IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. RUSSELL ALLEN BAUGHMAN, Defendant-Appellant, Respondent on Review.	Clatsop County Circuit Court No. 111306 CA A152531 SC S064086

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Clatsop County
Honorable CINDEE S. MATYAS, Judge

Opinion Filed: July 29, 2014
Author of Opinion: Sercombe, P.J.
Before: Sercombe, P.J.; Hadlock, Chief Judge; and Tookey, J.

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REPLY BRIEF OF PETITIONER ON REVIEW STATE OF OREGON

INTRODUCTION

Defendant's response brief is largely identical to the one that the defendant in *Mazziotti* filed, and the state's reply thus is largely identical to the one that it filed there.[1] Defendants collectively advance five arguments: (1) OEC 404(4) applies only to propensity evidence; (2) due process categorically bars propensity evidence in non-child-sex cases; (3) OEC 404(4) requires ordinary balancing; (4) propensity evidence is subjected to heightened scrutiny; and (5) balancing errors mandate new trials, not limited remands. Some of those issues go well beyond what is necessary to decide these cases—for example, the argument that due process categorically bars propensity evidence in non-child-sex cases is purely academic, because this *is* a child-sex case, and because the evidence in *Mazziotti* was admissible for a nonpropensity purpose.

This reply nonetheless addresses each argument in turn to ensure that this court has a full understanding of the issues defendants raise. As discussed below, none of the arguments have merit.

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[1] The state is not submitting a reply in *Zavala*, which turns almost entirely on plain-error issues that are not present here or in *Mazziotti*.

ARGUMENT

A. OEC 404(4) governs the admission of nonpropensity evidence.

Defendant's argument that OEC 404(4) applies only to propensity evidence (Resp Br 10-15) is mistaken. By its terms, OEC 404(4) governs the admission of all evidence "of other crimes, wrongs, or acts by the defendant," and that is so *regardless* whether the evidence is offered for a nonpropensity or propensity purpose. Nothing in the text draws any distinction based on the purpose for which the evidence is offered. Nor does any context or legislative history establish that purpose matters or that OEC 404(3) continues to apply to nonpropensity evidence. "[T]he legislature explicitly made OEC 404(4) subject to certain specified rules of evidence" and OEC 404(3) was not one of them. *State v. Williams*, 357 Or 1, 13, 346 P3d 455 (2015). As *Williams* held, "the text, context, and legislative history of OEC 404(4)" establish that "the legislature intended OEC 404(4) to supersede OEC 404(3) in criminal cases." 357 Or at 15. In *State v. Moore/Coen*, 349 Or 371, 245 P3d 101 (2010), this court applied OEC 404(4) to reverse a trial court ruling excluding nonpropensity evidence, and the Court of Appeals has applied OEC 404(4) to nonpropensity evidence in a large number of cases over the years.

State v. Turnidge, 359 Or 364, 374 P3d 853 (2016)—the sole basis for defendant's argument—is not to the contrary. Because the evidence there was admissible under the established case law applying OEC 404(3) and OEC 403,

this court did not have to address unresolved propensity and balancing issues under OEC 404(4), which sets forth a lower standard for admissibility. 359 Or at 431-43. In other words, evidence that was formerly admissible under OEC 404(3) necessarily is admissible under OEC 404(4). *Turnidge* simply avoided addressing unresolved OEC 404(4) issues. *See also Williams*, 357 Or at 19 n 17 (avoiding resolving nature of balancing requirement). The court did not hold that OEC 404(3) continues to apply to evidence of a defendant's other acts offered for a nonpropensity purpose, and such a holding would not be correct. OEC 404(4) supersedes OEC 404(3) and governs the admission of nonpropensity evidence, which also means that the OEC 404(4)(a) balancing rule applies to that evidence.

B. Due process requires a case-by-case analysis whether the admission of the evidence would render the trial fundamentally unfair.

Defendant makes an extended argument that due process "categorically bans the admission of other acts evidence to prove propensity in cases not involving child sexual abuse." (Resp Br 15-25). That issue is purely academic, because this is a child-sex case.

In all events, defendant's "categorical" approach is misguided. "State * * * statutes and rules ordinary govern the admissibility of evidence" in state criminal cases, not categorical due process rules. *Perry v. New Hampshire*, 565 US __, 132 S Ct 716, 723, 181 L Ed 2d 694 (2012). Due process prohibits the

admission of evidence only if it would render a particular trial fundamentally unfair. *Id*. That requires a fact-specific analysis in each case. No categorical rule is appropriate, because the admission of propensity evidence often will not violate due process. Nor would a categorical rule be necessary, because OEC 404(4) balancing ensures that "'potentially devastating evidence of little probative value will not reach the jury.'" *Williams*, 357 Or at 12.

1. There is no historical basis for a categorical rule.

Defendant's claim that propensity evidence is categorically inadmissible in non-child-sex cases purports to be rooted in historical practice. Although historical practice is pertinent in deciding whether a rule is constitutionally "fundamental," *Montana v. Egelhoff*, 518 US 37, 43, 116 S Ct 2013, 135 L Ed 2d 361 (1966), "the historical background of the prohibition on propensity evidence is far more complicated than most commentators tend to admit." Michael L Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 Am Crim L Rev 321, 334-38 (2015). Over time a narrow rule developed in England and America that prohibited other-acts evidence when its *sole* relevance was the "evil disposition" of the accused. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv L Rev 954, 961, 965-66, 976 (1933); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv L Rev 988, 989-90, 1033-34 (1938). Yet the evidence historically has been admitted when

relevant for any other reason, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, and to impeach. OEC 404(3); OEC 608; OEC 609. The fact that the evidence routinely was admitted in trials, and that the focus centered on a nuanced question of use, suggests the absence of an unalterable, categorical rule.

Significantly, courts historically have inconsistently applied the propensity rule. For example, "courts have routinely allowed propensity evidence in sex-offense cases." *United States v. LeMay*, 260 F3d 1018, 1026 (9th Cir 2001). That practice was not limited to sex crimes involving child victims; some courts applied the rule to sex crimes directed at adult victims or otherwise involving adults. Thomas J Reed, *Reading Gaol Revisited: Admission of Unhcharged Misconduct Evidence in Sex Offender Cases*, 21 Am J Crim L 127, 169-182, 182-220 (1993). The historical "lustful disposition" exception for sex crimes—standing alone and without more—demonstrates that there was no categorical ban on propensity evidence. That exception establishes that, even on its face, the propensity ban was not absolute, and that courts would admit propensity evidence when there were reasons to do so. *See also* Stone, *Similar Fact Evidence: England*, 46 Harv L Rev at 978 (explaining how England adopted propensity provisions in 1871 and 1916 that applied in stolen-property cases).

Moreover, there was no clear, consistent tradition excluding propensity evidence offered to prove *state of mind*. The character rule was directed at proof of conduct (*id*. at 976), and there has been a vigorous debate whether the character rule even applies to proof of mental state. A "wealth of case law" supports the idea that the ban on propensity evidence "comes into play only when the prosecutor offers the [other-acts evidence] to support an ultimate inference of conduct." Edward J. Imwinkelried, *The Use of Evidence of An Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St L J 575, 578–79 (1990). If the evidence is offered to prove mental state (even based on an intermediate propensity inference about the defendant's character), the evidence is admissible. *Id.* Although Professor Imwinkelried disagreed with that case law, it further demonstrates the absence of a longstanding, historical rule precluding such evidence.

Furthermore, even those courts that apply the rule when the evidence is offered to prove mental state could not agree when the propensity rule was triggered. The mental-state body of case law that developed was incoherent. *See generally* Stone, *Similar Fact Evidence: America*, 51 Harv L Rev at 988-1031 (discussing how the "spurious" "exclusionary view" of the character rule created confusion and inconsistency, including for mental-state evidence). "The many 'state of mind' cases [did] not develop[] any cohesive or consistent

line of reasoning for decision and caused Dean John Henry Wigmore to exclaim that in his survey of the opinions he found 'bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction.'" *State v. Johns*, 301 Or 535, 552, 725 P2d 312 (1986). There thus has been a lack of consensus both on whether the propensity rule applies to other-acts evidence offered to prove mental state and, if it does, when the rule applies.

A similar inconsistency exists for "hostile motive" evidence, which is evidence of other acts of hostility directed at the same victim or same class of victims. *See State v. Moen*, 309 Or 45, 68-69, 786 P2d 111 (1990) (discussing theory). In some homicide cases, even when the other hostile acts involved the same victim, the Oregon Court of Appeals treated that as propensity evidence and excluded it. *See, e.g.*, *State v. Pyle*, 155 Or App 74, 80-82, 963 P2d 721, *rev den*, 328 Or 115 (1998); *State v. Davis*, 156 Or App 117, 125-26, 967 P2d 485 (1998). Many, if not most, jurisdictions would reject that view and admit the evidence as nonpropensity evidence. *See State v. Taylor*, 689 NW 2d 116, 125-29 (Iowa 2004) (citing cases). Many jurisdictions recognize that "[i]n marital homicide cases, any fact or circumstance relating to ill-feeling; ill-treatment; jealousy; prior assaults; personal violence; threats, or any similar conduct or attitude by the husband toward the wife are relevant to show motive and malice in such crimes." *Romero v. People*, 460 P2d 784, 788 (Colo 1969).

To summarize, there was no clear, consistently-applied historical categorical ban on propensity evidence. The propensity rule was fairly narrow, there was no consensus on when it applied or what constituted propensity evidence, and many courts gave up any pretense of applying the rule and recognized an exception for highly probative propensity evidence when policy considerations supported an exception (*viz*., the lustful-disposition exception). Long ago, the morass of inconsistencies prompted evidence scholar Dean Wigmore to remark that "it is hopeless to attempt to reconcile the precedents under the various heads." Stone, *Similar Fact Evidence: England*, 51 Harv L Rev at 988 (*quoting* 1 Wigmore, *Evidence* 616 (2d ed 1923)).

Although the historical record is muddled and uncertain, the significance of that fact is not. "It is not the [government] which bears the burden of demonstrating that its rule is 'deeply rooted,' but rather [defendant] who must show that the principle of procedure *violated* by the rule (and allegedly required by due process) is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Egelhoff*, 518 US at 47 (emphasis original; internal citation omitted). Defendant has not carried that burden, because there was no clear, consistently-applied historical rule banning propensity evidence.

2. Contemporary practice does not support defendant's proposed rule.

Contemporary practice also undermines defendant's position. Many jurisdictions have enacted propensity provisions for sex crimes involving adult or child victims. *See e.g.*, FRE 413 & 414. Defendant cites to at least thirteen jurisdictions that have done so but he maintains that "courts have maintained an unwavering commitment to the rule against propensity evidence in other types of criminal prosecutions" for which a "steadfast[]ban[] [on] propensity evidence" continues "to this day in all 50 states." (Resp Br 2, 20 n 10, 21-22). That simply is not the case.

Several states have provisions that authorize propensity evidence in domestic-violence prosecutions. Alaska R Evid 404(b)(4); Cal Evid Code § 1109(a)(1); 725 Ill Comp Stat 5/115-7.4; Mich Comp Laws § 768.27b; Minn Stat § 634.20; *see also* Colo Rev Stat § 18-6-801.5 (a rule 404(3) for domestic-violence cases); Mo Ann Stat § 565.063(13). There are compelling reasons for allowing propensity evidence in domestic-violence cases. *See People v. Johnson*, 77 Cal App 4th 410, 419, 91 Cal Rptr 2d 595 (2000) (quoting legislative history for California provision); Andrew King-Ries, *True to Character: Honoring the Intellectual Foundations of the Character Evidence Rule in Domestic Violence Prosecutions*, 23 St Louis U Pub L Rev 313 (2004) (detailing how the character-evidence ban has served to perpetuate and

implicitly condone and sanction domestic violence by concealing its true nature from public scrutiny); Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future*, 2003 U Ill L Rev 1115 (2003) (detailing need for propensity).

Another expanded use of propensity evidence involves the "first aggressor" issue, which is evidence of the defendant's and victim's character for violence and peacefulness in homicide and assault cases involving a self-defense claim. Many jurisdictions—including the federal courts—now permit the government to respond by presenting evidence of the *defendant's* character when the defendant presents evidence of the *victim's* character. FRE 404(4)(a); *Commonwealth v. Morales*, 982 NE 2d 1105, 1111, 1111 n 10 (Mass 2013) (adopting rule and citing to rules from other jurisdictions). And some jurisdictions permit the use of specific instances of violence rather than limiting the evidence to mere opinion or reputation evidence. *See e.g.*, *Morales*, 982 NE 2d at 1111-12 (adopting rule); Cal Evid Code § 1103(b).

Child and elder abuse cases also have been the subject of propensity-evidence legislation. California allows propensity evidence for both types of cases. Cal Evid Code § 1109(a)(2) & (a)(3). And Texas has a child-abuse, propensity-evidence provision that applies to assault and sexual-abuse crimes. Texas Code Crim Proc Art 38.37, § (2)(b).

And even in Oregon, courts admit propensity evidence in non-child-sex cases under *State v. LeClair*, 83 Or App 121, 730 P2d 609 (1986), *rev den*, 303 Or 74 (1987), which held that a defendant has a limited constitutional right to present propensity evidence of the victim's propensity to make false accusations. Although *LeClair* involved sexual abuse, the Court of Appeals recently applied the rule in a domestic-violence case. *State v. Taylor*, 275 Or App 962, 365 P3d 1149 (2015), *rev den*, 360 Or 26 (2016). The scope of the rule is unclear. *See also State v. Maxwell*, 172 Or App 142, 148-50, 18 P3d 438, *rev den*, 332 Or 559 (2001) (open question whether rule applies to false accusations made by non-victim witness).

Finally, England—the country that gave us the character rule—has abolished the rule. In *Regina v. Boardman* (1975) App Cas 421, the House of Lords relaxed the character ban, reasoning that the distinction between propensity and nonpropensity evidence was largely one of degree, and that the decisive factor for admission should be the probative value of the evidence. In 2003, the English Parliament abolished the common-law character rule for criminal proceedings and authorized the use of evidence of the defendant's character to prove propensity. Criminal Justice Act 2003, ch 44, Pt 11, Ch 1, § 99(1) & § 101(1).

The fact that so many jurisdictions have enacted such a wide array of rules allowing propensity evidence, and that England has abolished the rule,

cast considerable doubt on defendant's claim that the use of propensity evidence offends a deeply-rooted rule of fundamental fairness.

3. The admission of propensity evidence often will not render a particular trial fundamentally unfair.

Even if history or contemporary practice offered support for defendant, that would not end the due-process analysis, because the ultimate focus is on fundamental fairness in operation. *See generally* 1 Wayne R. LaFave, et al, *Criminal Procedure*, § 2.7(c), (4th ed 2015). The scope of the character rule is not "inflexible" or "engraved in stone." *State v. Manrique*, 271 Or 201, 210, 531 P2d 239 (1975). "That [a] practice is ancient does not mean it is embodied in the Constitution." *United States v. Enjady*, 134 F3d 1427, 1432 (10th Cir 1998). "Many procedural practices—including evidentiary rules—that have long existed have been changed without being held unconstitutional." *Id.* Nothing prohibited Oregon from "creat[ing] exceptions to the longstanding practice of excluding prior-bad-acts evidence." *United States v. Mound*, 149 F3d 799, 801 (8th Cir 1998). To establish that due process *categorically* bars propensity evidence in non-child-sex cases, defendant would have to demonstrate that its admission will *invariably* and *always* result in a due-process violation. Defendant did not and cannot make that showing.

The admission of other-acts evidence violates due process when its admission would render the trial fundamentally unfair. "[T]he facts must be

extreme before the admission of the evidence will amount to a denial of due process" and "courts rarely conclude that the admission of [other-acts evidence] constitute[] a violation of the substantive due process right." 2 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 10:16 (2014). A colorable claim exists in extreme cases when three factors are present: (1) "the proof of the defendant's commission of the act is slim or flimsy"; (2) "the prejudicial effect of the evidence greatly outweighs its probative effect"; and (3) the evidence relates to a critical or crucial issue in the case." *Id*. (footnotes omitted).

The admission of propensity evidence will not result in a due-process violation in a substantial number of cases, because the evidence will be highly probative. Propensity evidence has been deemed objectionable not because it lacks probative value, but rather because it has too much probative value. *See Michelson v. United States*, 335 US 469, 476, 69 S Ct 213, 93 L Ed 2d 168 (1948) (excluded "despite its admitted value" because of concerns that the evidence would "overpersuade"). But the admission of other-acts evidence does not violate due process unless its probative value is so outweighed by the

prejudice that it renders the trial fundamentally unfair, and propensity evidence often will be admissible under that test.[2]

That conclusion follows from the courts' treatment of nonpropensity evidence, because the risks associated with propensity and nonpropensity evidence are more or less the same. Propensity evidence creates "'the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.'" *Old Chief v. United States*, 519 US 172, 181, 117 S Ct 644, 136 L Ed 2d 574 (1997). Yet, as the Tenth Circuit has explained, nonpropensity evidence presents precisely the same risks and is constitutional:

> Whenever such evidence is before the jury, the jury may be tempted to convict for the prior bad act, or what it says about the defendant's character, rather than what it says about the likelihood

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[2] The use of propensity evidence in sex cases is justified, in part, by the fact that such crimes are often committed in private without witnesses or corroborating evidence, that they involve difficult credibility determinations, that propensity evidence bolsters and protects vulnerable victims, and that the evidence is probative. *Enjady*, 134 F3d at 1431-32. That reasoning extends to other types of cases, including domestic-violence cases, child-abuse cases, and cases in which the disputed issue is the defendant's state of mind. *See* Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U Haw L Rev 221, 222-23 (1998) ("[d]ue to the unique nature of domestic violence crimes, prior acts of abuse are necessary to provide the fact-finder with the whole truth"); Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Cases*, 34 Fam L Q 43, 56 (2000) ("[e]vidence of prior bad acts is especially relevant and probative in domestic violence cases because of the cyclical nature of domestic violence); *Johns*, 301 Or at 551 ("[i]ntent or state or mind is often the most difficult element of a crime to prove").

> that the defendant committed the charged crime. *Therefore, the Supreme Court has described the risk of prejudice associated with evidence admitted under Rule 404(4)(b)—which allows evidence of prior bad acts—in almost precisely the same terms as that associated with propensity evidence*. The Court has said that Rule 404(4)(b) evidence presents the risk that "the jury may choose to punish the defendant for the similar rather than the charged act, or [that] the jury may infer that the defendant is an evil person inclined to violate the law." *Huddleston v. United States*, 485 US 681, 686, 108 S Ct 1496, 99 L Ed 2d 771 (1998). Nevertheless, since the Court upheld the common law equivalent of Rule 404(b), there has been no doubt that it is a constitutional rule[.]

United States v. Castillo, 140 F3d 874, 882 (10th Cir 1998) (emphasis added; citations omitted). The fact that character evidence offered for nonpropensity purposes and propensity purposes presents the same or similar risk of prejudice, and that the former almost never violates due process is a compelling indication that the latter does not always do so.[3]

Defendant counters that propensity evidence violates due process, because it vitiates the "presumption of innocence," undermines the proof-beyond-a-reasonable-doubt requirement, and presents an unacceptable risk that a defendant will be found guilty because of his criminal status and not because he committed a crime. (Resp Br 24-25). Courts repeatedly have rejected those challenges to the admission of other-acts evidence, and the arguments fail for

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[3] To be sure, there may be situations in which propensity evidence could be used in ways that are different from, and more problematic than, the ways in which nonpropensity evidence could be used. General evidence that the accused is a bad person lacks probative value and would not be proper. But not all propensity evidence shares that problem.

the same reasons here. 2 Imwinkelreid, *Uncharged Misconduct Evidence* §§ 10:14-10:17 (discussing rejection of arguments); *Enjady*, 134 F3d at 1432-33 (rejecting arguments). Defendants' constitutional rights are protected by the application of the balancing rule and the jury instructions, including an appropriate limiting instruction upon request. *See Dowling v. United States*, 493 US 342, 352-53, 110 S Ct 668, 107 L Ed 2d 708 (1990) (stressing the availability of balancing and limiting instructions).

To be sure, the admission of propensity evidence *sometimes* may violate due process. That is the whole point of the OEC 404(4)(a) balancing requirement. *Williams* noted that the federal courts generally have found no constitutional flaw in evidentiary rules expanding the admission of other-acts evidence, so long as trial courts retain the ability to exclude unfairly prejudicial evidence under a balancing test. 357 Or at 12. OEC 404(4)(a) serves precisely that function by requiring the application of whatever balancing determination is constitutionally necessarily to ensure that OEC 404(4) is constitutional and to exclude the admission of evidence that would violate due process.

That balancing safeguard guarantees the constitutional application of OEC 404(4) in all types of criminal cases. Courts have upheld all the various forms of propensity provisions against due-process challenges reasoning that Rule 403 balancing will protect against the use of evidence that would be fundamentally unfair. *See e.g.*, *Enjady*, 134 F3d at 1433 (sex offense); *People*

v. Falsetta, 986 P2d 182, 189-90 (Cal 1999) (same); *State v. Dabbs*, 940 NE 2d 1088, 1099 (Ill 2010) (domestic violence); *Fuzzard v. State*, 13 P3d 1163, 1166-67 (Alaska App 2000) (same); *People v. Fuiava*, 269 P3d 568, 700 (Cal 2012) (first-aggressor provision). That reasoning is correct. Regardless of the type of case, a criminal defendant's right to a fair trial is fully protected by the OEC 404(4) balancing requirement.

At bottom, defendant's argument is flawed, because the distinction between nonpropensity and propensity evidence is a matter only of degree, because the risks associated with both types of evidence is largely the same, and because the "propensity" label is not a helpful, reliable indicator of the probative value of the evidence or its prejudicial effect. Some nonpropensity evidence is not particularly probative, whereas some propensity evidence is extraordinarily probative. And the use of propensity evidence in practice often will resemble the use of nonpropensity evidence. For example, under the hostile-motive, nonpropensity theory, the state is permitted to prove that "'when similarly agitated in a domestic setting defendant will act violently and intentionally.'" *Moen*, 309 Or at 69. The admission of propensity evidence in a domestic-violence case likely would be framed similarly.

In sum, this court need not address defendant's argument that due process categorically bars the use of propensity evidence in non-child-sex cases, because this is a child-sex case. In all events, defendant is mistaken. The due-

process determination is highly fact specific and must be made on a case-by-case basis. *See also State v. Miller*, 327 Or 622, 629, 969 P2d 1006 (1998) ("few legal standards * * * are more case specific than the standard of prejudice"). No categorical rule is appropriate. As the state explains its opening brief (App Br 23-36), the admission of the challenged evidence in this case (much of which was nonpropensity evidence) did not render defendant's trial fundamentally unfair.

C. OEC 404(4)(a) limits the application of OEC 403 to due process balancing.

Defendant's argument that OEC 404(4)(a) mandates ordinary OEC 403 balancing (Resp Br 26-42) is incorrect as well. As a matter of text, OEC 404(4)(a) subjects evidence to OEC 403 only "to the extent required by" the constitution. Contrary to defendant's assertion (Resp Br 29), it is not plausible to read "to the extent required by" to mean the same thing as "if required by." Although the word "extent" alone may have multiple connotations, the phrase "to the extent" has only one: "the point or degree to which something extends <they spent money *to the ~ of* $1500>." *Webster's Third New Int'l Dictionary* 805 (unabridged ed 1993) (emphasis added). Thus, OEC 403 applies *only to the degree it is necessary* to do so to comport with due process.

As the state explained in its opening brief (App Br 16-23), that means that a court must (upon request) determine whether the probative value of the

evidence is substantially outweighed by its unfair prejudicial effect. But it need not separately weigh the other considerations mentioned in OEC 403, such as whether the evidence is cumulative, because those considerations do not implicate due process. Nothing in the context or legislative history of OEC 404(4) undermines that interpretation. Although OEC 404(4)(d) independently allows a court to exclude evidence directly under the constitution—that is, if its admission would render the trial fundamentally unfair—subsection (a) gives the court a procedural mechanism to protect against that unfairness: balancing probative value against the prejudicial effect. The legislature might not have needed to include both provisions, but as defendant recognizes, "legal terminology can be redundant." (Resp Br 32 n 13). And the legislative history defendant cites reflects only that the legislature contemplated a balancing of "the probative evidence versus the *prejudicial* impact" or application of "Rule 403 with respect to *prejudice*," not that it contemplated balancing for other issues such as cumulativeness. (Resp Br 36-37; emphasis added and omitted). That comports with the state's understanding of how due-process balancing under OEC 403 works. *See Moore/Coen*, 349 Or at 387-92 (applying requirement).[4]

[4] Defendant argues that the parties in *Moore/Coen* merely assumed that OEC 404(4) mandated a limited application of OEC 403. (Resp Br 14 n 4). Defendant is mistaken. In *Moore/Coen*, the trial court excluded nonpropensity

Footnote continued…

D. If OEC 404(4) requires ordinary balancing, the ordinary rules apply.

Defendant asserts that, in performing ordinary balancing under OEC 404(4), trial courts must play a "heightened role" to act as an "evidentiary gatekeeper" and have a duty to engage in "on the record" balancing." (Resp Br 42, 49-51). The state disagrees. Nothing in the text, context, or legislative history of OEC 404(4) supports defendant's position.

If OEC 404(4) requires ordinary balancing, there is no principled reason to apply anything other than the normal rules under OEC 403. Trial courts would have discretion in deciding whether to admit or exclude the evidence. Courts would apply the ordinary OEC 403 standard to make that determination though case law over time would identify pertinent considerations. *See e.g.*, *Falsetta*, 986 P2d at 189-90 (identifying some considerations).

The only caveat would be that, because OEC 404(3) does not apply, a trial court would lack discretion to exclude evidence solely on the ground that it

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(…continued)
evidence on balancing grounds, because it was cumulative and thus—in the court's view—essentially propensity. 349 Or at 387. The Court of Appeals reversed, because OEC 404(4) precluded ordinary balancing. *State v. Coen*, 231 Or App 280, 284-85, 220 P3d 423 (2009). On review, the defendant asserted that, by precluding ordinary balancing, OEC 404(4) was facially unconstitutional, because "OEC 403 codifies a due process principle that ensures that prosecutions are conducted in a fundamentally fair manner." *Moore/Coen*, 349 Or at 388. The parties extensively briefed the issue. *See State v. Coen*, S058152, S058145 (Pet Br 28-41; Resp Br 11-46). This court affirmed the Court of Appeals' reversal of the trial court's order excluding the evidence and thus rejected defendant's arguments on review.

is propensity evidence without regard to its probative value and quality. The balancing rule "must be applied to allow [OEC 404(4)] to have its intended effect." *United States v. LeCompte*, 131 F3d 767, 769 (8th Cir 1997). The balancing determination must comport with the legislature's policy choice to have OEC 404(4) supersede OEC 404(3) and make probative propensity evidence admissible.

Relatedly, the fact that a trial court "mislabels" evidence as nonpropensity evidence or propensity evidence would not be enough to establish a balancing error, because the line between propensity and nonpropensity evidence is a fine one, and because propensity evidence is admissible. As long as the trial court correctly identifies the issue or issues for which the evidence is relevant, the sole focus should be on the core-balancing issues of the probative value and potential prejudice. That comports with *Williams* as this court's application of OEC 404(4) did not clearly identify the extent to which the evidence was propensity or nonpropensity evidence. *See* 357 Or at 22-23 (relevancy analysis).

Nor does OEC 404(4) alter the ordinary preservation rules involving OEC 403 rulings and other-acts evidence. That means that a defendant must separately preserve and raise any ancillary issues, including a claim that the trial court needed to articulate or more fully articulate its balancing ruling on the record. *See State v. Turnidge*, 359 Or at 443 (inferring that the trial court

conducted balancing and suggesting that any claim that the trial court failed to adequately explain its decision must be separately preserved). That also would include a challenge to any improper argument by the prosecutor. And it would include a challenge to the absence of a limiting instruction. *See* OEC 105 (requiring limiting instruction "upon request"); Laird C. Kirkpatrick, *Oregon Evidence* § 105.03, 65 (6th ed 2013) (attorneys choose not to request limiting instructions "to avoid emphasizing the evidence or alerting the jury to its possible prohibited use"); *State v. Clegg*, 332 Or 432, 442-43, 31 P3d 408 (2001) (litigant must request limiting instruction or issue is waived); *State v. Stevens*, 328 Or 116, 138, 970 P2d 215 (1998) (request must be timely). The preservation rule is particularly important in this area, because trial courts easily can correct these types of errors if given the chance.

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

Finally, defendant's argument that a limited remand would be impermissible is mistaken. Defendant asserts that the appellate court must be able to determine on appeal that the evidence was, in fact, admissible or that any error was harmless, and that if the court cannot affirmatively do so, it must order a new trial. (Pet Br 54). That argument is refuted by the large body of state and federal case law ordering limited remands to address procedural and analytical constitutional claims of error, including evidentiary claims of error.

See also State v. Campbell, 299 Or 633, 652-53, 705 P2d 694 (1985). Nothing mandates that the appellate court definitively resolve a claim of error on appeal or prohibits an appellate court from using the trial court and a limited-remand procedure as part of the error determination and correction process.

Defendant also contends that a limited remand is impermissible, because the trial court may decide that only a portion of the other-acts evidence was admissible or that the evidence was admissible only for a limited purpose, and that it is unfair to apply hindsight to determine whether or how an error in admitting evidence affected the course of a trial. (Resp Br 54-56). Those same arguments always have been levied against harmless-error review generally and repeatedly have been rejected. Oregon law does not recognize the "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, 306-08, 111 S Ct 1246, 113 L Ed2d 302 (1991). Appellate courts routinely conduct harmless-error review for evidentiary errors, including errors involving the admission of other-acts evidence. *See e.g.*, *State v. Gibson*, 338 Or 560, 570-71, 575-77, 113 P3d 423 (2005) (although the trial court erred in admitting some of the other-acts evidence, that error was harmless).

Moreover, defendant's concerns are not implicated at all in the substantial number of cases in which a trial court on remand concludes that all

of the evidence was admissible. 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 it was admissible only for a limited purpose. Yet appellate courts routinely make those types of harmless-error determinations, and there is no reason that trial courts cannot make those same determinations during limited remands. This court has recognized as much and ordered that form of a limited remand. *See State v. Cartwright*, 336 Or 408, 421, 85 P3d 305 (2004) (limited remand for disclosure of materials and determination whether error in denying access to materials affected the verdict).

Defendant also is wrong that trial judges will fail to fairly perform OEC 403 balancing, because the judges "will be invested in the original result," will have "seen how the trial played out and may have come the same [guilty] conclusion as the jury," or "may * * * be inclined to save judicial resources and not order a new trial." (Resp Br 56). 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. If a remand is required, this court should modify the Court of Appeals' decision and order the limited-remand procedure identified in the state's opening brief. (*See* App Br 41).

CONCLUSION

OEC 404(4) discards the unnecessary distinction created by the character rule in favor of a more flexible approach based on relevancy and the probative value of the evidence. OEC 404(4) expressly incorporates constitutional protections, involves the application of a due-process balancing test to protect against unduly prejudicial evidence, and may be applied in all types of criminal cases. This court should reject defendant's contrary arguments and remand the case to the Court of Appeals for it to make the due process determination. Alternatively, if a remand to the trial court is necessary for balancing, this court should modify the Court of Appeals' decision and order a limited remand.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 31, 2016, I directed the original Reply Brief of Petitioner on Review State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Eric R. Johansen, attorneys for respondent 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 6,000 word-count limitation established by this court's order (dated 10/31/16) granting the state's motion for leave to file an overlength reply brief, and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,873 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).

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