

PRIOR BAD ACTS LIST

EVIDENCE—OEC 403 / APPEALS—REMEDY: Because trial court did not conduct on-the-record balancing required by OEC 403, case was remanded for the trial court to conduct the balancing, and then determine whether a new trial is necessary or appropriate; on remand, defendant is not limited to making the same OEC 403 arguments that he previously made in the trial court.

State v. Davis, 288 Or App 451, __ P3d __ (2017) (*per curiam*) (Multnomah) (AAG Dave Thompson). At trial, defendant, who was charged with promoting prostitution and witness tampering, objected to evidence of two recordings found on his cell phone in which he is heard rapping about being a pimp. The trial court (Judge John Wittmayer) admitted the evidence but did not conduct on-the-record balancing under OEC 403, although defendant specifically argued that OEC 403 required exclusion of the evidence. The jury convicted defendant of the charged offenses. Defendant appealed, assigning error to the trial court's decision to admit the evidence, arguing, among other things, that the trial court erred by admitting the evidence without conducting the required OEC 403 balancing.

Held: Reversed and remanded. [1] In light of the Supreme Court's recent decisions in *State v. Baughman*, 361 Or 386 (2017), and *State v. Mazziotti*, 361 Or 370 (2017), the proper disposition of this appeal is a remand to the trial court to conduct the omitted OEC 403 balancing, and to determine whether, in view of the outcome of that balancing, a new trial is necessary or appropriate. [2] On remand, defendant is not limited to making the same arguments under OEC 403 that had previously made to the trial court. "OEC 403 balancing under *State v. Mayfield*, 302 Or 631 (1987), requires a trial court to 'make a ruling to admit all the evidence, to exclude it all or to admit part of it.' *Id.* at 647. Thus, necessarily, a trial court must consider whether to take something other than an 'all or nothing' approach to admitting evidence when it conducts its OEC 403 inquiry. Beyond that, *Baughman* and *Mazziotti* both contemplate that each party may seek to present new arguments on remand, and otherwise advise that the trial court is in the best position to determine the appropriate scope of the proceedings on remand."

<http://www.publications.ojd.state.or.us/docs/A159471.pdf>

EVIDENCE—PRIOR BAD ACTS: Because in conducting OEC 404(3) analysis trial court did not explain the theory by which other-acts evidence was relevant, case was remanded for trial court for trial court to "provide an explanation."

State v. Roberts, 288 Or App 145, __ P3d __ (2017) (Multnomah) (AAG Dave Thompson). For years, defendant physically and sexually abused his disabled daughter. The state prosecuted him for raping, sodomizing, sexually abusing her when she was an adult. Each of the rape, sodomy, and sexual abuse charges alleged that defendant had subjected the victim to "forcible compulsion." That allegation relied on the description of events that the victim had given others shortly after calling 911 to report the incident—

i.e., that defendant had grabbed her, pushed her onto his bed, pulled down her pants, and put his penis into her vagina and anus. The victim further told the grand jury that, during the incident, she had cried and asked defendant to stop, but that he had continued to force himself on her. By trial, the victim's description of events had changed—she testified that she and defendant had engaged in consensual sexual intercourse while she was under the influence of alcohol and various medications. Anticipating that she might change her account, the state had moved *in limine* for a ruling allowing the state to introduce evidence under OEC 404(3) that would refute her characterization of the sexual activity as consensual—*i.e.*, evidence that defendant, 13 years earlier, had “rammed” a 40-ounce bottle inside the victim's vagina so forcefully that she began to hemorrhage, and that on another occasion he had burned the victim with a cigarette “on top of” her vagina. The trial court (Judge Alicia Fuchs) allowed the evidence over defendant's relevance objection and his further objection under OEC 403. In granting the state's motion, the court did not expressly adopt a specific theory of relevance or expressly conduct OEC 403 balancing. At trial, the court gave the jury a limiting instruction restricting use of the state's other-act evidence to evaluating the victim's testimony and her state of mind at the time of the alleged incident, and prohibiting use of the evidence to draw an inference that defendant had a propensity to commit sex crimes against the victim. The jury ultimately convicted defendant of some of the charges and acquitted him of others. Defendant appealed, assigning error to admission of the other-act evidence over the OEC 403 objection.

Held: Vacated and remanded (DeHoog, J.). Because the record is unclear as to “*how* the trial court thought that the prior bad acts were probative, we cannot assess whether the trial court abused its discretion in concluding that their probative value was not substantially outweighed by the potential for unfair prejudice.” “It is not sufficient for purposes of our review to know that the trial court concluded that the challenged evidence was relevant to the issue of consent, if, in fact, that was the court's conclusion. Instead, the court was required to assess the manner and extent to which the evidence tended to prove something about consent by, for example, suggesting that the victim considered anything less than torture to be ‘consensual.’ Only then could it proceed to balance that probative value (and the state's corresponding need for the evidence to prove that point) against the potential for that evidence to unfairly prejudice defendant, as required under OEC 403.” “Thus, despite defendant's apparent concession on appeal that the evidence was relevant, this case presents a rare instance in which we must remand the matter to the trial court so that it can explain which, if any, of the state's relevance arguments it accepts and how it views the evidence to be probative of any particular point. Without that understanding, we are unable to evaluate whether the court abused its discretion in determining that the evidence was not unduly prejudicial in light of that probative value.”

<http://www.publications.ojd.state.or.us/docs/A157462.pdf>

Note: This decision reflects the increasing concern the Court of Appeals has with the absence of an express explanation by the trial court regarding its thinking in admitting

evidence over an OEC 403 more-prejudicial-than-probative objection. Just how much of an explanation must appear on the record to enable meaningful appellate review of an OEC 403 ruling should become clearer once the Supreme Court decides *State v. Anderson*, S064633 (argued and submitted Sept. 22, 2017). But until then, prosecutors facing a dual objection based on OEC 401 and OEC 403 should do the following, so as to avoid a remand like the one in this case: (1) ensure a clear record is made on the trial court's ruling on the theory of relevance for the proffered evidence, and (2) ensure that the court, in admitting the challenged evidence, makes an equally clear record on why the evidence is not unduly prejudicial. Also, (3) if the court admits the evidence only for a limited purpose, ensure that an appropriate limiting instruction is given.

APPEALS—APPROPRIATE DISPOSITION: Under *State v. Baughman*, the appropriate remedy for the trial court's failure to balance under OEC 403 is a limited remand, rather than a new trial.

State v. Brown, 286 Or App 714, __ P3d __ (2017) (Multnomah) (AAG Doug Petrina). The Court of Appeals previously held in this case that the trial court (Judge Edward Jones) “erred by admitting other acts evidence without first weighing the risk of unfair prejudice against the probative value of that evidence, pursuant to OEC 403,” and it reversed and remanded for a new trial. 284 Or App 671 (2017). The state filed a petition for reconsideration based on *State v. Baughman*, 361 Or 386 (2017). *Held*: Reconsideration granted; disposition modified (Linder, S.J.). [1] “Under *Baughman*, the appropriate remedy for the trial court's failure to balance under OEC 403 is a limited remand, rather than a new trial.” [2] Defendant's arguments in support of a new trial either are not preserved or have no merit.

EVIDENCE— OTHER BAD ACTS: In prosecution for robbery, evidence that defendant had been convicted of three prior robberies, without any evidence of the circumstances surrounding those robberies, was improper propensity evidence.

State v. Jones, 285 Or App 680, __ P3d __ (2017) (Multnomah) (AAG Rebecca Auten). Defendant approached the manager of a pizza restaurant, told him “I'm here to rob you,” and reached toward his waistband. The manager pulled out a gun, and defendant said, “I want to commit suicide, just shoot me.” Defendant was charged with second-degree robbery, ORS 164.405(1)(a). At trial, he contended that he lacked the requisite intent because he was depressed and suicidal on the day of the robbery. To rebut that defense, the state offered evidence of that he had been convicted of robbery three times before, which the state argued was relevant for the nonpropensity purposes of proving intent, motive, plan, and absence of mistake or accident. Defendant argued that, because the state had not offered any evidence of the circumstances surrounding the prior robberies, evidence of those robberies was not relevant for a nonpropensity purpose. The trial court (Judge Kelly Skye) admitted the evidence, and defendant was found guilty. After trial, the Supreme Court issued *State v. Williams*, 357 Or 1 (2015), holding that, under OEC 404(4), the state may offer other-acts evidence for propensity purposes in

some circumstances. On appeal, the state argued that the evidence was admissible under OEC 404(4).

Held: Reversed and remanded (Duncan, P.J.). The trial court erred by admitting the prior-act evidence. [1] “[W]hen presented with an objection to other acts evidence, a court should first analyze any proffered nonpropensity purposes under OEC 404(3).”

Here, the relevance of defendant’s prior convictions depends on an impermissible character inference. “That is, the relevance theory, for evidence of the convictions alone, is based on reasoning that, because defendant has previously been convicted of robberies, he has a propensity for committing robberies, which makes it more likely that he intended to commit another robbery at the time of the charged acts. In order to establish that defendant’s prior conduct was relevant for one of the OEC 404(3) purposes the state identified below—to provide evidence of intent, absence of mistake or accident, plan, or motive—the state would have had to present more evidence about the prior conduct.”

The court declined to consider the state’s argument that the evidence was admissible for propensity purposes under OEC 404(4), because the state did not raise that argument in the trial court.

<http://www.publications.ojd.state.or.us/docs/A155326.pdf>

APPEALS—REMEDY / EVIDENCE—OTHER ACTS EVIDENCE: Other-acts evidence admitted under OEC 404 is subject to ordinary OEC 403 balancing. But the remedy for the trial court’s error in failing to balance under OEC 403 is a limited remand.

State v. Baughman, 361 Or 386, __ P3d __ (2017) (Clatsop) (AAG Doug Petrina). **(Child Sex Abuse case)**

The issue in this case is which balancing test is the court required to use when making a determination of admissibility of other acts evidence pursuant to OEC 404 (3) or (4). The court determined that the correct standard is that set forth in OEC 403:

“In this case we explain that, in a criminal action, when the state proffers evidence of uncharged acts, either to prove a defendant’s propensity to commit charged crimes under OEC 404(4), or for a non-propensity purpose under OEC 404(3), and a defendant objects to the admission of that evidence, the trial court must conduct balancing under OEC 403, according to its terms, to determine whether the probative value of the challenged evidence is substantially outweighed by the danger of unfair prejudice.”

<http://www.publications.ojd.state.or.us/docs/S064086.pdf>

APPEALS—REMEDY / EVIDENCE—OTHER ACTS EVIDENCE: Other-acts evidence admitted under OEC 404 is subject to ordinary OEC 403 balancing. But the remedy for the trial court’s failure to balance under OEC 403 is a limited remand.

State v. Mazziotti, 361 Or 370, __ P3d __ (2017) (Lane) (AAG Doug Petrina). **(Reckless Driving and Reckless Endangering case)**

<http://www.publications.ojd.state.or.us/docs/S064085.pdf>

APPEALS—HARMLESS ERROR / EVIDENCE—OTHER ACTS EVIDENCE: Admission of other-acts evidence without OEC 403 balancing was harmless because defendant failed to offer a meritorious argument that could persuade a trial court to exclude the evidence.

State v. Zavala, 361 Or 377, __ P3d __ (2017) (Lincoln) (SG Benjamin Gutman and AAG Doug Petrina). Defendant was charged with sexually abusing the two daughters of his then-girlfriend. The state sought to introduce evidence of another

uncharged incident against one of the victims. The trial court (Judge Thomas Branford) stated on the record that the evidence appeared to be admissible to prove defendant's sexual predisposition for the victim, but it invited the parties to research the issue further and raise it again later. Defendant did not raise it again and was convicted. The Court of Appeals reversed, holding that the trial court committed plain error in admitting the evidence without explicitly conducting OEC 403 balancing.

Held: Conviction affirmed (Walters, J.). It does not matter whether defendant preserved his OEC 403 objection, because even if he did, any error by the trial court in failing to conduct balancing was harmless. The evidence appeared to be relevant for a

nonpropensity purpose—to prove defendant's sexual predisposition for the victim—and such evidence is generally admissible under *State v. McKay*, 309 Or 305 (1990). Defendant did not offer any reason that, on the particular facts of his case, the risk of unfair prejudice substantially outweighed the probative value of the evidence. In the absence of a meritorious argument that could persuade a trial court to exclude the challenged evidence, the trial court's failure to conduct OEC 403 balancing did not significantly affect the court's decision to admit the evidence.

<http://www.publications.ojd.state.or.us/docs/S064072.pdf>

EVIDENCE—OTHER BAD ACTS: When state offers other-act evidence on a theory of relevance other than doctrine of chances, the requirements of *State v. Leistiko* do not apply.

SENTENCING—RESTITUTION: Record established causal connection between defendant's sexual abuse of the victim and the victim's need for drug and alcohol and mental health treatment.

State v. Woods, 284 Or App 559, __ P3d __ (2017) (Marion) (Former AAG Michael Shin). Defendant was charged with first-degree sexual abuse and second-degree sodomy of his 12-year-old stepson. At trial, the state sought to introduce testimony from the victim's uncle about an earlier incident, in which he saw defendant place his hand down the victim's pants. The state argued that the evidence was relevant and admissible to show

defendant's sexual inclination toward the victim, under *State v. McKay*, 309 Or 305 (1990). Over defendant's objection, the trial court (Judge Mary Mertens James) admitted the evidence, and defendant was convicted. On appeal, defendant argued that the trial court erred by not following the procedural requirements of *State v. Leistiko*, 352 Or 172 (2012)—i.e., failing to determine whether the record supported a finding that the charged act occurred, and by not instructing the jury that it could not consider the other act evidence until and unless it concluded that the charged act occurred. He also challenged the trial court's restitution award of \$85,611.73 for the costs of the victim's alcohol and drug treatment and residential mental health treatment, arguing that the state failed to prove a causal relationship between his criminal activities and the victim's economic damages. *Held*: Affirmed (Ortega, P.J.). [1] Defendant failed to preserve his *Leistiko* argument. [2] Because the state did not offer the other-act evidence on a doctrine-of-chances theory of relevance, "the trial court's failure to comply with *Leistiko* is not error, let alone plain error." [3] Defendant did not ask the trial court to engage in OEC 403 balancing, "and we have consistently held that our review of that claimed error depends on defendant making such a challenge." [4] The fact that defendant argues that balancing was required as a matter of due process does not mean he can raise it for the first time on appeal; "even an argument pertaining to due process rights must be properly preserved to be considered on appeal." [5] The record supported the trial court's restitution award to cover the costs of the victim's outpatient drug and alcohol treatment and residential mental health treatment. The trial court concluded that the state had proved a causal relationship between defendant's abuse and the victim's economic damages, and the trial court's factual findings supported that conclusion. <http://www.publications.ojd.state.or.us/docs/A154144.pdf>

EVIDENCE—OTHER ACTS: Incidents of defendant's sexual contact with victim in another county were admissible to prove defendant's conduct and intent, after OEC 403 balancing.

State v. Gonzalez-Sanchez, 283 Or App 800, __ P3d __ (2017) (Washington)(AAG Doug Petrina)

Defendant was charged with multiple sex crimes against a single child victim. The State sought to introduce evidence of other sex acts committed against the victim by the Defendant in a different county (which occurred after the acts/crimes being litigated in Washington Co.). The court admitted the 'Other Acts' evidence under the State's proffered theories: 1) To demonstrate D's sexual interest in this particular victim (per *State v. McKay*); and 2) To provide an explanation regarding Victim's delayed report/disclosure (per *State v. Zybach*). Upon D's request, the trial court also found that under 403, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The Defendant was convicted of multiple sex crimes. On appeal, Defendant argued that the trial court committed two errors in conducting OEC 403 balancing: (1) by failing to make an adequate record of its balancing decision; and (2) by concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice

The COA's opinion acknowledges that post-*Williams/Turnidge/Brumbach*, the court, upon request, must engage in the *Mayfield* four-part process for 403 balancing.

The COA said that though the trial court did not “walk through” the *Mayfield* analysis on the record, the record is nevertheless sufficient in that it reflects that the trial court engaged in the “conscious process of balancing the costs of the evidence against its benefits” that OEC 403 requires.”

The convictions were affirmed.

<http://www.publications.ojd.state.or.us/docs/A153708.pdf>

EVIDENCE—RELEVANCE (OEC 401): In prosecution for domestic assault in which defendant's defense was that he hit his wife accidentally, evidence of his long-ago threat to kill her was not logically relevant and thus should not have been admitted.

State v. Wright, 283 Or App 160, __ P3d __ (2016) (Klamath) (AAG Dave Thompson). Defendant struck and injured his wife during a domestic dispute, and he was charged with fourth-degree assault. His defense was that he hit her accidentally. At trial, the state offered evidence that a few years previously he had made a threat to the victim that he would take her out into the woods and kill her. Defendant objected to the evidence as irrelevant, but the court (Judge Dan Bunch) overruled that objection and admitted the evidence, on the theory that it was relevant to show that defendant had caused his wife's injuries intentionally, not accidentally. The jury found defendant guilty.

Held: Reversed and remanded (Duncan, P.J.). The trial court erred by admitting the evidence at issue, because the evidence of the prior threat was not logically relevant. [1] In *State v. Williams*, 357 Or 1 (2015), the court held that, for evidence of a criminal defendant's other acts, OEC 404(4) supersedes OEC 404(3) as the controlling rule. But the Court of Appeals has held in several post-*Williams* cases that the types of relevant evidence set out in OEC 404(3) remain viable theories for admission of prior acts evidence. “Thus, in evaluating whether evidence of ‘other crimes, wrongs or acts’ is admissible for nonpropensity purposes, we may draw on the ‘settled principles’ of relevance embodied in OEC 404(3) and case law construing that provision.” [2] The trial court applied the relevance test set out in *State v. Johns*, 301 Or 535 (1986), in admitting the prior-threat evidence. But the *Johns* test applies only when the prior-acts evidence is offered on a doctrine-of-chances theory. Because the prior-threat evidence was not offered under that theory, the court improperly applied the *Johns* test. [3] Instead, the evidence—offered by the state to show that defendant had continuing hostile feelings toward his wife (a hostile-motive theory), and thus to help prove that defendant had *intentionally* injured his wife—was subject to the following test: (1) the evidence must be logically relevant under OEC 401, and (2) under OEC 404(3), the evidence must be probative of something other than disposition to do evil. [4] The prior-threat evidence

did not meet the first part of that test: it was not logically relevant because there wasn't a substantial connecting link between the prior threat and the charged assault. "In short, [the prior-threat evidence] does not contain evidence from which a non-speculative inference could be drawn regarding whether the motive for the threat—hostility—was likely to persist until, or recur on, the date of the charged crime and motivate the commission of that crime." Therefore, under OEC 404(3), this other-act evidence was inadmissible.

<http://www.publications.ojd.state.or.us/docs/A153774.pdf>

****This case was tried pre-Williams and the line of cases interpreting Williams.** In this case, the trial court admitted Defendant's prior threats to kill the victim based on 404(3) Johns analysis. The COA determined that the proper basis for admissibility is under 404(3) hostile motive which requires a different analysis than doctrine of chances (Johns). The COA determined that the evidence offered does not pass that analysis because it is not "logically relevant." The court spends quite a bit of time discussing logical relevance (starts on page 171). However, there is no discussion of the nuances of a DV relationship, DV dynamics, or that, by definition, DV is a pattern of behavior—a review by the court of any of these topics could've/would've, I hope, satisfied the court that, indeed, that there actually WAS "a substantial connecting link between the prior threat and the charged assault." I would recommend that prosecutors take a look at the court's discussion. I have not yet heard whether Appellate will be seeking review of this decision.

EVIDENCE—OTHER BAD ACTS: [1] In prosecution for domestic assault, evidence of a prior incident in which the defendant assaulted the victim in a jealous rage was admissible as relevant to prove motive. [2] But trial court erred when it failed to conduct balancing under OEC 403 as requested by defendant.

State v. Edwards, 282 Or App 328, __ P3d __ (2016) (Coos) (AAG Patrick Ebbett). In two incidents, defendant assaulted and threatened his girlfriend in a jealous rage, and he was charged with fourth-degree assault, unlawful use of a weapon, harassment, coercion, and menacing. Before trial, the state filed a motion *in limine* to admit evidence of an incident that occurred before the charged incidents. In that incident, defendant became angry with the victim over a "jealousy issue" and hit her with a chair. The first charged incident occurred when she returned a week later and defendant again assaulted her. The state argued that the chair episode was admissible under OEC 404(3) to prove defendant's jealous motive to harm the victim in the charged incidents. Defendant objected, arguing that the evidence was inadmissible propensity evidence and, alternatively, that it should be excluded as more prejudicial than probative under OEC 403. The trial court (Senior Judge Marshall Amiton) admitted the evidence as relevant to prove motive, but the court did not engage in OEC 403 balancing. On appeal, defendant renewed his argument that the evidence was relevant only for a propensity purpose, and argued that the trial court erred by failing to conduct OEC 403 balancing. *Held*: Reversed and remanded (Tookey, J.). [1] The evidence was relevant and

admissible under OEC 404(3) for the nonpropensity purpose of proving defendant's motive because it "supported an inference that the same 'jealousy issue' that led to defendant's assault of the [victim]" in the prior uncharged incident led to the assaults on the charged occasions. [2] When nonpropensity evidence is offered under OEC 404(3), OEC 403 balancing is required upon request. [3] The trial court erred in failing to conduct OEC 403 balancing even though defendant had requested that it do so. [4] The error was not harmless "because we cannot conclude that the trial court's error had little likelihood of affecting the verdict."

<http://www.publications.ojd.state.or.us/docs/A156021.pdf>

EVIDENCE—OEC 403: Because the record did not reflect that trial court had engaged in OEC 403 balancing before admitting evidence, the case had to be remanded.

State v. Anderson, 282 Or App 24, __ P3d __ (2016) (Lincoln) (AAG Shannon Reel). Defendant stole an ATM card from a woman in whose home he was staying and used it to withdraw funds from her bank account. He was charged with identity theft and second-degree theft. At trial, the state introduced into evidence photographs and a video of defendant using the ATM, in which he attempted to hide his face. The state also introduced a video of him being booked at the police station, in order to show that he was wearing the same or similar clothing as he wore in the ATM video. Defendant objected to the admission of the booking video, contending that it was unduly prejudicial. The trial court (Judge Thomas Branford) watched the video "to decide the balancing issues," overruled the objection, and admitted the evidence, saying "it's relevant." Defendant was found guilty.

Held: Reversed and remanded (Flynn, J.). [1] Under OEC 403, relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." [2] The trial court was required to demonstrate that it exercised its discretion by balancing the probative value of the video against the danger of unfair prejudice. *See State v. Mayfield*, 302 Or 631 (1987). [3] The record does not reflect that the trial court had engaged in the required balancing where, in response to defendant's objection, the court ruled that it was admitting the video because "it's relevant." The court found that the record failed to reflect that the trial court had assessed the "quantum of probative value" of the evidence or the extent to which the video might improperly bias the jury. Thus, the trial court erred in admitting the evidence. [4] The error was not harmless.

<http://www.publications.ojd.state.or.us/docs/A155404.pdf>

Notes: [a] Judge DeVore dissented. He would have found that the record sufficed to show that the trial court implicitly exercised its discretion to determine that the probative value outweighed its prejudice. The dissent contends that the majority ignored the context of the parties' arguments

regarding the relevance versus the prejudicial effect of the video, and also incorrectly discounts the trial court's statement that it wanted to watch the video twice to help it "decide the balancing issues." [b] The state intends to petition for review in this case.

State v. Johnson, 281 Or App 51 (2016)

Johnson 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."

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

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 erred 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: 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>

Remember: Under *Williams* the Court has to do an OEC 403 balancing analysis. Technically, the Defendant has to request it, but it is best practice to have the court do the analysis regardless. In the case below, the Defendant “raised” the 403 issue in his written Motion in Limine, but did not reiterate it during trial. The court did not do a 403 analysis

and admitted the other acts evidence. Here, the COA held the MIL was enough to preserve the 403 argument; it does not need to be raised during trial.

When arguing 404(4) motions please have the court do the appropriate 403 analysis. On the record.

State of Oregon v. Joshua Turnidge (2016): 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>

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.

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

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 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.”

****The state, in its appeal, did NOT ask the COA to consider *State v. Williams* and a 404(4) argument.**

<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.

SENTENCING—ATTORNEY FEES: Trial court plainly erred by ordering defendant to pay attorney fees on a record that contained no evidence of ability to pay.

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>

Note: The state, on appeal, did not raise any "propensity" arguments which might implicate *State v. Williams*. Thus, the court

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.

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

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

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

Held: Reversed and remanded (Sercombe, P.J.). [1] Under OEC 404(4) as interpreted in *State v. Williams*, 357 Or 1 (2015), due process requires a trial court to conduct OEC 403 balancing before admitting other-acts evidence. [2] In evaluating the trial court's application of OEC 403, the purposes for which the court admitted the evidence must be examined; here, the court was incorrect as to two of its three stated "non-propensity" purposes for admitting the evidence. [4] As to identity, although the acts were similar to the charged acts, they did not show that "defendant operated in a novel or distinctive manner" that would identify him as the perpetrator. [5] As to bolstering the victim's credibility, "the admission of prior misconduct evidence to bolster the victim's credibility simply amounts to the admission of evidence for a propensity purpose." [6] Given the similarity of the charged and uncharged acts, the evidence was admissible to prove intent under the *Johns* factors. [7]

Having erred on two of the three grounds for admissibility, when the trial court applied OEC 403 balancing it “did not correctly consider the quantum of probative value of the evidence.” [8] Because “under *Williams*, a failure to perform the requisite balancing test is violation of defendant’s due process rights under the United States Constitution, the court applies the federal “harmless beyond a reasonable doubt” harmless error test. [9] The error was not harmless beyond a reasonable doubt. <http://www.publications.ojd.state.or.us/docs/A152531.pdf>

Note: The trial court in this case did not purport to admit the evidence under a propensity theory of relevance, and thus did not consider that theory in conducting OEC 403 balancing. Therefore, the Court of Appeals did not address whether the evidence might have been admissible under a propensity theory, as suggested by the Supreme Court in *Williams*.

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

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

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

State v. Zavala, 276 Or App 612, __ P3d __ (2016) (Lincoln) (AAG Michael Shin). Defendant was charged with sexually abusing his ex-girlfriend's two daughters. At trial, the state called a former coworker of the ex-girlfriend, who testified that prior to the alleged abuse, she had observed defendant inappropriately touching one of the victims and that she had told the ex-girlfriend about the incident. Defendant asked the trial court to strike the evidence as "an inadmissible prior bad act." The trial court (Judge Thomas Branford) admitted the evidence to show defendant's sexual predisposition toward the victim under *State v. McKay*, 309 Or 305 (1990). Defendant did not ask the court to conduct OEC 403 balancing. The jury found defendant guilty. On appeal, he argued that the trial court should have excluded the evidence under OEC 404(3) or, alternatively, under OEC 403. The state argued that those claims were not preserved, and the evidence was properly admitted under *McKay*. The Court of Appeals affirmed without opinion. After the Oregon Supreme Court issued its decision in *State v. Williams*, 357 Or 1 (2015), defendant moved for reconsideration, arguing that the trial court plainly erred in admitting the coworker's testimony without conducting OEC 403 balancing as required by the Due Process Clause. The state argued that that claim was not preserved and the trial court did not plainly err because *Williams* held that for the admission of evidence under OEC 404(4), due process requires OEC 403 balancing only "upon request."

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

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

State v. Althof (August 26, 2016)

Defendant appeals from convictions for SA I and USP I. He assigned errors based on admission of evidence of uncharged conduct and admission of testimony by detective as expert on topic of delayed reporting. Re: uncharged conduct, the Court rejected the Defendant's argument that the court should have applied the *Leistiko/Pitt* procedures citing *State v. Horner*, 272 Or App 355, 367-68, __P3d__(2015) (where evidence might be relevant, and not just conditionally relevant under a doctrine of chances theory of intent, it is not obvious that the trial court errs by not employing the *Leistiko* framework.)

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

Defendant challenged a judgment convicting him of two counts of menacing and two counts of criminal mischief in the second degree, and a judgment convicting him of one count of unauthorized use of a vehicle and two lesser-included counts of criminal trespass in the first and second degree.

Those convictions all involve defendant's conduct towards his long-term girlfriend. Specifically, in the course of a series of arguments spanning a few days, he scratched words into his girlfriend's car, broke her car window, threw an object at her, poured gasoline on the porch of their house, and threatened to burn the house down. Months later, in the course of another argument, defendant drove off in his girlfriend's truck without her permission.

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

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

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

Defendant also moved to exclude two categories of evidence about the Vagos gang: (1) images that the state had obtained from the Internet that demonstrated the Vagos creed (e.g., "SNITCHES are a DYING BREED" and "Whenever your brother bleeds you bleed"); and (2) photographs taken of Rives's home of Vagos-festooned clothing and home décor. Defendant argued that the evidence was irrelevant, inadmissible character evidence that was unfairly prejudicial under OEC 403. The trial court denied the motion to exclude that evidence, ruling that, although it was character evidence, it was relevant to demonstrate motive and the high probative value outweighed any risk of unfair

prejudice. **Held:** Affirmed (Garrett, J.). [1] The eyewitness identification was properly admitted under the framework set forth in *State v. Lawson/James*, 352 Or 724 (2012), which was decided after the trial court decided the motion. The Court of Appeals walked through the *Lawson/James* factors in detail and concluded that the state demonstrated the threshold requirements for admissibility. Because defendant did not make an OEC 403 argument on appeal, the Court of Appeals did not address OEC 403. [2] The trial court correctly denied the motion to exclude the Vagos evidence from the Internet, because the evidence was relevant to establish defendant's motive for the assault. [a] The evidence is character evidence because the state offered it "to convince the jury that defendant's behavior on a specific occasion conformed to a set of beliefs or values that defendant held." Accordingly, OEC 404(4) and the framework set out in *State v. Williams*, 357 Or 1 (2015), govern the admissibility of the evidence. [b] The evidence was relevant for the nonpropensity purpose of establishing defendant's motive. The evidence "is illustrative of the Vagos belief system, including the importance of being loyal to gang 'brothers' and taking violent action against 'snitches.'" It therefore "tends to explain why defendant, a self-described Vagos member, would have felt justified in assaulting the victim, who was a friend of a 'snitch.'" The trial court did not abuse its discretion in concluding that the probative value outweighed the risk of unfair prejudice under OEC403. [3] The trial court should have excluded the photographs taken in Rives's house as irrelevant, because it was not probative of *defendant's* motive. However, the error was harmless because it was cumulative and not qualitatively different from the Vagos evidence that the trial court properly admitted.

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

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

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

The state argued that the evidence of defendant's prior convictions was admissible under OEC 404(3) as construed in *Pitt* and *Leistiko* because that evidence—offered under the "doctrine of chances" theory—met the test for such evidence set forth in *State v. Johns*, 301 Or 535 (1986), and was relevant to prove defendant's intent or to show that there was an absence of mistake or accident in his strangulation of the victim. The trial court (Judge Vance Day) agreed with the state and ruled that the prior-conviction evidence was admissible. After that evidence came in at trial, the court instructed the jury that it "may not use this evidence for the purpose of drawing the inference that because the defendant was convicted of a previous crime the defendant may be guilty of the crime charged in this case." Defendant did not object to that limiting instruction, nor did he request any additional limiting instruction. On appeal, defendant argued that the trial court committed reversible error by failing to give a *Leistiko* instruction with respect to the prior-conviction evidence. **Held:** Affirmed (DeVore, J.). [1] Defendant failed to preserve his claim that the trial court erroneously failed to give a *Leistiko* instruction. "In this case, defendant did not request a *Leistiko* instruction, object to the absence of such an instruction, or object

to the different form of the limiting instruction given by the court.” “Although defendant argued that the court was required to comply with *Pitt*, the record demonstrates that defendant’s arguments were that the evidence was simply not admissible as propensity evidence and that, if it was admissible, the state was required to prove sequentially the *actus reus* of the charged offenses before introducing prior acts evidence.” That argument did not alert the court to the purported need for a *Leistiko* instruction. [2] The error was not plain, in light of *State v. Brown*, 272 Or App 424 (2015) (failure to give *Leistiko* instruction is not plain error under OEC 404(4)), and *State v. Horner*, 272 Or App 355 (2015) (unpreserved argument regarding *Leistiko* analysis is not plain error in light of *State v. Williams*, 357 Or 1 (2015)).

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

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.

State v. Brown, 272 Or App 424, __ P3d __ (2015) (Washington) (AAG Dave Thompson). Defendant cashed a number of forged checks. He was charged with first degree theft, first-degree forgery, and first-degree criminal possession of a forged instrument. At trial, defendant denied knowing that the checks were “bad” and contended that he had been unwittingly induced to cash them. In response to that defense theory, the state offered evidence of defendant’s six prior convictions for theft, forgery, identity theft, and possession of a forged instrument to show that defendant knew that the checks he had cashed were forged. Defendant objected to that evidence under OEC 404(3), requesting a hearing to determine its admissibility under *State v. Johns*, 301 Or 535 (1986). The trial court (Judge Andrew Irwin) admitted the prior-conviction evidence for the purpose the state identified without applying *Johns*. The court deemed a *Johns* hearing unnecessary, ruling that the evidence was admissible to establish defendant’s “guilty knowledge.” The court stated that it had applied OEC 403 and determined that the probative value of the evidence was not substantially outweighed by unfair prejudice. Further, the court gave the jury a

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

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

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

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

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

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

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

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

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

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

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

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

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

Note: This case illustrates how matters that do not seem to be in dispute at trial can become dispositive on appeal—in this case, the introduction of prior bad acts and the interplay between *Leistiko/Pitt* and *State v. Williams*. *Leistiko*, *Pitt*, and *Williams* all came out after defendant's trial. Those cases all apply to defendant's case because of

State v. Jury, 185 Or App 132 (2002), where the Oregon Court of Appeals held that it will apply the law existing at the time the appeal to any criminal case, so that if it is “obvious” that the trial court erred under the new legal landscape, the Court of Appeals would reverse the conviction.

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

Thompson). Defendant was charged with first-degree sexual abuse for conduct involving a five-year-old girl: touching her vaginal area and having her touch his clothed penis. At trial, defendant denied committing either act. The state offered evidence that he possessed two pairs of little girls'

underwear that his landlord had found in his residence after he vacated the property; one pair was stuffed between the mattress and box spring on his bed, and another pair was in a duffel bag. The state offered that evidence to prove that he had touched the victim with a sexual purpose, rather than accidentally. Defendant objected to the evidence as irrelevant under OEC 401 and unfairly prejudicial under OEC 403. The trial court (Judge Pat Wolke) admitted the evidence under OEC 404(3), concluding that the evidence was logically relevant under OEC 401 and that, under OEC 403, its probative value was not substantially outweighed by the danger of unfair prejudice. A jury found defendant guilty.

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

HELD: Decision of the Court of Appeals reversed, and the case remanded to that court for consideration of defendant's remaining assignments of error (Walters, J.). The

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

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

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

State v. Ardizzone, 270 Or App 666, __ P3d __ (2015) (Umatilla) (AIC Jennifer Lloyd). Defendant was charged with solicitation to commit aggravated murder. He previously had been convicted of soliciting the murder of the same victim. The prior incident involved his arrangements with an informant to kidnap and murder of the victim: he had paid the informant \$13,000, and a search of his car revealed a gun with the serial number removed, a large black cloth bag, and a roll of black garbage bags. Based on that evidence, he was convicted and sentenced to prison. In prison, he solicited a cellmate to act as a middleman for another abduction attempt, and the cellmate reported

him to authorities. Ultimately, the cellmate wore a body wire and recorded defendant asking him to “take the victim out.” In questioning, defendant told police that he was paying the cellmate for legal work in the prison, and that any statements about killing the victim were made in jest. Before trial, the state sought to offer the prior solicitation as evidence of defendant’s intent. Defendant agreed that the evidence was relevant, but argued that its probative value would be substantially outweighed by the risk of undue prejudice. The trial court (Judge Lynn Hampton) applied the *Johns* test and concluded that the evidence was relevant to intent, and that OEC 403 did not bar its admission. At trial, defendant generally renewed his argument and asked the court to instruct the jury not to consider the evidence for propensity purposes. The trial court gave the requested instruction, and the jury found defendant guilty. On appeal, defendant argued under *State v. Leistiko*, 352 Or 172 (2012), that the evidence was inadmissible because he had not stipulated to the conduct and because the trial court had not instructed the jury not to consider the evidence unless it found that defendant committed the charged conduct. He also argued that the admission of the evidence violated his due-process rights.

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

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

State v. Stapp, 266 Or App __, __ P3d __ (October 29, 2014) (Marion). During a night of drinking and playful roughhousing, the victim put defendant in a headlock. Defendant got mad, broke free, grabbed a large knife, and stabbed the victim repeatedly. He was charged with first-degree assault, and claimed self-defense at trial. During cross-examination and in response to a statement that defendant made about the circumstances of the stabbing, the prosecutor commented to defendant that the prosecutor had never stabbed anyone before, and defendant responded that he had never stabbed anyone either. Over defendant’s objection, the trial court (Judge Susan Tripp) allowed the state to briefly question defendant about a prior incident in which defendant had threatened, but not stabbed, a bicyclist with a knife. The jury convicted defendant. **Held:** Affirmed (Nakamoto, J.). The trial court incorrectly allowed the state to question defendant about the prior incident, but the error was harmless. [1] OEC 404(3) prohibits evidence of other acts to prove a person’s character and that the person acted in conformity with that character. But the rule allows “other act” evidence if it is relevant for a non-character purpose such as impeachment by contradiction. [2] “Evidence that defendant had, in a prior incident, threatened someone with a knife was not relevant to discredit his testimony that he had not stabbed anyone.” [3] Defendant’s testimony was with regard to a “precise

fact”—that he had never stabbed anyone before. “That precise statement of fact is only susceptible to impeachment by contradiction with evidence that contradicts the same precise fact, that is, only by evidence that showed defendant had stabbed someone before.” [4] But the error was harmless. The dispositive issue as to defendant’s self-defense claim was whether defendant acted with a reasonable amount of force. “Given the undisputed evidence that what defendant feared was being hit by [the victim] again and that he reacted by stabbing [the victim] eight times, including in the back of the legs, the error at issue here had little likelihood of affecting the jury’s verdict as to the ‘reasonable use of force’ issue.”

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

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

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

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

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

State v. Cruz-Rojas, 263 Or App __, __ P3d __ (May 29, 2014) (per curiam) (Marion). Defendant was charged with assault and numerous sexual offenses, including first-degree rape and sodomy. At trial, the state offered evidence that he had sexually and physically assaulted the victim’s older sister, too. The trial court (Judge Dennis Graves) admitted the evidence as relevant to rebut defendant’s assertion that the victim had consented to sexual activity with him. The jury found him guilty.

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

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

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

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

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

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

State v. Jones, 258 Or App __, __ P3d __ (August 14, 2013) (Lane). Defendant was prosecuted for numerous serious offenses for torturing, assaulting, strangling, and sodomizing his wife over the course of several weeks in 2009. According to the victim, he accused her of being unfaithful and told her he was making her less attractive to other men. At trial, the state presented evidence of similar crimes he had committed against JM, his previous girlfriend, two years before, based on the same motive. Defendant objected solely on the ground that the evidence did not meet the *Johns* requirements. The trial court (Judge Debra Vogt) overruled the objection. Defendant's defense was that he was not the one who assaulted the victim, and the jury found him guilty. He appealed and argued that the trial court erred by admitting the prior-crimes evidence involving JM. The Court of Appeals affirmed the convictions, concluding that defendant had failed to preserve the argument he raised on appeal. Meanwhile, the Oregon Supreme Court decided *State v. Leistiko*, 352 Or 172, modified on recons, 352 Or 622 (2012) (defendant's prior bad acts not admissible to prove intent unless the defendant concedes the actus reus or the jury is instructed that it cannot consider the evidence for proof of intent unless it first finds that the actus reus occurred). The Supreme Court then remanded this case for reconsideration in light of *Leistiko*. Held: Reversed and remanded (Haselton, C.J.). [1] The Court of Appeals reaffirmed its previous ruling that defendant's claim of error is not preserved. [2] But, light of *Leistiko*, the trial court committed plain error when it admitted the prior-crimes evidence: "Here, as in *Leistiko*, defendant did not concede that he had engaged in the *actus reus*; nor was the jury instructed to consider the uncharged misconduct evidence as evidence on the issue of intent only if they first found that defendant had committed the actus reus. Those circumstances are patent and uncontroverted, and the application of *Leistiko*'s principles on this record is not reasonably in dispute. Accordingly, in light of *Leistiko*, the error in admitting JM's testimony and submitting it

to the jury without the requisite qualifying instruction was reviewable plain error.” “Here, the gravity of the error and the nature of the case militate strongly in favor of reversal. In particular, we agree with defendant that the details of the prior assault on JM—and in particular the testimony that defendant used pliers on her nipples—was highly inflammatory.”

<http://www.publications.ojd.state.or.us/docs/A142958A.pdf>

State v. William Urcel Teitsworth, 257 Or App ___, __ P3d __ (June 26, 2013): In this case, as in *Yong*, there was no dispute that defendant and the victim had a physical altercation on the night of the charged incident, nor was there any dispute that, at a minimum, defendant pushed the victim in the face and that, when the police arrived, the victim’s face was bruised and bleeding. Thus, while defendant admitted that he acted intentionally or knowingly with respect to some conduct, his specific intent—whether he did so in self-defense—was a contested issue. Accordingly, under *Yong*, 206 Or App at 542, evidence of defendant’s prior altercations with the victim was admissible to prove “the state’s theory that defendant had, in fact, been the aggressor[.]” If evidence of uncharged misconduct is introduced to show a defendant’s hostile motive toward the victim, “which in turn is probative of intent,” *Moen*, 309 Or at 68, the evidence must meet the *Johns* test for admitting evidence of uncharged misconduct to show intent. *Johns*, 301 Or at 555-56; see also *State v. Pyle*, 155 Or App 74, 81-82, 963 P2d 721, *rev den*, 328 Or 115 (1998) (evidence of the defendant’s prior acts of punching the victim was not relevant to prove that he intentionally shot the victim). Here, the charged act requires proof of intent; the prior act also required intent; the victim was the same in both acts; and both acts involved defendant striking the victim in the context of a domestic dispute. Therefore, we conclude that the trial court did not err in admitting the evidence of uncharged misconduct to rebut defendant’s self-defense claim. Affirmed.

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

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

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