found defendant guilty of violating an SPO, and the court found defendant in contempt of court.
Held: Reversed (Haselton, C. J.). [1] Despite the statutory text, "the totality of the statutory design and the legislative history demonstrates that a 'written communication,' is not an 'object' for purposes of ORS 163.750(1)," the statute governing violation of an SPO. "Thus, defendant's . . . letter to M and her family was not an 'object' for purposes of the crime of violating a stalking protective order." Because the state alleged that defendant had delivered an "object" to M's home and the state did not prove that defendant delivered any item other than the letter to M's home, the trial court should have granted the motion for judgment of acquittal.
[2] "The same is true with respect to the contempt charge, which, similarly, was predicated solely on the delivery of an 'object.'"
http://www.publications.ojd.state.or.us/docs/A151149.pdf

Note: The Court of Appeals' reversal of the contempt charge is something of a mystery, because the definition of "object" that applies to the SPO violation statute does not apply to contempt—as the state argued in its brief on appeal.

CIVIL STALKING PROTECTIVE ORDER

A.M.M. v. Hoeffer (02-19-2015): A Petitioner to meet the burden of proof for a permanent stalking protective order (SPO), petitioner must tie their fear and alarm to an apprehension regarding personal safety.
Respondent appealed a judgement imposing a permanent stalking protective order (SPO) under ORS 30.866. Petitioner petitioned for the SPO against Hoeffer, the Respondent. After petitioner and Hoeffer stopped dating, Hoeffer confronted petitioner at a nightclub. Later that night, Hoeffer took items from petitioner's front porch, that he had returned earlier, then sent five e-mails to a friend of petitioner, calling her a "downtown tramp". Several days later, petitioner filed for an SPO, and the court granted her a temporary SPO. At the hearing for the permanent SPO Hoeffer argued that evidence is insufficient to support an SPO because his contacts did not contain a "threat" as defined in ORS 30.866. The trial court held that petitioner met the burden of proof that his unwanted contact represents a threat. Hoeffer appealed, and the Court of appeals held that because the petitioner did not tie her fear and alarm to apprehension regarding personal safety, the record has no basis for the court to assess whether apprehension was objectively reasonable. Reversed. http://www.publications.ojd.state.or.us/docs/A154043.pdf

U-VISA

IMPEACHMENT: In prosecution for sexual abuse of a child, trial court erred when it excluded defendant's proffered testimony that the victim and her mother were biased because the mother had applied for a U-Visa.
State v. Real-Galvez, 270 Or App 224, __ P3d __ (2015) (Washington) (AAG Matt Lysne).
Based on repeated sexual assaults on the victim, a 15-year-old girl, defendant was charged with first-degree sexual abuse and coercion. At trial, he proffered evidence that the victim had a motive to falsely accuse him of sexual abuse so that the victim's mother could gain an immigration benefit (a U-Visa). The trial court (Judge
Thomas Kohl) excluded: (1) cross-examination testimony of the victim that she knew her mother was "undocumented"; (2) testimony from a witness (a co-worker with the victim's mother), who said that after she and the victim and victim's mother had listened to a radio program about a woman who reported sexual abuse and obtained an immigration visa as a result, overheard the victim's mother tell the victim to accuse her father of sexual abuse so that the victim's mother could obtain a visa; and (3) evidence that the victim's mother had applied for a U-Visa based on the allegations that defendant had sexually abused the victim. The jury found defendant guilty.
Held: Reversed and remanded (Tookey, J.). The trial court erred when it excluded defendant's proffered impeachment evidence. [1] Defendant laid a sufficient foundation to show the victim's possible interest in testifying—specifically, that the victim knew about her mother's immigration status and that alleging sexual abuse could help her mother obtain a U-Visa (*i.e.* the co-worker's testimony). "Defendant was not required to show that [the victim] knew or believed that her mother would submit a U-Visa application if [she] accused defendant of sexual abuse." [2] The error was not harmless.
http://www.publications.ojd.state.or.us/docs/A153489.pdf

WEAPONS

WEAPONS OFFENSES: "Use" of a weapon includes both employing a weapon to inflict harm or injury, as well as threatening to inflict harm or injury.
State v. Ziska / Garza, 355 Or 799, __ P3d __ (August 7, 2014) (Washington) (AAG Matt Lysne).
Defendant Ziska threatened to hurt another person with a crowbar, and defendant Garza threatened to hurt another person with a knife. Defendants were separately tried and both were convicted of one count of menacing and one count of unlawful use of a weapon.
Defendants challenged their convictions for unlawful use of a weapon under ORS 166.220(1)(a), arguing that they did not "use" their respective weapons for purposes of ORS 166.220(1)(a).
Under ORS 166.220(1)(a), a person commits the crime of unlawful use of a weapon if he or she "[a]ttempts to use unlawfully against another, or carries or possesses with intent to use unlawfully against another, any dangerous or deadly weapon as defined in ORS 161.015."
Defendants argued that the term "use" (which is undefined in the statute) had a narrow and specific meaning, one which required that the state prove that they either attempted or intended to physically strike another person with that weapon—and that the text, context, and legislative history of ORS 166.220 supported their interpretation. *Held*: Affirmed (Landau, J.). As used in ORS 166.220(1)(a), "use" refers both to employment of a weapon to inflict harm or injury and employment of a weapon to threaten immediate harm or injury. The court examined the text, context, and legislative history of ORS 166.220(1)(a) and noted first that, although "use" has many meanings, the context and legislative purpose of the statute suggest that the legislature did not intend the narrow meaning

advanced by defendants. The court explained that ORS 166.220(1)(a) was first enacted in 1917 as a part of a "broader package of legislation that was intended to regulate the manufacture, sale, possession, and use of certain dangerous or deadly weapons" and included separate prohibitions on certain use and possession of those dangerous or deadly weapons. The court concluded that nothing in the 1917 legislation suggested that the legislature intended that the term "use" would mean "actually employing" a weapon to cause injury, and that interpreting the term "use" to include using a weapon to threaten others did not conflict with any of the terms in the 1917 legislation.
The court concluded that defendants' interpretation introduced an unnecessary and unlikely redundancy in the state's criminal statutes in 1917 given that it had been a crime to commit an assault with a dangerous weapon. The court further concluded that when the legislature substantively amended ORS 166.220(1)(a) in 1985, nothing suggested that the legislature intended to change the original meaning of the term "use." Lastly, turning to the evidence in the cases, because the evidence was undisputed that each defendant displayed a dangerous or deadly weapon against another person in a manner that threatened the other person with imminent serious physical injury and that constituted the crime of menacing, sufficient evidence established that both defendants violated ORS 166.220(1)(a).
http://www.publications.ojd.state.or.us/docs/S060946.pdf

WEAPONS OFFENSES:, *State v. Smith* (10/28/15): "Use" in ORS 166.220(1)(a) includes both the actual use of physical force and the threat of immediate use of physical force.

Defendant appealed his conviction for two counts of unlawful use of a weapon, and the trial court's imposition of a fine and attorney fees. Defendant argued that the trial court wrongly interpreted the meaning of the word "use," claiming that a person does not unlawfully "use" a weapon when simply using the weapon to threaten another person. The Court found that the trial court did not error because the Supreme Court that the threat of immediate force is sufficient to satisfy the use requirement. Defendant also assigned error to the imposition of a fine and attorney fees by arguing that the record did not demonstrate his ability to pay those fees. Although Defendant's argument about the fine and attorney fees was unpreserved, The Court concluded that the trial court plainly erred by imposing attorney fees without evidence of his ability to pay and exercised their discretion to correct the error. Portion of the judgment requiring Defendant to pay attorney fees reversed; otherwise affirmed.
http://www.publications.ojd.state.or.us/docs/A152558.pdf