LEGAL UPDATE
BOOT CAMP VII
2016

APPEALS

APPEALS—HARMLESS ERROR: Even if trial court erred in admitting hearsay evidence, the error was harmless in light of similar statements elicited by defendant and other evidence admitted at trial.
APPEALS—PRESERVATION OF ERROR: Defendant's objection at trial to admission of exhibit as a whole did not preserve argument on appeal that only certain portions of the exhibit were inadmissible.
State v. Chandler, 278 Or App 537, __ P3d __ (2016) (Tillamook) (AAG Peenesh Shah). In May 2011, a DOJ investigator was able to download seven images from a computer in defendant's home, five of which depicted "underage children involved in acts of sexual conduct." The investigator determined that the Internet Protocol (IP) address used to share those images over a peer-to-peer network was registered to defendant. After obtaining defendant's name and address, the investigator secured a search warrant for his apartment. When she served the warrant, she found defendant sitting in front of a computer, which was on and running at the time. Shortly thereafter, defendant told the investigator that "there were images on his computer that…he may not be able to confirm the age of the girls" and that "he would go so far as to say that there would be stuff on his computer." Agents then searched defendant's home and located two computers, which were linked together through the same network. Both computers contained photographs depicting child sexual abuse; however, the photographs that were the basis for the charged offenses in this case were located on the computer that defendant had been sitting in front of when the warrant was executed. Before trial, defendant made several incriminating statements to his wife during a phone call recorded by police. The state introduced those statements at defendant's trial, along with testimony from agents involved with the investigation. The computer forensics examiner who preserved and analyzed the evidence found on defendant's computer testified that, in addition to the photographs that provided the basis for the charges against defendant, the computer also contained adult pornography and cartoon drawings of child sexual abuse.
The jury also heard testimony, elicited by both the state and defendant, about his wife's out-of-court statements regarding who had access to the computers found in the home.
Defendant's defense theory was that there had been other members of his household, namely his wife and two young children, who had access to the computer and could not be excluded as suspects. Neither defendant nor his wife testified at trial. Defendant objected to the testimony about his wife's out-of-court statements, but the trial court
(Judge Donald Hull) admitted the evidence. The court also overruled defendant's objections to two exhibits showing the contents of his computer beyond those underlying his criminal charges. Defendant appealed both rulings.
Held: Affirmed (Ortega, P.J.). [1] The wife's statements were hearsay, but any error in admitting them was harmless. Defendant elicited similar hearsay statements from the same witness that also established that he was the computer's primary user but that his wife, at one point, had also used the computer. The substance of the evidence was also admitted through other unchallenged testimony, and through defendant's recorded admissions. [2] Defendant's objection to the admission of the exhibits showing the contents of his computer did not provide a basis for reversal because at least some portions of those exhibits were admissible. Because defendant objected at trial to the exhibit as a whole, the court could not conclude that the trial court understood his objection to reference only a subset of the exhibit—and if so, which part. Because

defendant failed to afford the trial court a clear opportunity to address the admissibility of specific portions of the exhibit that he found problematic, the Court of Appeals could not find that the trial court erred in admitting the exhibit in its entirety. [3] Defendant's hearsay and relevance objections to another exhibit was insufficient to preserve his argument that the exhibit was inadmissible because it contained evidence of prior bad acts, which is the sole basis of his challenge on appeal.
http://www.publications.ojd.state.or.us/docs/A153171.pdf

CRIMES

ASSAULT: Victim's testimony that she felt a "sting" when defendant slapped her was insufficient to support a finding of "physical injury."
State v. Johnson, 275 Or App 468, __ P3d __ (2015) (*per curiam*) (Multnomah) (AAG Rebecca Auten). As a result of a domestic dispute, defendant was charged with, among other offenses, fourth-degree assault for slapping the victim, ORS 163.160. At trial, the victim testified that she felt "a sting" when he slapped her. He moved for a judgment of acquittal on that charge, but the trial court (Judge Karin Immergut) denied the motion.
Held: Assault conviction reversed; remanded for resentencing; otherwise affirmed.
Physical injury means substantial pain or impairment of a physical condition. The victim's testimony that she felt a "sting" is "insufficient to support a finding of substantial pain. Moreover, there is no evidence that the victim suffered any impairment of her physical condition as a result of defendant's slap."
http://www.publications.ojd.state.or.us/docs/A151101.pdf

NOTE: **Defendant was convicted of 17 charges, specifically, five counts of assault in the fourth degree, ORS 163.160; six counts of harassment, ORS 166.065; three counts of coercion, ORS 163.275; and one count each of sexual abuse in the second degree, ORS 163.425, menacing, ORS 163.190, and strangulation, ORS 163.187. All but the Harassment charges were charged using the "constituting DV" language.

ASSAULT: *State v. Guzman* (1/27/16)

Defendant was convicted of assault in the fourth degree constituting DV based on the theory of substantial pain (the trial court did not believe there was sufficient evidence to support a finding of impairment of physical condition). Defendant appeals the conviction. Ct. of Appeals affirms:

The victim did not appear for GJ or for trial despite many attempts by the State to procure her attendance. (It is clear from a footnote in the opinion, which presents a text message from the defendant to the victim, that the defendant had tampered with the victim/witness.) Despite the victim's lack of attendance, the State went forward with the case. The State had independent witnesses who made good observations of the victim's demeanor and physical appearance. There was also a 911 call and pictures of the victim's injuries. The pictures "*depict[ed] bright red scratches on the victim's chin and left cheek; some swelling on both of the victim's cheeks, around both of her eyes, and on the left side of her forehead; and more pronounced swelling on the right side of the victim's forehead, from her eyebrow to her hairline."*

The holding hinges on the court's analysis and conclusion about the factfinder's ability to infer (rather than speculate) whether the victim suffered substantial pain.

The court concludes:

*"A rational juror could infer from the evidence, including the 9-1-1 call, the descriptions of the victim's condition and demeanor by the two witnesses, and the photographs of the victim's injuries, that the victim physically struggled against defendant and that he scratched and punched her face, or that her face collided with a hard surface in the car during the struggle. And, based on those inferences and the photographs, a rational juror could infer that the victim's injuries involved "ample" or "considerable" pain that was "more than * * * fleeting." Lewis, 266 Or App at 527-28. That is, given the basic facts adduced at trial, there is a reasonable probability that the victim's significant facial swelling immediately after the altercation was painful and that her injuries turned into significant bruising and soreness that persisted for a consequential*
See State v. Pipkin, 245 Or App 73, 77, 261 P3d 60 (2011), aff'd, 354 Or 513, 316 P3d 255 (2013) ("evidence that the victim was still in pain at least an hour after the attack and that her injuries were of substantial degree—her eye was swollen," inter alia, "was sufficient to create a question for the jury about whether the victim suffered substantial pain")."

The Court dismisses, without discussion, the defendant's assignment of error to the admission of the victim's 911 call.

http://www.publications.ojd.state.or.us/docs/A155005.pdf

KIDNAPPING: *State v. Demetrius Level Vaughan-France 279 Or App 305 (2016)* (June 29, 2016)
Defendant was convicted of various crimes, including Kidnapping and Assault II, stemming from his attacks and confinement of his girlfriend. On appeal, the Defendant argues that the State did not present sufficient evidence of its theory of Kidnapping, i.e., of "confinement in a place where the victim was not likely to be found," ORS 163.225(1)(b).
Citing previous cases, *State v. Montgomery*, 50 Or App 381, 624 P2d 151, *rev den*, 290 Or 727 (1981) and *State v. Kawamoto*, 273 Or App 241, 250-51, 359 P3d 305 (2015), the Court rejected Defendant's "confinement" argument. Similarly, the Court rejected the Defendant's argument that the State had not presented sufficient evidence that the Kidnapping was not merely "incidental" to other crimes.
The Court affirmed Defendant's convictions.
http://www.publications.ojd.state.or.us/docs/A155485.pdf

MENACING: Youth's threats to kill his middle-school classmates did not constitute menacing, because nothing about the threats or the situation in which they were made would lead a reasonable person to fear "imminent" harm.
State v. C. S., 275 Or App 126, __ P3d __ (2015) (Lake) (AIC Jennifer Lloyd). A few times a week for about three weeks, 12-year-old youth told three of his middle school classmates that they were "going to die" in various disturbing ways and that he would kill

them. When he saw them in the halls, he drew his finger across his throat and said "die." The state filed a delinquency petition alleging that youth committed four counts of menacing, ORS 163.190(1). Youth argued that the evidence was insufficient to establish that his words and conduct would have caused a reasonable person to fear "imminent serious physical injury." The juvenile court (Senior Judge Lane Simpson) found youth within its jurisdiction.
Held: Reversed in part; otherwise affirmed (Garrett, J.). [1] The record was "legally insufficient to demonstrate that an objectively reasonable person would have feared a threat of serious injury or death that was 'imminent'"; nothing in youth's threats "implied that he was threatening to carry out violence at [any particular] time, as opposed to an unspecified future date," and nothing in youth's relationship with the victims indicated an escalating level of conflict or a history of violence or aggression toward the victims. [2] "On these facts, an objectively reasonable person might fear the possibility of future harm, but a reasonable person would not understand youth's threats to imply harm that is moments away as required by ORS 163.190.…"Youth's conduct, while cause for reasonable concern among his classmates, is not the type of behavior that the menacing statute was designed to criminalize."
http://www.publications.ojd.state.or.us/docs/A154245.pdf

SEXUAL ABUSE: To prove crime of second-degree sexual abuse, ORS 163.425(1)(a), state need not prove that the defendant exerted control over the minor victim or that the victim did not actually consent.
State v. Bernhardt, 277 Or App 867, __ P3d __ (2016) (Lane) (AAG Michael Slauson). The victim, who was 16 years old, initiated and performed oral sex on defendant, who was 29 years old; he made no attempt to stop her. He was charged with second-degree sexual abuse, ORS 163.425(1)(a). At trial, he moved for a judgment of acquittal, arguing that the state failed to prove that the victim did not consent. The trial court (Judge Josephine Mooney) denied the motion. At the close of the evidence, defendant asked the court to instruct the jury that the term "subjects," as used in ORS 163.425(1)(a), is an element of the crime and requires the state to prove that defendant exerted some control over the victim. The trial court declined to give that instruction, and the jury found him guilty.
Held: Affirmed (Tookey, J.). [1] The trial court correctly denied the motion for judgment of acquittal. A minor victim is legally incapable of consent, and the state need not prove that the victim did not actually consent. *State v. Ofodrinwa*, 353 Or 507
(2013). [2] The trial court correctly refused to give defendant's requested jury instruction on the meaning of the term "subjects." The statutory requirement in ORS 163.425(1)(a) that a defendant "knowingly subjects" the victim to deviate sexual intercourse does not require the state to prove that the defendant exerted control over the victim: "an adult 'subjects' a minor to deviate sexual intercourse if the adult causes the minor to be exposed to that sexual conduct." To accept defendant's interpretation "would mean that, by using the word 'subjects,' the legislature intended to excuse sexual conduct with minors unless the conduct was initiated by the defendant or is against the minor's will in some way. We reject that interpretation and decline to read such a contradictory intent into the statute." [3] "If the state proved that defendant knowingly caused [the victim] to be exposed to his erect penis and, thus, actively participated in the oral sex, the

state will have met its burden to show 'the minimal force inherent' in 'subjecting' [the victim] to deviate sexual intercourse."
http://www.publications.ojd.state.or.us/docs/A152817.pdf

TAMPERING: Evidence did not support a reasonable inference that defendant intended to induce a witness to withhold testimony at an official proceeding.
State v. Williams, 275 Or App 752, __ P3d __ (2015) (Clatsop) (AAIC Jamie Contreras). Defendant was the director of the Commercial Fisherman's Festival (CFF) in Astoria. During a dispute over pay, defendant resigned his position, withdrew money from CFF's bank accounts, and took property that belonged to CFF and its sponsors. He then talked about what he'd done on Facebook. Defendant and a member of the CFF board, Elizabeth McMaster, started sniping at each other on Facebook. CFF eventually complained to police about the thefts, and police obtained a warrant, with Elizabeth McMaster's help in identifying items that defendant had stolen. They executed the warrant for defendant's home and vehicles, taking numerous pieces of CFF property.
Two weeks later, defendant approached Elizabeth's husband Kenneth, who was also a member of the CFF board. Defendant told Kenneth that the "sh*t talking" had to stop, and "[i]f you don't stop the sh*t talking, if it doesn't stop, I will burn down your f*cking house." Defendant was charged with witness tampering, ORS 162.285, based on that statement, as well as theft. He moved for a judgment of acquittal on the tampering charges, arguing that the state failed to prove that he intended to induce the McMasters not to testify at an official proceeding. The trial court (Judge Philip Nelson) denied the motion. The jury acquitted defendant of tampering with respect to Elizabeth, but found him guilty of tampering with respect to Kenneth, as well as the thefts.
Held: Witness tampering count reversed; remanded for resentencing; otherwise affirmed (Sercombe, P.J.). The trial court should have granted defendant's motion for judgment of acquittal. [1] As pertinent here, a person tampers with a witness if he knowingly attempts to induce a person from unlawfully withholding testimony in an official proceeding. ORS 162.285(1)(a). The evidence must support an inference that the defendant "specifically and reasonably believes that the victim will be called to testify at an official proceeding." *State v. Bailey*, 346 Or 551, 565 (2009). [2] Here, the evidence did not permit a rational trier of fact to infer that defendant intended to induce Kenneth to withhold testimony in an official proceeding. Nothing in the evidence permitted an inference that defendant believed that Kenneth had special knowledge about the thefts that could lead him to be called as a witness, or that his threat was an attempt to induce Kenneth not to testify in an official proceeding.
http://www.publications.ojd.state.or.us/docs/A154262.pdf

UNLAWFUL USE OF A WEAPON: Trier of fact could conclude from defendant's statements and actions that he possessed his shotgun with the intent to use it in a threatening manner.
State v. McAuliffe, 276 Or App 259, __ P3d __ (2016) (Klamath) (CLS Jon Zunkel-deCoursey, AAIC Andrew Lavin). Defendant is a rancher who lives near the Klamath Falls airport. Several times, he called 911 and the airport to complain about a small airplane flying low over his property. In one call, defendant angrily stated that he was going to "take matters into his own hands." In another call, he said: "I'm sitting here with a shotgun" and "If they don't want to do something, then I'll do it myself …

I'm not going to put up with any more crap." Police went to defendant's property and saw a shotgun on defendant's porch. During police questioning, defendant asked: "What do I have to do, shoot him down to get him off of me?" Defendant also admitted that he had "serious thoughts" about shooting at the airplane and that he had held a shotgun shell up to the airplane as it flew by in order "to send [the pilot] a message to stop flying over his house." The state charged defendant with unlawful use of a weapon with a firearm,
ORS 166.220(1)(a). At the close of the state's case, defendant moved for judgment of acquittal, arguing that the state presented insufficient evidence that he intended to use the shotgun unlawfully against another person. The trial court (Judge Marci Warner Adkisson) denied the motion and a jury convicted defendant.
Held: Affirmed (Duncan, J.). The trial court correctly denied the motion for judgment of acquittal. [1] A person commits the crime of UUW if he or she carries or possesses a dangerous or deadly weapon with the intent to use it unlawfully against another. ORS 166.220(1)(a). Therefore, "a person can commit UUW without actually 'using' a weapon. All that the UUW statute requires is that the person 'carries or possesses' the weapon 'with intent to use [it] unlawfully against another[.]'" [2] A rational juror could find that defendant possessed a shotgun with the requisite intent to either fire it at a plane or point it at the plane in a manner suggesting that he would fire it immediately.
http://www.publications.ojd.state.or.us/docs/A156306.pdf

EVIDENCE

EVIDENCE—ADOPTIVE ADMISSION: [1] Where state offered evidence that defendant did not respond to a text message from the victim, admissibility of the text message and non-response must be considered together because neither aspect of the evidence is relevant without the other. If the non-response or silence is offered to show that the listener did not respond to statements in a way that a listener would be expected to respond if the listener disagreed with the statements, the evidence must meet the requirements of an adoptive admission. [2] A communication may be found to be an assertion even though phrased as a question if it contains—expressly or impliedly—factual content that amounts to an assertion.
State v. Schiller-Munneman, 359 Or 808, __ P3d __ (2016) (Josephine) (AAG Peenesh Shah). Defendant was charged with first-degree rape of the victim, a friend who had spent the night on defendant's couch after an evening of drinking. The victim contacted the police following the incident, and a detective asked the victim if she would send defendant text messages to "try to get [defendant] to make a comment about what had happened between the two of them." The victim agreed, and the detective instructed her on the content of the messages. The victim sent defendant two text messages. The first said, "I don't understand how this happened[.] [W]e've been friends for [a long] time[.] [W]hy did [you] do that to me?" The second message said, "I really want to know why? [I don't know] what to do but I was passed out[.] [W]hat made what [you] did ok?" Defendant did not respond to either message. At trial, defendant challenged the admissibility of the text messages and his nonresponse on both constitutional and evidentiary grounds. The trial court (Judge Pat Wolke) concluded that

the evidence was not admissible under the adoptive admission rule, but that the evidence was nevertheless admissible. Defendant appealed that ruling, and the Court of Appeals affirmed.
Held: Reversed and remanded (Walters, J.). [1] The court viewed the challenged evidence—the victim's text messages and defendant's nonresponse— in combination and as a whole because neither aspect of the evidence is relevant without the other. Without the messages, defendant's lack of response is simply the absence of evidence. Without defendant's nonresponse, the messages have no probative value; the only evidentiary value that the state claims for the messages is to demonstrate their effect on defendant, and the only effect it claims is defendant's nonresponse. [2] If silence is offered to show that the listener did not respond to statements in a way that a listener would be expected to respond if the listener disagreed with the statements, then it is offered to show, in effect, that the listener agreed with the statements. In that circumstance, the evidence must meet the requirements of an adoptive admission. If the party offering such evidence cannot demonstrate that the listener intended to adopt or approve the contents of the statements to which the listener did not respond, then the evidence is inadmissible. [3] Because the trial court concluded that the evidence was not admissible under the adoptive admission rule, the evidence also was not admissible for its "effect on the listener" and should have been excluded. [4] The victim's text messages were assertions even though phrased in question form. A communication may be found to be an assertion even though phrased as a question if it contains—expressly or impliedly— factual content that amounts to an assertion. In context, the text messages contained an assertion that defendant did something wrongful to the victim against her wishes while she was "passed out." [5] The error in admitting the evidence was not harmless: the text messages and defendant's nonresponse addressed the only contested issue in the case— whether defendant's sexual contact with the victim was consensual—and were not duplicative of the other evidence of defendant's guilt. Moreover, the state emphasized the evidence when examining the defendant and the victim.
http://www.publications.ojd.state.or.us/docs/S063526.pdf

Note: The court declined to reach the constitutional question of whether, absent custody or compelling circumstances, a defendant's invocation of the right to silence may be introduced at trial as substantive evidence of the defendant's guilt. The court noted a split of federal authority on the issue. The court also noted that it has yet to decide whether invocation, express or implied, is necessary to trigger the protections of Art. I, § 12.

EVIDENCE—ADOPTIVE ADMISSIONS: Trial court correctly admitted text messages as non-hearsay under "adoptive admissions" rule, OEC 801(4)(b)(B).
EVIDENCE: Because proffered exhibits, which contained multiple text messages, contained at least one text message was admissible, the trial court correctly admitted the exhibits as a whole.

EVIDENCE: OEC 612 and OEC 803(5) authorize admission of out-of-court statements only if statements are offered by the "adverse party."
State v. Martinez, 275 Or App 451, __ P3d __ (2015) (Malheur) (AAG Rolf Moan). Defendant was charged with manufacture, delivery, and possession of methamphetamine; of being a felon in possession of a firearm; and of endangering the welfare of a minor. At trial, the state presented printouts of numerous text messages, along with two cell phones containing the texts, to prove the drug crimes. Defendant objected on hearsay grounds to "any and all text messages," and to printouts and phones containing the texts, but the trial court (Judge Patricia Sullivan) admitted them as evidence. The trial court found defendant guilty.
Held: Affirmed (Garrett, J.). [1] Each of the exhibits at issue contained multiple text messages, and the state argued that defendant, to preserve his arguments, had to identify "specific, objectionable text messages" instead of objecting to each exhibit as a whole. Defendant's repeated hearsay objections "to the introduction of text message evidence against him" adequately preserved his claims for review. [2] The trial court correctly admitted a number of text messages from third parties under the "adoptive admission" rule in OEC 801(4)(b)(B), which provides that an out-of-court statement is not hearsay if it is offered against a party, and if that party had manifested an adoption of the statement or a belief in its truth. (*E.g.*, defendant had received a text message from a third party that read, "the stuff u hve ovr here isn't any good"; defendant responded by sending a text message that read, "how u [know] did u try it?" The court described defendant's response as "an implied manifestation of defendant's belief in the truth of [the third party's] statement that defendant had 'stuff' where [the third party] was." [3] If a party objects to an exhibit as a whole, and any part of the exhibit is admissible, the Court of Appeals will affirm the admission of the entire exhibit. Because at least one of the text messages in each of two exhibits containing multiple texts was admissible, the trial court did not err in admitting the exhibits. [4] The trial court erred by admitting text messages in Exhibit 41 under OEC 612 (allowing the use of a writing to refresh a witness's memory) and OEC 803(5) (permitting the use of a recorded past recollection).
Although OEC 612 entitles an adverse party to have portions of a writing admitted when a "witness uses a writing to refresh memory for the purpose of testifying," it did not entitle the state, as the *proponent* of the text messages in Exhibit 41, "to have them introduced into evidence over defendant's objection." Similarly, OEC 803(5) permits a memorandum or record, when used to help a witness testify accurately, to be received as an exhibit only if "offered by an adverse party"; it thus provided no basis for the state to successfully introduce Exhibit 41 as evidence. [5] But any error in admitting Exhibit 41 was harmless. The first two text messages in the exhibit were "cryptic" and did not obviously link defendant to the charged crimes; although the third text supported the state's general theory that defendant was a methamphetamine dealer, the state "presented extensive [other] evidence" to that same effect; further, the third text was at most cumulative of other admissible texts. [6] The court declined to address defendant's claims of error with respect to two cell phones admitted into evidence, because defendant failed to develop an argument explaining why their admission was error.
http://www.publications.ojd.state.or.us/docs/A152946.pdf

EVIDENCE—CHAIN OF CUSTODY: Court has discretion to admit evidence despite gap in chain of custody if it finds reasonable probability that evidence has not been changed in important respects.

WEAPONS OFFENSES: Under ORS 166.190, which defines the offense of pointing a firearm at another "within range" of the firearm, "range" refers to the distance to which the firearm's shot or projectile *may* be propelled—*i.e.*, its intended range.
State v. Summers, 277 Or App 412, __ P3d __ (2016) (Umatilla) (AAG Peenesh Shah). Responding to a report that defendant had flipped his truck on a highway, officers found that he had fled the scene and that the truck smelled strongly of alcohol. After determining that federal warrants were outstanding for defendant's arrest, the officers set out to search for him, borrowing a snowmobile to follow his tracks in the snow, which led them to a cabin. They noticed him crouching down, aiming a rifle in their direction. The officers drew their guns, told him to drop his weapon, and fired at him. He slumped over and dropped the rifle. At the scene, officers seized the rifle and a glass pipe from defendant's jacket, which later tested positive for methamphetamine residue. The officers also determined that the rifle was a stolen "muzzleloader" that was inoperable because it was missing a necessary part. Defendant was charged with several crimes, including pointing a firearm at another, ORS 166.190. Before trial, he moved to exclude two state's witnesses, Kerr and Minthorn, because the state had not listed the witnesses in pretrial discovery under ORS 135.815 or in its motion to allow for the subpoena of more than 10 witnesses under ORS 136.570. Defendant also moved to exclude the meth pipe on chain-of-custody grounds. The trial court (Judge Lynn Hampton) denied both motions. At trial, defendant moved for a judgment of acquittal, arguing that the state failed to prove that he had pointed the gun "within range" of the officers. The trial court denied the motion, and the jury convicted defendant on all but one of the charged counts.
Held: Affirmed (Ortega, P.J.). **Discovery violation:** [1] Violation of ORS 136.570 does not provide a basis for exclusion of the challenged witnesses. The statute does not provide for an exclusionary remedy, and defendant does not point to any other authority requiring exclusion under that statute. Thus, the trial court could not have ordered exclusion for any such violation. [2] Although the state violated ORS 135.815 by not including Kerr and Minthorn on its pretrial witness list, broad discretion is conferred upon the trial court in the choice of sanctions to be imposed in the event of a failure to disclose the names of witnesses in a criminal case. Although exclusion of the witnesses may be warranted in the absence of prejudice if it facilitates the administration of justice, such sanction "should be imposed only when no lesser sanction would accomplish the aim of the statute." Because the court limited Kerr's testimony and allowed defense counsel time to meet with Kerr, the court did not abuse its discretion in refusing to exclude that witness: the "record does not reveal any prejudicial effect caused by Kerr's testimony that was not otherwise addressed by the court's order, nor does it suggest that the exclusion of that testimony would have facilitated the administration of justice in some way." The record also did "not support a conclusion that defendant was so prejudiced by the discovery violation that allowing Minthorn's testimony was outside the range of allowable discretion, especially when considering that the court allowed Minthorn to be recalled to clarify her testimony as necessary to address defendant's concerns." [3] To the extent that other sanctions, short of exclusion, might have been appropriate, defendant here did not propose any lesser sanction or otherwise advance his current argument that the court should have considered other sanctions. **Chain of custody:** [4] The court properly ruled that the chain-of-custody evidence was sufficient to allow admission of the meth pipe. Determining the adequacy of the foundation required to establish a chain of custody rests within the discretion of the trial judge. Ordinarily when an object is taken from the defendant for the purpose of testing and passes through the hands of several persons, the chain-of-custody requirement must be satisfied by the testimony of

each person who had possession or custody of the article. The purpose of that foundation is to allow a court to determine whether the evidence is in substantially the same condition as when the crime was committed. Ultimately, a court may allow the introduction of the evidence if it determines that there is a reasonable probability that the evidence has not been changed in important respects. [5] Here, although the state did not present testimony from one of the two scientists who tested the meth pipe, that chain-of-custody gap does not necessarily imply a substantial change in the evidence. There is no rule requiring the prosecution to produce as witnesses all persons who were in a position to come into contact with the article sought to be introduced in evidence. **Pointing a firearm:** [6] In the "within range" element of ORS 166.190, "range" refers to the distance to which the firearm's shot or projectile *may* be propelled—*i.e.*, its intended range. Thus, defendant was not entitled to acquittal simply because an inoperable firearm has no actual range.

http://www.publications.ojd.state.or.us/docs/A152471.pdf

EVIDENCE—IMPEACHMENT: In prosecution for domestic assault, the trial court properly precluded defendant from impeaching the victim with evidence of a prior allegedly false accusation against him.
State v. Taylor, 275 Or App 962, __ P3d __ (2015) (Washington) (AIC Jennifer Lloyd). Based on an incident of domestic abuse, defendant was charged with fourth degree assault. At trial, defendant sought to cross-examine the victim (his wife) with information in a police officer's handwritten "application for 72-hour detention for evaluation and treatment." That document indicated that the victim had accused defendant of assaulting her and pushing her into a window, but that the responding officers had seen a broken window but no evidence of any marks or injuries. The application contained the officer's conclusion that "there was no fight." Following the incident, no arrest was made and the victim was taken to a hospital for a mental-health evaluation and treatment. Defendant claimed that he should be entitled to impeach the victim with the prior accusation under *State v. LeClair*, 83 Or App 121 (1986), which held that Art. I, § 11, allows a defendant to cross-examine a victim about other accusations in three circumstances: (1) when the victim has recanted the accusations;(2) when the defendant demonstrates to the court that those accusations were false; or (3) there is some evidence that the victim has made prior accusations that were false, unless the probative value of the impeachment is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay. Defendant did not argue that the victim had recanted, but he argued that the officer's application was evidence that the prior accusations were false. The trial court (Judge James Fun) concluded that, although the application constituted *some* evidence that the accusation was false, the court was not convinced that the accusation was false. The court then excluded the evidence after weighing the probative value against the possible prejudice from the impeachment and concluded that the evidence would "not be helpful to the jury" because it would "ask the jury to decide the truth or falsity of the occurrence of the prior events" based on no evidence other than the application. Defendant was convicted at trial, and appealed. *Held*: Affirmed (Hadlock, J.). [1] Although the evidence does not fit the first or second *LeClair* category—*viz.*, that the victim recanted or that the defendant has proved the falsity of the accusation—it does fit the third: the application by the officer constituted *some evidence* that the victim had made a prior false accusation against defendant. [2] In order to admit such evidence, the court must balance the

probative value against the risk of prejudice. The court did so here, and its evaluation was not an abuse of discretion: it was entitled to exclude the evidence based on its conclusion that it would create an "unhelpful trial within a trial." Moreover, because the prior incident occurred out of state and the officer witnesses were not present at trial, and because defendant was the only other witness to the events and could not be compelled to testify, the court reasonably could conclude that the risk of prejudice would outweigh the probative value of the impeachment evidence.
http://www.publications.ojd.state.or.us/docs/A154655.pdf

EVIDENCE—PRIOR BAD ACTS / IMPEACHMENT: In prosecution for domestic assault, defendant's volunteered testimony that he is "a caring man" opened the door to the victim testifying in rebuttal to other incidents in which he had committed acts of violence against her.
State v. Oliver, 275 Or App 552, __ P3d __ (2015) (Washington) (AAG Doug Petrina). During a domestic dispute, defendant knocked his girlfriend to the ground. He was charged with fourth-degree assault. At trial, defendant testified that the victim attacked him and he was defending himself with the least amount of force when she fell to the ground. He volunteered, "I'm a caring man." The court (Judge Andrew Erwin) permitted the victim to testify in rebuttal about three previous incidents during which defendant had either used force or put his hands on her. The jury found defendant guilty. *Held*: Affirmed (Lagesen, J.). The trial court correctly admitted the prior-acts evidence to impeach defendant. "[T]he evidence of defendant's previous acts of violence toward the victim was, at a minimum, relevant to the jury's assessment of defendant's credibility. Defendant's own testimony made it so. Once defendant testified that he was a 'caring man' who would not use force to harm another person, the evidence of defendant's prior acts—which tended to refute defendant's characterization of himself— became probative to impeach that testimony."
http://www.publications.ojd.state.or.us/docs/A157480.pdf

Note: The court noted that defendant did not argue on appeal that the trial court abused its discretion under OEC 403 when it determined that the probative value of the evidence as impeachment exceeded the risk of unfair prejudice posed by it.

EVIDENCE—OTHER BAD ACTS: Trial court committed plain error by failing to conduct OEC 403 balancing before admitting prior-act evidence.
APPEALS—PLAIN-ERROR REVIEW: In case involving unpreserved federal constitutional error, court applies state law rules to determine whether unpreserved error should be reversed, not federal harmless-error standard.
State v. Zavala, 276 Or App 612, __ P3d __ (2016) (Lincoln) (AAG Michael Shin). Defendant was charged with sexually abusing his ex-girlfriend's two daughters. At trial, the state called a former coworker of the ex-girlfriend, who testified that prior to the alleged abuse, she had observed defendant inappropriately touching one of the victims and that she had told the ex-girlfriend about the incident. Defendant asked the trial court to strike the evidence as "an inadmissible prior bad act." The trial court (Judge Thomas Branford) admitted the evidence to show defendant's sexual predisposition toward the victim under *State v. McKay*, 309 Or 305 (1990). Defendant did not ask the court to conduct OEC 403 balancing. The jury found defendant guilty. On appeal, he argued that the trial court should have excluded the evidence

under OEC 404(3) or, alternatively, under OEC 403. The state argued that those claims were not preserved, and the evidence was properly admitted under *McKay*. The Court of Appeals affirmed without opinion. After the Oregon Supreme Court issued its decision in *State v. Williams*, 357 Or 1 (2015), defendant moved for reconsideration, arguing that the trial court plainly erred in admitting the coworker's testimony without conducting OEC 403 balancing as required by the Due Process Clause. The state argued that that claim was not preserved and the trial court did not plainly err because *Williams* held that for the admission of evidence under OEC 404(4), due process requires OEC 403 balancing only "upon request."
Held: Reconsideration allowed; former disposition withdrawn; judgment vacated and remanded (Ortega, P.J.). [1] *Williams* establishes that due process requires the trial court to engage in OEC 403 balancing for the admission of evidence of uncharged sexual conduct. The trial court's admission of the evidence concerning defendant's uncharged abuse of the victim without conducting a balancing was therefore plain error and exercise of the court's discretion to review the error is appropriate. Although *Williams* makes clear that OEC 403 balancing must be requested by a defendant in child sexual-abuse cases, before that decision, the role of OEC 403 balancing was not manifest prior to *Williams*. [2] Because the failure to conduct OEC 403 balancing was an unpreserved federal constitutional error, the federal harmless-error analysis does not apply; instead, the court applies state-law rules to determine "whether an unpreserved error is one that can and should be reversed." [3] Because in this case it is speculative whether defendant was harmed by the trial court's failure to conduct OEC 403 balancing, "it is not clear that an outright reversal is permitted or appropriate, but it is also not clear that affirmance is appropriate." Accordingly, the court ordered a conditional remand to the trial court to conduct OEC 403 balancing. If, after conducting the balancing, the trial court finds that the disputed evidence should not have been admitted, it must order a new trial; if it finds that the evidence was properly admitted, it should reinstate the judgment of conviction.
http://www.publications.ojd.state.or.us/docs/A154491A.pdf

Notes: [a] The Court of Appeals noted that if this error had been preserved, the court would not have ordered a limited remand for the trial court to conduct OEC 403 balancing; rather, it would have ordered a new trial, as it did in *State v. Brumbach*, 273 Or App 552 (2015), a case in which the state has petitioned for review. According to the Court of Appeals, the federal harmless-error standard compels a new trial in such cases. [b] It appears that this "plain error" ruling applies only to cases that were tried *before* the Supreme Court issued its decision in *Williams* and in which the trial court admitted evidence of prior bad acts under OEC 404(3) or (4) without conducting balancing under OEC 403. For a case tried after *Williams*, the trial court should not be required to balance such evidence under OEC 403 unless the defendant specifically requests it.

EVIDENCE—OTHER BAD ACTS: Other-acts evidence was inadmissible to prove defendant's intent, because the prior act and the charged act were not physically similar.
State v. Hudman, 279 Or App 180, __ P3d __ (2016) (Josephine) (AAG Dave Thompson). A jury convicted defendant of unlawful delivery and unlawful possession of marijuana based on his involvement with a marijuana grow operation on agricultural land surrounding a home owned by his wife. The police found over 60 pounds of marijuana in the home, which led the state to charge defendant with several marijuana-related crimes.

Defendant testified at trial that his wife had leased the land surrounding their home to people whom defendant believed were lawfully growing and storing marijuana. The state countered that, although three people were lawfully growing marijuana on defendant's wife's property, defendant was using that fact to conceal a larger, unlawful marijuana growing operation in which he was engaged. As part of its case, the state offered evidence that, a year after the seizure of the marijuana for which he was prosecuted, defendant had stolen and sold in California marijuana that another person had grown on defendant's wife's property. The state contended that the evidence was admissible under OEC 404(3) as evidence of defendant's intent and as spurious-plan evidence—evidence that is offered to show that a defendant has engaged in a pattern of conduct from which the existence of a plan to commit the charged crimes can be inferred. Over defendant's objection that the evidence was improper propensity evidence, the trial court (Judge Pat Wolke) ruled that it was admissible under OEC 404(3) as evidence of intent and plan, and that its probative value was not substantially outweighed by the danger of unfair prejudice (OEC 403). On appeal, defendant assigned error to that ruling, arguing that the evidence was impermissible propensity evidence under OEC 404(3) and that, under *State v. Leistiko*, 352 Or 172, *adh'd to as modified on recons*, 352 Or 622 (2012), the trial court erred in admitting the evidence without giving the jury an appropriate limiting instruction on the jury's consideration of the evidence as evidence of intent.
Held: Reversed and remanded (Armstrong, P.J.). The trial court erred by admitting the other-act evidence. [1] "To determine whether other-act evidence is relevant to show that a defendant engaged in the charged criminal conduct with the requisite intent, the trial court must consider the five factors set out in [*State v.*] *Johns*, including whether 'the physical elements of the [other] act and the [charged] act are similar.' 301 Or at 556. If the answer to any of the five *Johns* questions is negative, then the evidence is not admissible as evidence of intent." [2] Although there were some similarities between the charged conduct and defendant's alleged theft and sale of marijuana (both involved the use of lawful marijuana-related activity to facilitate unlawful marijuana-related activity), physically, the two sets of acts were fundamentally different, and did not share the physical similarity required by *Johns* to make the evidence of defendant's theft and sale of marijuana admissible to prove his intent regarding the charged crimes. [3] It follows from that conclusion that the other-act evidence was not admissible as evidence of plan, either, given that plan evidence requires a greater degree of similarity with the charged conduct than does the evidence of intent for the evidence to be admissible as plan evidence. [4] The trial court's error in admitting the disputed evidence was not harmless, "because it allowed the jurors to infer that defendant was the type of person who violated marijuana laws and that he had done so again."
http://www.publications.ojd.state.or.us/docs/A152410.pdf

EVIDENCE—OTHER BAD ACTS: Other-acts evidence was inadmissible in theft case to prove intent on "doctrine of chances" theory, because the other act and the charged act were insufficiently similar. But the error was harmless.
State v. Davis, 279 Or App 223, __ P3d __ (2016) (Clackamas) (AAG Dave

Thompson). A jury convicted defendant of theft for checking out 50 books from libraries in Clackamas County and failing to return them. Police recovered one of the books from Powell's Books; Powell's records showed that defendant had sold that book to Powell's three days after he checked it out from the library. The book had been altered to remove its bar code and to obscure markings that identified it as a library book. Defendant admitted that he had sold perhaps nine more of the library books as part of a group of
500 books that he had arranged to sell through Craigslist. In his statements to the police, defendant contended that he had sold those books—the one sold to Powell's and the others sold through Craigslist—accidentally, when they became intermingled with other books that he intended to sell. Before trial, the state moved to admit evidence of two prior thefts by defendant—his theft of 13 books from the Multnomah County Library, accomplished by checking out the books from various library branches and failing to return them, and his theft of books from the Friends of Tigard Library book sale, accomplished by taking the books from the sale without paying for them. The state argued that evidence of the Multnomah County Library and Tigard book-sale thefts was "relevant to preparation, knowledge, lack of mistake, and intent," all of which are
nonpropensity purposes listed in OEC 404(3). As to both prior thefts, the state asserted that the evidence "would explain to the trier of fact how [defendant's] actions were not a mistake or accident and his reason for doing this." The trial court (Judge Douglas Van
Dyke) admitted the evidence of both prior thefts. It reasoned that the evidence went to "mistake or accident," which it characterized as "really the only [way for defendant] to avoid culpability." The court also stated that the evidence was admissible to show defendant's plan. After defendant was convicted, the court sentenced defendant to a 26- month prison term, ordered him to pay restitution of $3,834.73, and required him to pay $510 in court-appointed attorney fees. On appeal, defendant argued that the court erred in admitting the evidence of the theft from the Tigard book sale; he did not challenge the court's admission of evidence of the Multnomah County Library theft. Defendant also assigned error to the attorney fee award, arguing that the court plainly erred in awarding fees in the absence of evidence regarding his ability to pay them.
Held: Convictions affirmed; portion of judgment requiring defendant to pay attorney fees reversed (Duncan, P.J.). The trial court erred in admitting the evidence of the Tigard book-sale theft under OEC 404(3) because it was not relevant to show intent— that is, mistake or lack of accident—based on the doctrine of chances, but the error was harmless. [1] "As a general matter, the circumstances of this case did lend themselves to
[doctrine-of-chances] evidence, because defendant admitted he had done the *actus reus*— he checked out the library books and did not return them—and, as the [trial] court noted, the real dispute went to whether defendant intended not to return the books. Defendant's assertion to the police that, although he had sold some of the books (making it impossible to return them), he had done so accidentally, put defendant's intent at issue. Given those circumstances, evidence that defendant had previously committed the same *actus reus* would make it more likely that defendant's failure to return the books to the Clackamas County libraries was not a mistake." [2] "However, [under the test for admission of other-act evidence offered on a doctrine-of-chances theory, which is set forth in *State v.*
Johns, 301 Or 535, 555-56 (1986),] the evidence of the Tigard book-sale theft was too dissimilar from the conduct at issue to be probative of defendant's lack of mistake or accident. The *actus reus* was different—in the Tigard theft, defendant took books from the book sale without paying for them, rather than taking them with permission and then failing to return them. The doctrine of

chances rests on the principle that 'multiple instances of similar conduct are unlikely to occur accidentally.' *Leistiko*, 352 Or at 182.
However, the fact that bad conduct, as a general category, has occurred more than once does not allow any inference about the likelihood that the charged conduct happened by accident.… Even where the prior act and the charged act involve similar kinds of bad conduct—here, both involved theft of books from library-related organizations—the similarities between the physical elements must outweigh the differences." [3] Applying those principles here, "the Tigard book-sale theft evidence was not admissible under
OEC 404(3) to prove defendant's lack of mistake in failing to return the books. It did not 'bear something close to a point-by-point correspondence' to the charged conduct and did not meet the 'stringent test for similarity.'" [4] It follows that the trial court also erred in admitting the Tigard book-sale theft evidence to show plan, given that where other-act evidence is not sufficiently similar to be admissible to prove intent, it necessarily is not sufficiently similar to be admissible to prove plan. [5] The court's evidentiary error, however, was harmless. The Multnomah County Library theft evidence, which defendant did not challenge, was powerful evidence rebutting defendant's claim that he accidentally sold the books at issue in this case. [6] The sentencing court plainly erred in ordering defendant to pay attorney fees because the record is silent on his ability to pay.
http://www.publications.ojd.state.or.us/docs/A154743.pdf

EVIDENCE—OTHER BAD ACTS: Trial court committed reversible error under *State v. Williams* by admitting other-acts evidence without first conducting balancing under OEC 403, as required by the Due Process Clause.
State v. Altabef, 279 Or App 268, __ P3d __ (2016) (Marion) (AAG Rolf Moan).
Defendant sexually abused his six-year-old niece, and was charged with first-degree sodomy and first-degree sexual abuse. At trial, the state offered evidence that defendant had first sexually abused the victim in Washington while the family was driving home to
Oregon and that he then abused her, during that same drive, when they crossed the Oregon border. The state argued that the evidence was relevant, among other reasons, to establish his opportunity to commit the crime and to show his sexual predisposition toward the victim. Defendant objected, arguing that the evidence was not relevant and that any probative value was outweighed by the danger of unfair prejudice. He noted that, although OEC 404(4) generally requires courts to admit relevant evidence of a criminal defendant's other acts, it provides that OEC 403 balancing is still required "to the extent required by the United States Constitution," and he argued that due process principles required such balancing. The trial court (Judge Thomas Hart) admitted the evidence, stating that the evidence "is important to explain how this all came about," that it would instruct the jury to "only use that other information to help explain how we got to where we are," and that it would not let the parties "run crazy with any of the details about any of that [other-acts] stuff." The jury found defendant guilty.
Held: Reversed and remanded for a new trial (DeVore, J.). [1] The trial court erred by not conducting, on the record, balancing under OEC 403, as required by the Due Process Clause. As a result, it erred under *State v. Williams*, 357 Or 1 (2015), by admitting the other-acts evidence. [2] Although the court remanded for a new trial, it noted that the state could reassert on remand the same arguments supporting admission of the evidence, including the argument that "the prior sexual contacts were admissible to show the defendant's sexual predisposition toward this

particular victim.…[O]ur decision permits the trial court, in the first instance, to consider the probative value of such evidence when balancing under OEC 403."
http://www.publications.ojd.state.or.us/docs/A156547.pdf

Notes: [a] The Court of Appeals stated that it "need not resolve whether the evidence was relevant under either (or both) OEC 404(3) or OEC 404(4) because, regardless of the theory of relevance, the court was required to balance in this case" and erred by failing to do so. [b] The state will petition for review in this case. In this case and in others pending before the Supreme Court, the state is arguing that, in cases in which the alleged error is the trial court's failure to do balancing before admitting the evidence, that the proper remedy is *not* a remand for a new trial but rather a remand only for the trial court, in a *post hoc* hearing, to conduct the necessary balancing. Only if the court concludes that the evidence is inadmissible would the defendant be entitled to a new trial.

State of Oregon v. Joshua Turnidge: This is a death penalty case where this defendant and his co-defendant, his father, were convicted of multiple counts of aggravated murder and other felonies arising from their involvement in a bombing at a bank that killed two law enforcement officers and injured one other officer and a bank employee. In its case, the state offered evidence that many years prior to the instant offense the defendant had called in a bomb threat to a different bank in the same city. The court ultimately affirmed the admissions of the evidence under 404(3).
(Pages 427-445 provide a good discussion of "Other Acts" evidence.)

Some takeaways (from the Court's opinion):

State v. Williams answered one question: that propensity evidence CAN be admitted in a child sex abuse case under 404(4) if Due Process permits.

There are two unanswered questions from *Williams*:

1) The extent to which PBA evidence can be admitted SOLELY for propensity purposes in criminal cases OTHER than ones involving child sex abuse;

2) Whether in criminal cases in which evidence is admitted for propensity purposes, Due Process requires traditional 403 balancing OR requires a greater sharing of unfair prejudice (than 403 would require) in order to exclude otherwise probative evidence.

Turnidge did not resolve these questions because:

1) This case does not involve child sex abuse;

2) *Turnidge* does not present the question whether the contested evidence could have been admitted SOLELY for propensity purposes, in reliance on 404(4). "The state's theory of admission 'falls squarely within the nonexclusive list of non-propensity purposes for which PBA evidence historically has been admissible, which are largely codified in OEC 404(3)."

The state's theory of admission was to show, among other things, that defendant had a plan to commit at least some of the charged crimes, as demonstrated by an earlier trial run involving both calling in a threat to a bank teller and observing the police response to the threat.

The Court does a lengthy analysis of *Leistiko*, distinguishing that case from *Turnidge* based on the types of plans ("spurious" vs. "true") involved in each. Because the court determined that the admitted evidence was relevant to proving a "true plan," it concluded that it was properly admitted under 404(3). It also determined that the balancing under 403 was (necessary and) sufficient. And that because the State had not offered the evidence based on a "doctrine of chances" (intent or absence of mistake) theory, the trial court did not err in not providing the jury with a *Leistiko* limiting instruction.

http://www.publications.ojd.state.or.us/docs/S059155.pdf

EVIDENCE—OTHER BAD ACTS: Prior-acts evidence offered to prove motive need not be physically similar to the charged act to be admissible.

INSTRUCTIONS: A "*Leistiko* instruction"—*i.e.*, an instruction that the jury may not consider prior-acts evidence without first determining that defendant committed the charged act—is required only when other-acts evidence is offered to prove intent under a "doctrine of chances" theory.

State v. Clarke, 279 Or App 373, __ P3d __ (2016) (Deschutes) (AAG Patrick Ebbett). Defendant beat his roommate to death with a baseball bat in a jealous rage over the victim's relationship with defendant's ex-girlfriend. He was charged with murder. Before trial, the state filed a motion *in limine* seeking to present prior-acts evidence:

> (1) that seven to 10 days before the crime defendant had discussed killing the victim with a baseball bat, and (2) about a month before the murder, he sat on the porch of his home holding a baseball bat while ruminating about killing his ex-girlfriend. Defendant objected to the admission of that evidence, disputing its relevance to his motive, arguing that it was inadmissible under *State v. Johns*, 301 Or 535 (1986), and that its probative value was outweighed by the potential for unfair prejudice. The trial court (Judge Stephen Forte) overruled defendant's objection. Defendant was found guilty. On appeal, he argued that the trial court erred by failing to give a "*Leistiko* instruction" to the jurors—that they could not consider the evidence to prove defendant's intent unless they first found that he committed the charged act. He also argued that the trial court erred by admitting the evidence without first balancing under OEC 403, and that the evidence of his ruminations about killing his ex-girlfriend was irrelevant under OEC 401.

Held: Affirmed (Sercombe, P.J.). [1] A *Leistiko* instruction is required only when other-acts evidence is relevant to prove intent under the "doctrine of chances," as set forth in *State v. Johns*. [2] The evidence that defendant threatened the victim with a bat was motive evidence relevant to prove that he committed the act (which, in turn, is probative of intent), so the *Leistiko* instruction is inapposite. [3] The trial court properly balanced under OEC 403 the evidence that defendant threatened the victim with a bat.

[4] Prior-act evidence offered to prove motive—unlike evidence offered to prove intent under a doctrine of chances theory—need not be physically similar to the charged act.
[5] The evidence that defendant ruminated about killing his ex-girlfriend while holding a bat was also relevant to prove motive because it tended to show that he was angry and homicidal about the demise of his relationship with his ex-girlfriend. [6] Although the trial court did not balance under OEC 403 the evidence that defendant ruminated about killing his ex-girlfriend, defendant failed to preserve an argument that balancing was required, and he did not request plain-error review. [7] In any event, any error in failing to balance was harmless because the testimony was cumulative of other evidence that defendant fantasized about killing his ex-girlfriend.
http://www.publications.ojd.state.or.us/docs/A152453.pdf

EVIDENCE—OTHER ACTS: Trial court erred by failing to conduct OEC 403 balancing before admitting evidence of defendant's prior conduct toward the victim; the error required a new trial.
State v. Holt, 279 Or App 663, __ P3d __ (2016) (Wasco) (AAG Doug Petrina).
Defendant was charged with two counts of third-degree sexual abuse. Before trial, he filed a motion *in limine* to exclude evidence that he had previously kissed the victim, snuggled with her, lain with her on the couch, talked to her on the phone, and asked her for photographs. In his written motion, defendant noted that he was relying on OEC 403.
At the hearing, where the state argued the evidence was admissible to show defendant's sexual predisposition to the victim, defendant did not expressly reiterate his request for OEC 403 balancing. The trial court (Judge Janet Stauffer) denied defendant's motion and admitted the evidence without conducting OEC 403 balancing. Defendant was convicted.
Held: Reversed and remanded for a new trial (Duncan, P.J.). [1] Defendant adequately preserved his argument for balancing under OEC 403 by raising the issue in his written motion, even though he did not reiterate that argument at the hearing on his motion. [2] The trial court erred in failing to conduct OEC 403 balancing, which violated defendant's right to due process. [3] Because the error was not harmless beyond a reasonable doubt, "we must reverse and remand for a new trial."
http://www.publications.ojd.state.or.us/docs/A154052.pdf

EVIDENCE—OTHER ACTS, *State v. Tena*, 281 Or App 57 (2016)

Facts: Defendant was charged with Assault against his girlfriend. Pre-trial, the State moved to admit evidence of Defendant's prior assaults against two ex-partners on two theories: Doctrine of Chances and Hostile Motive, under 404(3). (This case was tried prior to *State v. Williams*). The Court held a pre-trial motion hearing. The State asked the Court to defer ruling until the State had proven, at trial, that it had established that the defendant had committed the current offense. After it presented evidence at trial, the State requested the Court's ruling on the PBA motion. The Court granted the State's motion and allowed the evidence of past assaults under *Johns* (Doctrine of Chances) and *Moen* (Hostile Motive).

The Defendant was convicted.

On Appeal, Defendant argues that the trial court erred in admitting the evidence under 404(3) and that, even if the evidence was admissible, the trial court plainly erred by failing to give a proper *Leistiko/Pitt* instruction.

THEN, after Defendant filed his opening brief, the Supreme Court issued its ruling in *Williams.* Defendant filed a supplemental brief arguing that the trial court committed plain error by admitting the evidence of the prior two assaults without balancing (under 403).

Held: The COA only addresses the Defendant's challenge to the admission of evidence under *Moen* and AFFIRMS the conviction.

The Defendant had argued that the trial court errored by not applying the *Johns* six-part test to the hostile motive analysis (under Moen). In *Moen* case, the court DID apply the *Johns* test. However, more recently, in *Turnidge*, the Supreme Court overruled that aspect of *Moen*, "[t]he analytical framework that *Johns* announced was specific to the 'doctrine of chances' relevancy theory at issue in that case (*Moen*)." The *Turnidge* court explained that "[p]rior bad acts evidence can be relevant to a defendant's intent on theories other than the doctrine of chances."

Because the evidence (in the current case) was admitted under a Hostile Motive theory (and not Doctrine of Chances), the trial court did NOT err in not providing an adequate *Leistiko/Pitt* instruction. Further, the trial court did NOT commit plain error when it did not do a balancing analysis under OEC 403. In Turnidge, the court stated, "if a trial court determines that prior bad acts evidence is relevant to a non-propensity purpose under OEC 404(3), the court, *on a proper motion*, must weigh the probative value of the evidence against its potential to unduly prejudice the defendant." The Defendant, at trial, did not request such balancing to occur.

http://www.publications.ojd.state.or.us/docs/A154735.pdf

EVIDENCE—OTHER ACTS*: State v. Johnson*, 281 Or App 521 (2016)

http://www.publications.ojd.state.or.us/docs/A154709.pdf

Johnson is a case that was decided on the same day as *Tena (see below).* In *Johnson*, the defendant was convicted of crimes associated with her crashing her car into the victim's parked car. At trial, the state presented evidence that prior to the collision, defendant made threats to the victim over the phone. On appeal, the defendant challenges the court's denial of her motion to exclude the other acts evidence. As in *Tena*, the court in *Johnson* rejected the defendant's arguments that the other acts evidence did not pass the *Johns/Moen* test. The court stated, "*Tena* establishes that, following *Turnidge,* evidence of "hostile motive" need not meet the *Johns* test."

EVIDENCE—IMPEACHMENT: In prosecution for domestic assault, the trial court properly precluded defendant from impeaching the victim with evidence of a prior allegedly false accusation against him.
State v. Taylor, 275 Or App 962, __ P3d __ (2015) (Washington) (AIC Jennifer

Lloyd). Based on an incident of domestic abuse, defendant was charged with fourth degree assault. At trial, defendant sought to cross-examine the victim (his wife) with information in a police officer's handwritten "application for 72-hour detention for evaluation and treatment." That document indicated that the victim had accused defendant of assaulting her and pushing her into a window, but that the responding officers had seen a broken window but no evidence of any marks or injuries. The application contained the officer's conclusion that "there was no fight." Following the incident, no arrest was made and the victim was taken to a hospital for a mental-health evaluation and treatment. Defendant claimed that he should be entitled to impeach the victim with the prior accusation under *State v. LeClair*, 83 Or App 121 (1986), which held that Art. I, § 11, allows a defendant to cross-examine a victim about other accusations in three circumstances: (1) when the victim has recanted the accusations;(2) when the defendant demonstrates to the court that those accusations were false; or (3) there is some evidence that the victim has made prior accusations that were false, unless the probative value of the impeachment is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay. Defendant did not argue that the victim had recanted, but he argued that the officer's application was evidence that the prior accusations were false. The trial court (Judge James Fun) concluded that, although the application constituted *some* evidence that the accusation was false, the court was not convinced that the accusation was false. The court then excluded the evidence after weighing the probative value against the possible prejudice from the impeachment and concluded that the evidence would "not be helpful to the jury" because it would "ask the jury to decide the truth or falsity of the occurrence of the prior events" based on no evidence other than the application. Defendant was convicted at trial, and appealed. *Held*: Affirmed (Hadlock, J.). [1] Although the evidence does not fit the first or second *LeClair* category—*viz.*, that the victim recanted or that the defendant has proved the falsity of the accusation—it does fit the third: the application by the officer constituted *some evidence* that the victim had made a prior false accusation against defendant. [2] In order to admit such evidence, the court must balance the probative value against the risk of prejudice. The court did so here, and its evaluation was not an abuse of discretion: it was entitled to exclude the evidence based on its conclusion that it would create an "unhelpful trial within a trial." Moreover, because the prior incident occurred out of state and the officer witnesses were not present at trial, and because defendant was the only other witness to the events and could not be compelled to testify, the court reasonably could conclude that the risk of prejudice would outweigh the probative value of the impeachment evidence. http://www.publications.ojd.state.or.us/docs/A154655.pdf

EXPERT WITNESS TESTIMONY

EXPERT WITNESS TESTIMONY: DUII—DRE EVIDENCE: Trial court correctly permitted DRE officer to offer non-scientific expert opinion, based on an incomplete DRE protocol, that defendant drove under the influence of a CNS depressant.
CONFESSIONS—MIRANDA: Trial court correctly denied motion to suppress; officer did not question defendant in compelling circumstances, so *Miranda* warnings were not required.
State v. Downing, 276 Or App 68, __ P3d __ (2016) (Marion) (AAG Susan Howe). Shortly after taking some Ativan, defendant drove, jumped the curb right outside the Marion County Community College/Winema High School campus and struck three high-school students, killing two and seriously injuring the third. She was charged with first-degree

manslaughter, second-degree assault, and DUII, among other crimes. She moved to suppress incriminating statements that she made to police at the scene of the crime, arguing that she was questioned in compelling circumstances without receiving *Miranda* warnings. The trial court (Judge Dennis Graves) denied the motion. At the close of the case, the trial court instructed the jury on the meaning of "extreme indifference to the value of human life," an element of both the assault and manslaughter charges. The instruction told the jury, in part, that in deciding whether defendant acted with extreme indifference, it "should consider all the circumstances which reflect on her concern or lack of concern for her social and legal responsibilities." The jury found defendant guilty.

Held: Convictions for manslaughter and assault reversed and remanded; otherwise affirmed (Sercombe, P.J.). **Motion to Suppress**. [1] The trial court correctly denied the motion to suppress, because defendant was not in custody or compelling circumstances when she was questioned by a police officer at the scene of the crime. The interrogation was limited in scope and duration, and the questioning—which took place in the officer's patrol car with defendant's consent, to get her away from a large group of people at the scene and to protect her from the rain—imposed only a minimal level of restraint on defendant's freedom of movement. Although the officer asked defendant if she had been drinking or taking medication, he did not do so in a coercive or intimidating manner.

Motion for Judgment of Acquittal. [2] The trial court correctly denied defendant's motion for judgment of acquittal with respect to the sufficiency of evidence that she acted with "extreme indifference to the value of human life." The state presented evidence that she drove despite feeling impaired and after taking a drug that she had been warned could affect her ability to safely operate a vehicle. She had engaged in erratic and highly dangerous driving only moments before she struck the victims. That evidence, as well as comments that she made after the accident while in the presence of the seriously injured victims, all supported an inference that defendant's conduct showed extreme indifference to the value of human life—*i.e.*, "extraordinary lack of concern that her actions might cause the death of a human being."

Jury Instruction. [3] "Extreme indifference to the value of human life is a state of mind that is both more blameworthy than plain recklessness and that specifically relates to whether one cares about the death of another human being. [4] The trial court's instruction [did] not describe either of those characteristics." Instead, "the court's instruction that extreme indifference 'displays a lack of concern for social and legal responsibility' and that the jury should 'consider all the circumstances which reflect on her concern or lack of concern for her social and legal responsibilities'" could have led the jury to incorrectly find defendant guilty based on recklessness alone.

DRE Testimony. [5] The trial court did not err when it permitted a DRE officer to testify as a non-scientific expert that, based on his training and experience, defendant appeared to be under the influence of a central-nervous-system depressant after the accident. Although the officer did not complete the full 12-step DRE protocol, individual portions of the protocol are admissible if the state establishes a sufficient foundation, which the state did here.

http://www.publications.ojd.state.or.us/docs/A151627.pdf

Note: The COA's ruling will enable the state to determine whether to re-try defendant or whether to ask the trial court to enter convictions for lesser-included offenses of second-degree manslaughter and third-degree assault.

Practice Tip: The court noted that the jury instruction at issue appeared to be taken from a footnote in *State v. Boone*, 294 Or 630 (1983), which was *dictum* and was taken out of context. This case illustrates the risk of using quotes from appellate cases as the basis for jury instructions.

EXPERT WITNESS TESTIMONY: Trial court correctly excluded as inadmissible hearsay details of study referenced by defense expert because the defense did not offer it to explain the expert's opinion, but rather as direct evidence. / Trial court correctly excluded under OEC 609-1(2) another expert's testimony that her review of a child-abuse interviewer's testimony suggested bias, because the child-abuse interviewer fully admitted during her testimony the facts that demonstrated the claimed bias.

State v. Thomas, 279 Or App 98, __ P3d __ (2016) (Columbia) (AAG Doug Petrina). Defendant was charged with four counts of first-degree sodomy and four counts of first-degree sexual abuse for sexually assaulting a boy. At trial, a state's witness, Lundquist, recounted her interview of the victim at the Amani Center. She admitted on cross-examination that he had described implausible events that were collateral to his accusations against defendant and that she had not followed up with him on those statements. A defense expert, Dr. Bourg, attempted to testify that her review of Lundquist's interview of the victim suggested interviewer bias, due to Lundquist's failure to follow up on his implausible statements. The prosecutor objected, and the trial court (Judge Ted Grove) precluded Dr. Bourg from so testifying. Defendant then called Dr. Reisberg to testify "how false memories are created" and "how traumatic events are remembered." When defense counsel asked Dr. Reisberg to describe the details of a VCUG study, but the prosecutor objected that the details were inadmissible hearsay, and the trial court sustained the objection and precluded that testimony. The jury found defendant guilty.

Held: Affirmed (DeVore, J.). [1] The trial court properly excluded the details of the studies. [1] The details of the studies the witness referenced would be inadmissible hearsay under OEC 801(3) if offered for their truth, and "OEC 703 does not itself authorize the admission of otherwise inadmissible evidence." [2] "In this case, the details of the VCUG process or studies would not have helped explain or provide the necessary foundation for any opinion that Reisberg was actually asked to offer."

Distinguishing McCathern v. Toyota Motor Corp., 332 Or 59, 70 (2001). [2] The trial court properly excluded Dr. Bourn's testimony under OEC 609-1(2): Although "trial courts must give wide latitude to the admission of bias evidence, particularly in criminal cases," that wide latitude "does not apply to the admission of extrinsic evidence where the witness fully admits the facts claimed to show her bias. When the facts that might show bias have already been fully admitted, extrinsic evidence is inadmissible as a matter of law." Under OEC 609-1(1), evidence of Lindquist's conduct in the interview might have been admissible as conduct that at least could have had a mere tendency to show the bias of Lindquist as a trial witness. "Yet, insofar as the court also based its ruling on

Lindquist's trial testimony and on defendant's ability to uncover prospective bias through cross-examination, we conclude that the evidence was correctly excluded under OEC 609-1(2). As noted, OEC 609-1(2) provides that, 'if a witness fully admits the facts claimed to show the bias or interest of the witness, additional evidence of that bias or interest shall not be admitted."
http://www.publications.ojd.state.or.us/docs/A156080.pdf

JURY INSTRUCTIONS

JURY INSTRUCTIONS: Trial court plainly erred by failing to instruct the jury that had to find that defendant knowingly subjected to forcible compulsion, but the error was harmless.
SENTENCING—FEES: Trial court plainly erred by imposing $8,000 attorney fee based on defendant's past work history, especially in light of the substantial prison sentence he faced.
State v. Belen, 277 Or App 47, __ P3d __ (2016) (Marion) (AAIC Erin Galli).
Defendant was charged with first-degree sodomy by forcible compulsion. The court did not instruct the jury that it had to find that he subjected the victim to forcible compulsion knowingly. He did not object or take exception. The jury found him guilty. At sentencing, the court (Judge Lindsay Partridge) imposed a 202-month sentence and ordered defendant to pay $8,000 in attorney fees. Defendant appealed, challenging both the failure to instruct and the imposition of attorney fees. In response, the state argued that the failure to give the instruction was harmless and that the attorney fee award was proper because the record contains some evidence of defendant's work history.
Held: Fee award reversed; otherwise affirmed (Duncan, J.). [1] The trial court "plainly erred by failing to instruct the jury that it had to find that defendant knowingly subjected the victim to forcible compulsion[.]" The evidence did not support a plausible inference that defendant made a strategic choice not to object to the failure to give the instruction. [2] But the error was harmless because there was little likelihood that it affected the verdict. To find defendant guilty, the jury must have credited the victim's testimony, and that testimony established that defendant knowingly used forcible compulsion. [3] The sentencing court plainly erred in imposing a substantial sum of attorney fees. Evidence that defendant worked two jobs in the past did not show that, at the time of sentencing, he possessed sufficient assets to satisfy an award of fees under
ORS 151.505(3) and 161.655(4), particularly when the court imposed a lengthy prison term.
http://www.publications.ojd.state.or.us/docs/A154000.pdf

JURY INSTRUCTIONS: Where defendant was charged with only one count of fourth-degree assault but the state presented evidence of two distinct assaults that were separated by time and place, and each of which caused a distinct physical injury, and the prosecutor argued to the jury that either occurrence could support a conviction for fourth-degree assault, defendant was entitled to a *Boots* instruction.
State v. Teagues, 281 Or App 182, __ P3d __ (2016) (Lane) (AAG Susan Yorke). Defendant was charged one count of fourth-degree assault, among other crimes, based upon his abuse of his then-girlfriend over the course of an evening. A witness testified that she saw defendant push the victim to the ground on a driveway, causing her to fall and scrape her knee. Sometime later (long

enough that a third-party witness had fallen asleep after the knee incident and was awoken by the renewed fighting), defendant strangled the victim, impeding her breathing and leaving a mark on her neck. At the close of the evidence, defendant requested that the state be required to elect which of the two incidents constituted the assault or, in the alternative, that the trial court provide a concurrence instruction. The trial court (Judge Cynthia Carlson) denied that motion. In closing, the state argued that either incident, and either corresponding injury, was sufficient to establish fourth-degree assault. The jury found defendant guilty.
Held: Conviction for fourth-degree assault reversed and remanded; otherwise affirmed (Duncan, P.J.). The trial court erred in failing to provide a concurrence instruction. [1] Either an election or a concurrence instruction—*i.e.*, a *Boots* instruction—is required when the state charges a defendant with one count of a crime, but presents evidence of more than one occurrence of that crime, to ensure that the requisite number of jurors agree on which incident constituted the crime. [2] The record contained evidence of two "temporally, spatially, and substantively distinct occurrences" of fourth-degree assault. The state therefore should have been required to elect one of the two occurrences, or the jury should have been instructed that it had to agree upon the factual concurrence that constituted the assault.

http://www.publications.ojd.state.or.us/docs/A155051.pdf

RESTITUTION

RESTITUTION: State must put on evidence to demonstrate that charges on hospital bill to treat injuries caused by defendant were "reasonable"; it cannot rely on the bill as evidence of reasonableness.
State v. McClelland, 276 Or App 138, __ P3d __ (2016) (Coos).
Defendant appealed the trial court's restitution award, which followed defendant's convictions for fourth-degree assault and interfering with a police officer.
He argued that the trial court erred by ordering restitution based solely on a hospital bill for the victim's knee surgery, without further testimony or evidence that the charges were reasonable. The state argued that although medical bills alone are insufficient to support restitution in *civil* cases, such evidence is sufficient in *criminal* cases because the criminal restitution statutes merely require "evidence of the nature and amount of the damages."
See ORS 137.106(1)(a). The trial court (Judge Michael Gillespie) agreed with the state and ordered defendant to pay restitution in the amount of the hospital bill.
Held: Remanded for resentencing; otherwise affirmed (Shorr, J.).
[1] ORS 137.106(1)(a) allows criminal restitution for "the full amount of the victim's economic damages." The criminal restitution statute, ORS 137.103(2), defines "economic damages" based on a definition of that term in a civil statute, ORS
31.710(2)(a), which includes a "reasonableness" requirement for bills for medical and hospital services. Thus, civil cases holding that medical bills alone do not establish reasonableness apply to criminal restitution awards for hospital or medical services.
[2] A hospital bill alone is insufficient proof for a criminal restitution award of "reasonable" hospital or medical services; additional testimony or evidence is required to establish the reasonableness of such services. [3] Here, the trial court erred by relying on a medical bill and "common sense" to conclude that the relevant charges were reasonable.
http://www.publications.ojd.state.or.us/docs/A157254.pdf

RESTITUTION: *State v. Kirschner* *(2/19/16)*

Facts: The Defendant (and co-defendant) broke into the victim's home and, when confronted by the victim, fled. The Defendant was found a short distance away with drugs and a concealed weapon. He was charged w/ multiple crimes but ultimately pleaded guilty to a couple of drug possession charges and carrying a concealed weapon.

The state asked the court to impose restitution for the damage to the victim's home, the time the victim took off work to make those repairs, and victim's lost wages for appearing for trial and for the restitution hearing. The state subpoenaed him for both hearings. The defendant subpoenaed him for the restitution hearing. The court imposed all requested restitution. The Court of Appeals affirmed. The Supreme Court affirms, as well.

The Court's ruling explains that a victim's costs (including lost wages) may be awarded as "economic damages" if the state proves that the costs "resulted from" the defendant's criminal activity and were reasonably foreseeable.

http://www.publications.ojd.state.or.us/docs/S063069.pdf

SENTENCING

SENTENCING—OUT OF STATE CONVICTIONS: *State v. R-Robinson*

Under OAR 213-004-0011(1), an out-of-state adult conviction may be used to classify an offender's criminal history only where the elements of the offense would have constituted a felony or Class A misdemeanor under Oregon law.

Facts: Defendant was convicted of an Assault IV/Felony (constituting DV) in Oregon. During sentencing, the State argued that Defendant's two assault convictions from Colorado should count towards calculating Defendant's criminal history score. The court agreed, found the Defendant to be a 6-D, and sentenced him accordingly. On appeal, the COA found that Colorado's assault statute is broader than Oregon's (Colorado's statute includes language to include "impairment of physical *or mental* condition." Oregon's assault statute only covers physical, not mental, injury. Additionally, there was no evidence on the record to support a finding that Defendant's Colorado convictions involved impairment of physical condition so that it would be equivalent to Oregon's. Remanded for sentencing.

http://www.publications.ojd.state.or.us/docs/A157373.pdf

SENTENCING—PROBATIONARY DISPOSITIONS: Special probation condition was impermissibly overbroad insofar as it prevented defendant from "being" anywhere in the county north of a particular point, to avoid contact with his stalking victim.
State v. Hurita, 276 Or App 58, __ P3d __ (2016) (Lincoln) (AAG Michael Shin).
Defendant pleaded guilty to charges misdemeanor stalking and second-degree criminal trespass for repeatedly calling the victim and going to his residence on two occasions. At sentencing, the

court (Judge Thomas Branford) imposed special probation conditions that prohibited defendant from knowingly having contact with the victim and prohibited from entering the part of the county where he lived: "Do not be anywhere in Lincoln County North of Cape Foulweather." The court stated that the latter condition was meant to help her avoid any contact with the victim. *Held*: Remanded for sentencing; otherwise affirmed (Schuman, S.J.). The disputed probation condition prohibits defendant from being in a large geographical area that includes a major shopping center and the only major north-south road through the county. Because the condition that prohibits defendant from having contact with the victim sufficiently ensures that the two will not have contact, the disputed condition is superfluous and overbroad.
http://www.publications.ojd.state.or.us/docs/A155875.pdf