IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. EDWARD ZAVALA, Defendant-Appellant, Petitioner on Review.	Lincoln County Circuit Court No. 122847, 130820 CA A154491, A154492 SC S064051

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Lincoln County
Honorable THOMAS O. BRANFORD, Judge

Opinion Filed: March 2, 2016
Author of Opinion: Ortega, P.J.
Before: Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
ERICA HERB #063561
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: erica.herb@opds.state.or.us

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
DOUG M. PETRINA #963943
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: doug.petrina@doj.state.or.us

Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

In this case, the Court of Appeals reversed defendant's sexual-abuse convictions and ordered a limited remand for balancing under OEC 403, holding that the trial court committed plain error under *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), by admitting other-acts evidence under OEC 404(4) without balancing the probative value of the evidence against the danger of unfair prejudice. *State v. Zavala*, 276 Or App 612, 368 P3d 831 (2016). The state and defendant both petitioned for review, and this court granted both petitions. In its opening brief, the state argues that the trial court did not commit plain error by admitting the challenged evidence and that, even if it did, the Court of Appeals abused its discretion by correcting the claimed error.[1] In his opening brief, defendant argues that the Court of Appeals erred by ordering a limited remand, and that he was entitled to a new trial instead. The state addresses that argument in this brief.

---

[1] After the state filed its opening brief, the Court of Appeals essentially overruled this decision, holding that a trial court does not commit plain error by failing to conduct OEC 403 balancing without a proper motion by the defendant. *State v. Tena*, 281 Or App 57, 75, 75 n 8, ___ P3d ___ (2016).

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question presented: If a failure to balance or balancing error requires a remand, is the proper remedy a new trial or is it a limited remand for the trial court to conduct balancing, which may not require a new trial?

Proposed rule: The proper remedy is a limited remand for the trial court to conduct balancing and, if the evidence is admissible, to reinstate the convictions.

SUMMARY OF ARGUMENT

Defendant contends that the state and federal constitutional harmless-error doctrines preclude limited remands, and that the only permissible remedy was a new trial. But defendant's argument hinges on harmless-error principles that do not apply when, as here, the claim was not preserved. Moreover, even if those principles apply, neither the state nor federal constitutional harmless-error doctrines would preclude a limited remand. Article VII (Amended), section 3, of the Oregon Constitution would mandate a limited remand, and the federal constitutional harmless-error rule would not prohibit one. If a remand for balancing is necessary, the proper remedy is a limited remand. If the outcome of the balancing establishes that the evidence was admissible, the trial court should reinstate defendant's convictions.

ARGUMENT

A. If a remand is necessary, it should be a limited remand for balancing and not necessarily for a new trial.

In this case, the Court of Appeals explained that it will order a different remand for a *Williams* balancing-related error depending on whether the claim was preserved. *Zavala*, 276 Or App at 619-22. For an unpreserved claim, the court will order a limited remand for balancing and for reinstatement of the convictions if the balancing establishes that the evidence was admissible. *Id*. at 622. For a preserved claim, however, the court will order a new trial regardless of whether the balancing on remand establishes that the evidence was admissible, because the court has concluded that the federal constitutional harmless-error doctrine would preclude a limited remand. *Id*. at 618-19.

The Court of Appeals was partially correct. The court correctly concluded that limited remands are authorized in unpreserved cases but mistakenly concluded that they are not authorized in preserved cases. Although there are *additional* reasons that harmless-error principles do not preclude limited remands in unpreserved claims, limited remands are available in all cases.

1. The preservation rule supersedes the harmless-error principles invoked by defendant.

The state begins with the lack of preservation, which supplies additional reasons that harmless-error principles could not, even theoretically, preclude

limited remands in unpreserved cases. In unpreserved cases, the preservation doctrine entirely supersedes the federal constitutional harmless-error doctrine and supersedes the portion of the state constitutional harmless-error doctrine invoked by defendant.

The Court of Appeals cogently explains the former point in its decision in this case. The federal constitutional harmless-error doctrine does not apply in unpreserved cases. The United States Supreme Court "long has recognized that state courts have the authority to develop and enforce their own rules as to when to consider and correct an unpreserved or otherwise procedurally defaulted claim of error." *Zavala*, 276 Or App at 619. Moreover, the United States Supreme Court "itself does not apply the [federal constitutional] harmless error standard when reviewing unpreserved claims of federal constitutional error in cases arising in the federal courts" and, instead, applies the federal plain-error test, "'which requires a defendant to prove, in order to obtain a reversal, that a federal constitutional error prejudiced the defendant.'" *Id*. Consequently, the federal constitutional harmless-error doctrine does not even apply. Rather, an Oregon appellate court must apply Oregon "rules for determining whether an unpreserved error requires reversal," including the Oregon constitutional harmless-error doctrine, and the Oregon plain-error doctrine. *Id*. at 620.

Beyond that, the state preservation doctrine supersedes the state constitutional harmless-error rule invoked by defendant. This court has long recognized that the decision to correct a plain error is discretionary. *See e.g.*, *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991). That is, even when a trial court commits plain error that likely affected the outcome of the case (that is, the error was *not* harmless), the appellate court is not required to order a new trial as it would have had to do had the claim been preserved. Rather, the court can weigh the extent to which the purposes of the preservation rule and the interests of justice warrant a grant of discretionary relief. Nothing in the plain-error rule or the cases applying it requires an all-or-nothing approach (*viz.*, to either grant a new trial or to deny relief). The appellate court also could choose to address the claim but order a lesser remedy.

It bears emphasis that the state constitutional harmless-error rule is only partly superseded in unpreserved cases. Oregon appellate courts lack authority to order new trials based on harmless errors. *See* Or Const, Art VII (amended), § 3 (the "judgment shall be affirmed" if the error was harmless); *State v. Davis*, 336 Or 19, 28, 77 P3d 1111 (2003) (court "must" affirm if error was harmless); *State v. Parker*, 317 Or 225, 233, 855 P2d 636 (1993) (recognizing mandatory nature); *State v. Van Hooser*, 266 Or 19, 24, 511 P2d 359 (1973) ("[n]o discretion is permitted" in the matter). And that is so regardless of whether the claim was preserved. Consequently, in all cases including unpreserved cases,

Article VII (Amended), section 3, of the Oregon Constitution, precludes the ordering of a new trial unless an error occurred that was actually prejudicial.

But the converse is not true. In an unpreserved case, an appellate court is not *required* to order a new trial or even a limited remand simply because the constitutional harmless-error doctrine would allow that remedy. The court may fashion a limited remedy or order no remedy at all. Because defendant failed to preserve his claim, the harmless-error principles that defendant invokes did not apply and could not have—even theoretically—entitled him to a new trial.

2. The Oregon Constitution mandates limited remands for analytical or procedural errors, and the federal constitutional-harmless-error doctrine does not preclude limited remands.

But even if the state and federal constitutional harmless-error rules apply the same in unpreserved cases as they do in preserved cases, the proper remedy is a limited remand. The state explains the point in detail in its merits briefs in *State v. Mazziotti*, S064085 (Pet Br 31-41), and in *State v. Baughman*, S064086, (Pet Br 36-47) and summarizes that argument here. If a failure-to-balance or balancing error requires a remand in any case (preserved or not), the proper remedy for that balancing-related error is a limited remand for the trial court to perform balancing. If the outcome of that balancing establishes that the evidence was admissible, then the trial court should reinstate the convictions. Article VII (Amended), section 3, of the Oregon Constitution would mandate a limited remand for that type of procedural or analytical error. And that

approach would not violate the federal constitutional harmless-error rule, because a balancing-related error is not, itself, a constitutional violation, because the federal constitution does not preclude a limited remand to address a procedural or analytical error, and because, in all events, a balancing-related error would be harmless beyond all doubt if the balancing determination on remand establishes that the evidence was, in fact, admissible.

The harmless-error determination on remand should operate as follows: If balancing demonstrates that all of the evidence was admissible, that necessarily establishes that the prior balancing error was harmless, and the trial court should reinstate the convictions. If balancing establishes that none of the evidence was admissible, the prior balancing error was not harmless, and the trial court should order a new trial. If balancing establishes that only some of the evidence was admissible, then the trial court can conduct a harmless-error inquiry to determine whether the improperly admitted evidence contributed to the verdict and then, depending on the results, either reinstate the convictions or order a new trial.

Defendant argues that neither the Oregon nor the federal constitutions permit limited remands, advancing three arguments. First, defendant argues that the appellate court must be able to determine on appeal—and without the assistance or involvement of the trial court—whether the evidence was admissible and whether any error affected the verdict and if it cannot

affirmatively conclude that a balancing error was harmless, then the appellate court must order a new trial. (Pet Br 19-21). But defendant's position simply cannot be squared with the large body of Oregon and federal case law ordering limited remands to address procedural and analytical constitutional claims of error, including evidentiary claims of error. *See, e,g.*, *State v. Babson*, 355 Or 383, 434, 326 P3d 559 (2014); *State v. Mills*, 354 Or 350, 373-74, 312 P3d 515 (2013); *State v. Probst*, 339 Or 612, 629-30, 124 P3d 1237 (2005); *State v. Smith*, 190 Or App 576, 80 P3d 145 (2003), *rev'd on other grounds*, 339 Or 515 (2005); *State v. Paulson*, 313 Or 346, 352-53, 833 P2d 1278 (1992); *State v. McDonnell*, 310 Or 98, 106-07, 794 P2d 780 (1990); *State v. Campbell*, 299 Or 633, 652-53, 705 P2d 694 (1985); *Batson v. Kentucky*, 476 US 79, 100, 106 S Ct 1712, 90 L Ed 2d 69 (1986); *Wood v. Georgia*, 450 US 261, 272-74, 101 S Ct 1097, 67 L Ed 2d 220 (1981); *Coleman v. Alabama*, 399 US 1, 10-11, 90 S Ct 1999, 26 L Ed 2d 387 (1970); *United States v. Wade*, 388 US 218, 242, 87 S Ct 1926, 18 L Ed 2d 1149 (1967); *Gilbert v. California*, 388 US 263, 272-74, 87 S Ct 1951, 18 L Ed 2d 1178 (1967); *Jackson v. Denno*, 378 US 368, 84 S Ct 1774, 12 L Ed 2d 908 (1964). That authority refutes defendant's position that the appellate court must be able to definitively resolve a claim of error on appeal and cannot use the trial court and a limited-remand procedure as part of the error determination and correction process.

Second, defendant argues that a limited remand is impermissible, because the trial court may decide that only part of the evidence was admissible or that the evidence was only admissible for a limited purpose, and that it is impermissible to apply hindsight to determine whether or how an error in admitting evidence affected the trial. (Pet Br 21-23). Yet the same arguments have always been levied against harmless-error review generally and have repeatedly been rejected. Claims that particular types of errors are not susceptible to harmless-error review have not fared well. Oregon law does not recognize the so-called "structural error" doctrine at all, *Ryan v. Palmateer*, 338 Or 278, 294-97, 108 P3d 1127 (2005), and the erroneous admission of evidence is not structural error under the federal constitution. *Arizona v. Fulminante*, 499 US 279, 111 S Ct 1246, 1263-64, 113 L Ed2d 302 (1991). Harmless-error review is particularly well-suited to, and routinely occurs for, the review of errors involving the admission of evidence, including other-acts evidence. *See State v. Gibson*, 338 Or 560, 575-77, 113 P3d 423 (2005) (error in admitting other-acts evidence was harmless).

Moreover, defendant's concerns are not implicated at all in the sizeable chunk of cases in which trial courts conclude that all of the evidence was admissible "as is," or more accurately "as it was." At most, defendant's argument counsels caution when a trial court makes a harmless-error determination on remand after ruling that only some of the evidence was

admissible or that the evidence was admissible for only a limited purpose (that latter issue should only be cognizable if the defendant properly preserved it during his original trial by requesting a limiting instruction that was rejected). But that is precisely the type of harmless-error determination that appellate courts make, and there is no reason that trial courts may not make that same determination in the course of a limited remand. This court has recognized as much and ordered that type of remand in the past. *See State v. Cartwright*, 336 Or 408, 421, 85 P3d 305 (2004) (limited remand for disclosure of wrongly withheld materials and then for trial court to determine whether error in failing to grant access to materials affected the verdicts).

Third, defendant argues that trial judges will fail to fairly and fully perform OEC 403 balancing, because the judges will be "convinced of [the defendant's] guilt" from the original trial, "will be invested in the original result," will have "seen how the trial played out," or "may * * * be inclined to save judicial resources and not order a new trial." (Pet Br 23-24). Defendant is wrong on that point as well. Trial courts are well equipped to conduct limited remands and have been fairly, faithfully, and properly discharging that duty for quite some time and in a myriad of settings.

To summarize, in *all* cases in which a remand is necessary to correct a balancing-related error, the remand should be a limited remand for balancing.

Defendant's claim that he was entitled to a new trial, rather than a limited remand, is without merit.

B. If a limited remand is not a proper remedy (and the claimed failure-to-balance error is susceptible to plain-error review), the case should be remanded to the Court of Appeals for reconsideration.

The state contends that plain-error review is neither authorized or appropriate in this case. If this court rejects those arguments and also agrees with defendant that the limited remand was not authorized, this case would need to be remanded to the Court of Appeals for it to reconsider whether to reach defendant's unpreserved claim. The Court of Appeals' decision to exercise its discretion to reach the claimed error largely was based on its belief that a limited remand was authorized, and that a new trial may not be necessary. *See Zavala*, 276 Or App at 622 (stressing that limited remand that only allows a new trial if balancing reveals that one is necessary "does not undermine principles of judicial economy" and comports with preservation policy). If that understanding was incorrect, then the Court of Appeals' exercise of its discretion hinged on a false legal premise and would need to be redone. *See e.g.*, *State v. Romero*, 236 Or App 640, 644, 237 P3d 894 (2010) (discretionary decision based on a mistaken legal premise is not a proper exercise of discretion and is, itself, error).

CONCLUSION

The Court of Appeals erred by reversing defendant's sexual-abuse convictions under the plain-error doctrine. But if the state is mistaken, and it becomes necessary to address defendant's challenge to the limited nature of the remand that was ordered, this court should reject defendant's claim. A limited remand would be the correct remedy.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Doug M. Petrina

DOUG M. PETRINA #963943
Senior Assistant Attorney General
doug.petrina@doj.state.or.us

Attorneys for Respondent on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 14, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Erica Herb, attorneys for petitioner on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,655 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Doug M. Petrina

DOUG M. PETRINA #963943
Senior Assistant Attorney General
doug.petrina@doj.state.or.us

Attorney for Respondent on Review
State of Oregon

DMP:aft/7775529