

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Petitioner on Review,

v.

SHAWN GARY WILLIAMS,

Defendant-Appellant,
Respondent on Review.

Josephine County Circuit
Court No. 08CR0707

CA A145644

SC S061769

BRIEF ON THE MERITS 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 Josephine County
Honorable PAT WOLKE, Judge

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Author of Opinion: Nakamoto, J.
Before: Schuman, P.J., Wollheim, J., and Nakamoto, J.

Continued...

PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
KRISTIN A. CARVETH #052157
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
kristin.carveth@opds.state.or.us

Attorneys for Defendant-Appellant
Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
DAVID B. THOMPSON #951246
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
david.b.thompson@doj.state.or.us

Attorneys for Plaintiff-Respondent
Petitioner on Review

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BRIEF ON THE MERITS

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

This case is about the admissibility of evidence of a criminal defendant's uncharged acts (other-acts evidence) under OEC 404(4). That rule makes "evidence of other crimes, wrongs or acts by the defendant" admissible in a criminal trial when it is "relevant," unless constitutional principles require its exclusion. Here, defendant was charged with two counts of first-degree sexual abuse of a five-year-old girl. At trial, the court admitted evidence that defendant had possessed little girls' underwear at his residence a short time before the alleged abuse occurred. The state offered that evidence to help prove that defendant had a sexual purpose when he touched the victim's vagina and when he took her hand and placed it on his clothed penis. Defendant had denied any inappropriate contact with the girl, suggesting that if it had occurred, it was at most accidental.

After defendant was convicted of the charged offenses, the Court of Appeals reversed, holding that the trial court erred in admitting the underwear evidence. *State v. Williams*, 258 Or App 106, 110-14, 308 P3d 330 (2013), *rev allowed*, 354 Or 699 (2014). The court concluded that the evidence was inadmissible because, if the jury found that the alleged touching occurred,

defendant's sexual purpose was not truly at issue and thus the evidence was not logically relevant under OEC 401 (defining "relevant evidence"). *Id.* at 113-14.

The following questions are presented on review:

First question presented

Under OEC 404(4), "[i]n criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant." What relevance standard applies to the evidence described in that rule?

First proposed rule of law

Evidence is relevant under OEC 404(4) if it meets the definition of "relevant evidence" set forth in OEC 401. That is, evidence is relevant for OEC 404(4)'s purposes if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OEC 401.

Second question presented

If evidence is probative of a fact that the state must prove to obtain a conviction, is the evidence logically relevant under OEC 401 even if the fact is undisputed?

Second proposed rule of law

Yes. Evidence that is probative of any material fact is logically relevant regardless of whether the fact is in dispute. To determine whether a particular

fact is material, the court looks only to the pleading and substantive law, and not to whether the fact is in dispute.

Third question presented

If evidence of a criminal defendant's other acts is logically relevant, does OEC 403 authorize its exclusion on balancing grounds, such as the prosecution's alleged lack of need for the evidence (*e.g.*, when the fact to which the evidence relates is not vigorously disputed)?

Third proposed rule of law

Unless exclusion based on OEC 403 balancing is constitutionally required, OEC 404(4) precludes the application of OEC 403 and makes admissible logically relevant "evidence of other crimes, wrongs or acts by the defendant."

STATEMENT OF MATERIAL FACTS

A. The state charges defendant with two counts of first-degree sexual abuse.

Defendant sexually abused a five-year-old girl (C), who was the daughter of a woman defendant had recently met and started dating. One day, defendant, C's mother, and C went rafting and then returned to the mother's apartment. (Tr 199). When they arrived there, defendant volunteered to watch C while her mother was in the shower. (Tr 200-01). When the mother left to shower, defendant was sitting on the couch and C was sitting on the floor watching a

movie. (Tr 201). The mother showered for approximately ten minutes. (Tr 202). When C's mother returned, defendant and C were both lying on the couch. (Tr 202). Defendant stayed until late that evening and then went home. (Tr 203).

A few days later, C's mother asked her what she thought of defendant, and C replied, "I don't know about him, mommy." (Tr 205). When asked what she meant, C said, "Mommy, the other day when you were in the shower he tickled my potty and made me touch his." (Tr 208). C's mother asked her to show what happened, and C put her hand inside her underwear, wiggled her fingers, and said, "He did this." (Tr 209).

C's mother called the police, and Grants Pass Detective Pierce interviewed C. She told Pierce that the touching occurred when her mother was in the shower. (Tr 182-84). Pierce also interviewed defendant. Although defendant initially denied being alone with C, he admitted that they had been alone when her mother was in the shower. (Tr 310). But defendant denied that he ever "came close" to C or touched her private parts, "even accidentally." (Tr 310, 320).

Detective Lidey also interviewed defendant. (Tr 352). Defendant told Lidey that he had wrestled with C and may have inadvertently touched her private parts then. (Tr 360-61, 365, 369). He also said that he may have accidentally touched C when her mother was in the shower, explaining that C

was lying on him, his arms were wrapped around her, he fell asleep, his arms fell, and “there was a possibility that his hands could have, while he was sleeping, * * * landed in her crotch area.” (Tr 415-17).

Defendant was charged with two counts of first-degree sexual abuse. At trial, C testified that, when her mother was in the shower, defendant touched her private areas underneath her pants and made her touch his penis. (Tr 128-30, 160). Defendant’s theory of the case was that the jury could not be sure what happened and whether any touching was done for a sexual purpose. (*See, e.g.*, Tr 120, defense counsel’s opening statement to the jury: “you will find you can’t be sure of anything” and “[y]ou can’t be sure what happened”).

B. At trial, the state offers the underwear evidence to help prove that defendant acted with a sexual purpose.

In its case-in-chief, the state offered testimony from defendant’s landlord, who had rented him a small cabin as the sole occupant for approximately six months. (Tr 230-33, 265-68). Before defendant moved into the cabin, the landlord cleaned it; in doing so, she moved the mattress on the bed in the bedroom. (Tr 243, 267-68). There was no girls’ underwear in the cabin. (*Id.*). When the landlord evicted defendant and cleaned the cabin, it still contained some of defendant’s belongings. The landlord discovered two pair of little girls’ underwear. One pair was in defendant’s duffel bag under the bed, and the second pair was between the box spring and top mattress of the bed, where no

child could have placed it. (Tr 236-42, 269-77). The state offered the foregoing evidence to prove that defendant was sexually interested in young girls, that he therefore acted with a sexual purpose in touching C, and that he did not accidentally touch her when he fell asleep. (Tr 87-88, 247-49).

C. The trial court admits the evidence.

The trial court admitted the underwear evidence, ruling that it was relevant to prove defendant's mental state. (Tr 254-57). In doing so, the court found that the state's need for the evidence was "high," relying on the admonition from *State v. Johns*, 301 Or 535, 551, 725 P2d 312 (1986), that a defendant's "intent or state of mind is often the most difficult element of a crime to prove." (Tr 255-56). The court applied OEC 403 and concluded that the danger of unfair prejudice and related considerations did not outweigh the state's need for the evidence. (Tr 256-57).

The jury found defendant guilty on both charges. (Tr 560).

D. The Court of Appeals reverses.

The Court of Appeals held that the trial court committed reversible error by admitting the underwear evidence. Purporting to determine whether that evidence was "logically relevant to a contested issue in the case," the court concluded that it was not. *Williams*, 258 Or App at 114. The court agreed with defendant's argument that culpable mental state "was not truly a contested issue." *Id.* at 113. It observed that, although defendant made statements to

police suggesting that he accidentally touched the victim's crotch when he fell asleep, he did not admit that he "put his hand in the child's underwear or caused the child to touch his penis." *Id.* at 114. The court reasoned that, had defendant done the alleged acts, then "whether he did so with the purpose of sexual gratification or arousal was not truly at issue in this case; [the acts] strongly indicate a sexual purpose." *Id.*

SUMMARY OF ARGUMENT

By its plain text, OEC 404(4) controls the admission of evidence of a defendant's other acts in a criminal trial. That rule has two requirements: (1) the evidence must be relevant under OEC 401's definition of "relevant evidence," and (2) admission of the evidence must not be so manifestly unfair or unduly prejudicial as to violate due process. Here, the evidence of defendant's possession of little girls' underwear met both of those requirements.

The evidence was logically relevant under OEC 401, because it had at least some tendency to prove that he acted with a sexual purpose when he touched a little girl's vagina and had her touch his penis – the basis for the sexual abuse charges against him. The logical relevance of that evidence did not depend on whether defendant contested the mental-state issue. Further, the probative value of the evidence was not so far outweighed by the danger of unfair prejudice that its admission rendered defendant's trial fundamentally unfair. The trial court properly admitted the evidence under OEC 404(4).

ARGUMENT

The trial court correctly admitted the underwear evidence under OEC 404(4). As discussed more fully below, under OEC 404(4)'s plain text, evidence of a criminal defendant's other acts is admissible when it is relevant under OEC 401 and its admission will not render the trial fundamentally unfair.¹ Evidence that defendant possessed little girls' underwear was relevant under OEC 401 to prove that defendant acted with the requisite mental state for the charged crimes. Further, principles of due process did not require its exclusion. The trial court therefore correctly admitted it.

A. Under OEC 404(4), evidence of a defendant's uncharged other acts is admissible in a criminal case if the evidence is logically relevant and its admission does not violate due process.

OEC 404(4) controls the admission of evidence of a defendant's uncharged other acts in a criminal case. That rule provides in part:

¹ OEC 401 provides:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

OEC 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay or needless presentation of cumulative evidence.

(4) In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:

(a) [OEC 406 to 412] and, to the extent required by the United States Constitution or the Oregon Constitution, [OEC 403][.]²

The rule thus is extremely broad, allowing for the admission of a defendant's other acts as long as two requirements are met: (1) the evidence is "relevant," and (2) admission of the evidence is not so manifestly unfair or unduly prejudicial as to violate due process.

1. Evidence is relevant under OEC 404(4) if it meets OEC 401's traditional definition of "relevant evidence."

This court has recognized that the legislature intended that OEC 404(4) apply a "traditional standard[] of relevancy." *State v. Moore/Coen*, 349 Or 371, 389, 245 P3d 101 (2010), *cert den*, 131 S Ct 2461 (2011) ("[U]nder OEC 404(4), traditional standards of relevancy are preserved, and in all events, no evidence may be admitted that would violate state and federal constitutional standards.") The traditional standard of relevance is set forth in OEC 401: "Relevant evidence' means evidence having any tendency to make the

² OEC 406 through OEC 412 deal with the following kinds of evidence: OEC 406 (habit and routine practice), OEC 407 (subsequent remedial measures), OEC 408 (compromise and offers of compromise), OEC 409 (payment of medical and other similar expenses), OEC 410 (withdrawn plea or statement), OEC 411 (liability insurance), and OEC 412 (relevance in sexual cases of victim's past behavior or manner of dress). None of those rules is implicated in this case.

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” That necessarily is the definition that applies to the terms “relevant” and “evidence” as used in OEC 404(4): “In criminal actions, *evidence* of other crimes, wrongs or acts by the defendant is admissible if *relevant* * * *.” (Emphasis added). Nothing in OEC 404(4)’s text and context suggests that the terms “relevant” and “evidence” are intended to mean anything other than what they mean in OEC 401 or elsewhere in the Evidence Code. *See, e.g.*, OEC 402 (“All relevant evidence is admissible, except as * * *.”); OEC 403 (“Although relevant, evidence may be excluded if * * *.”); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) (“use of the same term throughout a statute indicates that the term has the same meaning throughout the statute”); *Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005) (“[w]hen the legislature uses the identical [term or phrase] in related statutory provisions that were enacted as part of the same law, we interpret the [term or] phrase to have the same meaning throughout the statute”).

This court therefore should hold that, for OEC 404(4)’s purposes, “evidence of other crimes, wrongs or acts by the defendant” is “relevant” if it meets the definition of “relevant evidence” in OEC 401. That is, evidence is relevant under OEC 404(4) if it has “any tendency to make the existence of a

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” OEC 401.

2. The Court of Appeals narrower interpretation of OEC 404(4) is incorrect.

For the reasons just described, “relevance” for purposes of OEC 404(4) means logical relevance as defined by OEC 401. But the Court of Appeals has adopted an interpretation of “relevance” for OEC 404(4) that is significantly narrower, in two respects. First, the court has concluded that relevant evidence under OEC 404(4) cannot include any character evidence of the sort prohibited by OEC 404(2) and (3). Second, the court has concluded that evidence that is probative of a fact that the state must prove is not “relevant” under OEC 401, and thus under OEC 404(4)) if the defendant does not dispute that fact. As explained below, the Court of Appeals is incorrect in both respects.

a. OEC 404(4) does not incorporate OEC 404(2)’s and (3)’s prohibition against “propensity evidence.”

The first way in which the Court of Appeals has misconstrued OEC 404(4) is by assuming that “relevant” evidence under OEC 404(4) necessarily excludes any propensity evidence of the sort prohibited by OEC 404(2) and (3). In this case, for example, the evidence necessarily was admitted under OEC 404(4), but the Court of Appeals analyzed its admission under OEC 404(3). *Williams*, 258 Or App at 111 (“We * * * begin our analysis by addressing how OEC 401 and OEC 404(3) may apply to this case.”). That rule prohibits the

admission of other-acts evidence “to prove the character of a person in order to show that the person acted in conformity therewith,” but permitting its admission for other purposes. The Court of Appeals thus tacitly has assumed that OEC 404(4)’s allowance for other acts evidence “if relevant” incorporates OEC 404(3)’s prohibition against “propensity evidence.”³ But that interpretation conflicts with the plain text of 404(4) and contrary to this court’s case law.

Under OEC 404(4)’s plain text, the admissibility of relevant other-acts evidence is subject to only a short list of statutory and constitutional rules that does *not* include OEC 404(2) and (3). *See* OEC 404(4)(a) – (d) (“evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as provided by * * * (a) [OEC 406 to 412] and, to the extent required by the United States Constitution or the Oregon Constitution, [OEC 403]; (b) [t]he rules of evidence relating to privilege and hearsay; (c) [t]he Oregon Constitution; and (d) [t]he United States Constitution”). By its terms OEC 404(4) is a self-contained rule; it is not a subpart of OEC 404(2) or (3), nor does it cross-reference or otherwise make its scope subject to those provisions.

³ The Court of Appeals has explicitly adopted the same rule in other cases. *See State v. Dunn*, 160 Or App 422, 430, 981 P2d 809 (1999), *rev den*, 332 Or 632 (2001) (interpreting OEC 404(4) as incorporating OEC 404(2)’s and (3)’s prohibition against propensity evidence).

In addition to finding no support in the text of OEC 404(4), the Court of Appeals assumption that OEC 404(4) incorporates OEC 404(3) is at odds with this court's case law. As this court has made clear, OEC 404(2) and (3) do not define "relevant evidence" for OEC 404(4) or any other evidence rule (including themselves). Instead, OEC 404(2) and (3) simply identify a type of evidence that—although relevant—is inadmissible based on a specific application of OEC 403:

Bad character evidence (such as other crimes by the accused) is excluded under the propensity rule, *not because it is irrelevant*, but because of the risk of unfair prejudice to the accused. *The propensity rule's general prohibition of bad character evidence, codified in OEC 404(2) and 404(3), is a specific application of OEC 403.* The theory is that the risk that the jury will convict for crimes other than those charged, or because the accused deserves punishment for his past misdeeds, outweighs the probative value of the inference that "he's done it before, he's done or will do it again." Weinstein & Berger, Weinstein's Evidence Manual 7-6, ¶ 7.01[01] (Student ed. 1987).

State v. Pinnell, 311 Or 98, 105-06, 806 P2d 110 (1991) (footnotes omitted) (emphasis added). OEC 404(2) and (3) thus are not relevancy provisions.

Furthermore, this court has previously recognized the legislature's purpose in enacting OEC 404(4) was to *eliminate* such OEC 403 balancing. In *Moore/Coen*, 349 Or at 389, this court thus recognized that OEC 404(4) had eliminated traditional (subconstitutional) OEC 403 balancing for evidence of a criminal defendant's other acts. *See also* Laird C. Kirkpatrick, *Oregon Evidence* § 404.07, 257 (6th ed 2013) ("In allowing propensity evidence, OEC

404(4) overrides the policy of OEC 404(2) and (3), both of which prohibit evidence of person's character to show 'that the person acted in conformity therewith' on a particular occasion."). By incorporating 404(3) into 404(4), the Court of Appeals has thus essentially re-inserted into 404(4) traditional 403 balancing — precisely what the legislature specifically intended to eliminate.

b. Evidence is logically relevant under OEC 401 whether or not a defendant contests the fact to which the evidence relates.

The Court of Appeals in this case concluded that the underwear evidence was not logically relevant under OEC 401 because defendant had not disputed culpable mental state. The court thus concluded that defendant's mental-state issue was "not truly at issue." In so doing, the court misconstrued the concept of relevance.

Logical relevance does not depend on whether a party opponent disputes the fact to which the evidence relates. "[W]hether a fact or proposition is material is determined by the pleadings and the substantive law." *State v. Hayward*, 327 Or 397, 407, 963 P2d 667 (1998). The logical relevance determination does not depend on whether the material fact is disputed.

The legislative commentary to OEC 401 explains:

"The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of * * * considerations [set

forth in] Rule 403 rather than under any general requirement that evidence is admissible only if directed to matters in dispute.”

Legislative Commentary to OEC 401, reprinted in Laird C. Kirkpatrick, *Oregon Evidence* § 401.02, 153 (6th ed 2013) (ellipses and brackets in original Legislative Commentary).

Notably, in *State v. Sparks*, 336 Or 298, 308, 83 P3d 304, *cert den*, 543 US 893(2004), this court relied on that legislative history in rejecting the defendant’s argument that the state’s photographic evidence “became irrelevant once he offered to stipulate to the facts that the state sought to prove with the photographs.” The court observed that the defendant’s “proposed stipulation only provide[d] an alternate form of proof; [i]t did not have the effect of making otherwise relevant evidence irrelevant.” *Id.* In short, “the mere availability of [the] defendant’s offered stipulation as an alternate form of proof did not render the photographs irrelevant [under OEC 401].”⁴ *Id.*

⁴ In *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012), this court held that other acts evidence was not relevant to prove intent, because the state had not proved that the charged acts had occurred. The court rejected the state’s argument that the “defendant’s not guilty plea alone was sufficient to make the evidence of [the defendant’s] uncharged misconduct relevant” and that therefore that evidence was unconditionally admissible because the state “had the burden to prove each element of the charge” and “[it], not the defense, controls how it will prove its case.” 352 Or at 580. But in rejecting that argument, the court said nothing about logical relevance, OEC 401, or *Sparks*. Nor did the court implicitly cast any doubt on the validity of *Sparks*’s holding that evidence is relevant under OEC 401 even if the defendant does not contest the fact to which the evidence relates.

Consequently, the underwear evidence admitted against defendant in this case was logically relevant under OEC 401, even if he did not contest the mental-state issue. The Court of Appeals' contrary analysis—which assumed that the evidence was not logically relevant under OEC 401 because defendant's denial of any alleged touching rendered the mental-state issue a non-issue—was wrong.

3. If other-acts evidence is relevant, OEC 404(4) compels exclusion only when its admission would render the trial fundamentally unfair.

The second requirement for admissibility under OEC 404(4) is simply that the evidence's admission does not violate a defendant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the United States Supreme Court has recognized, however, that is an exceedingly small category of evidence.

“Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.” *Dowling v. United States*, 493 US 342, 352 (1990). The Supreme Court therefore “ha[s] defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Id.*

Accordingly, OEC 404(4)(a) compels exclusion of relevant other-acts evidence only when its probative value is so far outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence *that its*

admission would render the trial fundamentally unfair. See Payne v.

Tennessee, 501 US 808, 825 (1991) (although Eighth Amendment does not prohibit admission of victim-impact evidence, Due Process Clause protects against admission of victim-impact evidence “so unduly prejudicial that it renders the trial fundamentally unfair”); *State v. Pitt*, 352 Or 566, 581 n 8, 293 P3d 1002 (2012) (“admission of [evidence of a defendant’s prior uncharged misconduct] must not violate [the] defendant’s right to due process”).

Put another way, exclusion under the Due Process Clause is required “[o]nly when [the] evidence ‘is so extremely unfair that its admission violates fundamental conceptions of justice[.]’” *Perry v. New Hampshire*, ___ US ___. 132 S Ct 716, 723 (2012) (holding that introduction of eyewitness testimony, without preliminary assessment of its reliability, did not render defendant’s trial fundamentally unfair under the Due Process Clause). Generally, other-acts evidence fits that description only when it “goes only to character and there are no permissible inferences the jury may draw from it.” *Leavitt v. Arave*, 383 F3d 809, 829 (9th Cir 2004) (internal quotation marks omitted; emphasis in original), *cert den*, 545 US 1105 (2005).⁵

⁵ Due process balancing differs from traditional (subconstitutional) OEC 403 balancing in one significant respect: under traditional OEC 403 balancing, a trial court has broad discretion to exclude evidence even if its admission would not render the trial fundamentally unfair. *See State v. Lawson*, 352 Or 724, 757-58, 291 P3d 673 (2012) (describing traditional OEC 403

Footnote continued...

B. The trial court correctly admitted the underwear evidence under OEC 404(4).

The trial court correctly admitted the underwear evidence under OEC 404(4). The evidence satisfied both of OEC 404(4)'s two requirements: The evidence was relevant because it had a tendency to increase the probability that defendant committed the alleged touching with a sexual purpose. And the probative value of the evidence was not so far outweighed by the danger of unfair prejudice or other considerations that its admission rendered defendant's trial fundamentally unfair.

(...continued)

balancing). Rule 403 authorizes the exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay or needless presentation of cumulative evidence." If a court concludes that probative value is substantially outweighed by one of those things, it may exercise its discretion to exclude the evidence. *State v. Sarich*, 352 Or 601, 618, 291 P3d 647 (2012). The proponent's need for the evidence is a significant factor in OEC 403 balancing. *State v. Mayfield*, 302 Or 631, 645, 733 P2d 438 (1987) (first step in four-step OEC 403 balancing is "assess[ing] the proponent's need for the uncharged misconduct evidence," and third step is "the judicial process of balancing the prosecution's need for the evidence against the countervailing prejudicial danger of unfair prejudice").

Although the Court of Appeals in this case did not expressly apply OEC 403 in holding that the underwear evidence was inadmissible, the court's view that the state *did not need* that evidence was key to its decision. That suggests the court may have implicitly relied on OEC 403 in analyzing the admissibility question. But, as discussed, OEC 404(4)(a) prohibits traditional OEC 403 balancing; OEC 403 applies to OEC 404(4) evidence only to the extent due process requires.

1. The evidence was logically relevant.

Because OEC 404(4) incorporates OEC 401's definition of "relevant evidence," the first step here is to determine whether the underwear evidence admitted against defendant was relevant under OEC 401. That inquiry simply is whether the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OEC 401. In short, is the evidence "logically relevant"? *State v. Lyons*, 324 Or 256, 270, 924 P2d 802 (1996) ("the trial judge must decide whether the proffered evidence satisfies the minimum threshold of logical relevance required by OEC 401"). As noted, the state offered the underwear evidence to help prove that defendant acted with "the purpose of arousing or gratifying [his or the other party's] sexual desire." ORS 163.305(7).

Evidence that tends to make more probable that the defendant acted with the requisite mental state is always logically relevant under OEC 401 and OEC 404(4). Because the underwear evidence met OEC 401's very low threshold for relevance, the trial court correctly admitted it. The evidence at least slightly increased the probability that defendant acted with a sexual purpose in his contact with C, because his possession of little girls' underwear—found under his mattress and under his bed, in a cabin he occupied by himself—gave rise to a reasonable inference that he had a sexual interest in little girls. *See State v.*

Lewis, 352 Or 626, 635, 290 P3d 288 (2012) (“The threshold for relevance [under OEC 401] is very low.”); *State v. Gailey*, 301 Or 563, 567, 725 P2d 328 (1986) (in determining relevance under OEC 401, “[t]he proper inquiry is: ‘Does the item of evidence even slightly increase or decrease the probability of the existence of any material fact in issue?’”); *State v. McKay*, 309 Or 305, 308, 787 P2d 479 (1990) (child’s testimony about sexual contacts between her and defendant on several occasions prior to incident giving rise to sexual abuse charge was admissible to demonstrate defendant’s sexual predisposition for particular victim).

As noted, the Court of Appeals in this case concluded that the evidence was not relevant because defendant’s culpable mental state was not truly at issue. But that was incorrect for either of two reasons.

First, the state had to prove that fact beyond a reasonable doubt, even if defendant did not affirmatively contest it. Under ORS 163.427(1)(a)(A), “[a] person commits the crime of sexual abuse in the first degree when that person * * * [s]ubjects another person to sexual contact and * * * [t]he victim is less than 14 years of age[.]” “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.” ORS 163.305(7). “[I]ntent or state of mind is often the most difficult element of the crime to prove because many crimes are

unwitnessed and even if a witness is present, the witness can only surmise the actor's state of mind." *Johns*, 301 Or at 551. As discussed, in *Sparks* this court made clear that evidence is relevant under OEC 401 even if the fact to which it relates is uncontested.

Second, even assuming evidence is relevant under OEC 404(4) only if the defendant explicitly contests the fact to which the evidence relates, the underwear evidence was nonetheless properly admitted. Contrary to the Court of Appeals' conclusion, whether defendant acted with a sexual purpose *was* at issue.

The Court of Appeals stated that, although "[t]he jury did hear defendant's out-of-court statements [to the police] suggesting at some points that some part of his body may have contacted the child innocently or inadvertently," "in none of those statements did defendant suggest that he may have put his hand in the child's underwear or caused the child to touch his penis, accidentally or not." *Williams*, 258 Or App at 114. The court viewed defendant's statements as a complete denial that any of the alleged touching actually occurred and as statements that thus rendered defendant's mental state a non-issue. It reasoned that, if the jury found that defendant had placed his hand inside C's underwear or caused her to touch his penis, then those acts alone "strongly indicate a sexual purpose." *Id.* That analysis is flawed on at least two levels.

First, the Court of Appeals' own description of what defendant told Detective Lidey in pre-arrest interviews undermines the conclusion that defendant never suggested that the alleged touching was accidental:

[D]uring Lidey's first interrogation of defendant, defendant had said that he was wrestling with the child at the apartment and may have inadvertently touched the child's private parts, and, during Lidey's second interview of defendant, defendant had said that, when the child was lying on top of him while her mother was in the shower, his hands "could have landed in her crotch area" while he was napping.

Id. Thus, the Court of Appeals recognized that defendant had admitted that he may have inadvertently touched C's "private parts" or "crotch area" while wrestling with her and while napping. That admission does not constitute a denial by defendant that his hand found its way underneath C's underwear.

Further, defendant explicitly drew the jury's attention to the possibility that the touching was accidental in closing argument:

[DEFENSE COUNSEL:] * * * So what it really comes down to is are you sure about what happened? Are you sure if anything happened (inaudible)? Are you sure that there was contact made by [defendant] with [C] for a sexual purpose? That's the question in front of you. No one is here to call [C] * * * a liar.

(Tr 516).

Second, in concluding that there was no issue regarding defendant's mental state because the alleged touching "strongly indicate[s] a sexual purpose," the Court of Appeals ignored the state's burden of proof. The prosecution had to prove *beyond a reasonable doubt* that defendant acted with a

sexual purpose. No prosecutor could confidently conclude that the state's burden would be met simply by convincing the jury that defendant committed the alleged acts, particularly in light of his suggestions to the police that he may have inadvertently touched C while wrestling with her or while asleep. In short, in light of those circumstances, it cannot be said that the state's burden was easily met merely because the alleged acts—taken alone—“strongly indicate a sexual purpose.” That is why the state offered the underwear evidence.

2. Admission of the evidence did not violate defendant's constitutional right to due process.

The second and final step in analyzing the admission of the underwear evidence under OEC 404(4) is to ask whether admission of the evidence violated defendant's due process rights. Notably, defendant has not maintained that the evidence did violate his due process rights. Nor did the Court of Appeals reverse on that basis. Regardless, admission of the underwear evidence did not violate due process.

As discussed, defendant's statements to the police raised the issue of whether the alleged touching was done with a sexual purpose or accidentally. And as noted, defendant's possession of little girls' underwear gave rise to a reasonable inference that he had a sexual interest in little girls, which was relevant to the jury's determination whether he acted with a sexual purpose with respect to C, a little girl. While certainly prejudicial to defendant (as is all

evidence the state offers against a defendant, *Pinnell*, 311 Or at 105 n 12), the evidence—offered to show a specific, highly relevant character trait (defendant’s sexual interest in little girls) rather than general bad character—did not deprive him of a fair trial.

This was not highly inflammatory evidence gratuitously offered for no purpose other than to show defendant’s propensity to do evil and that he acted in conformity with a general evil disposition. Perhaps in such a situation due process principles might warrant exclusion of the other-acts evidence, because the probative value of the evidence (if any) is dramatically outweighed by the risk that the jury will convict based on the defendant’s general bad character rather than on an objective assessment of the evidence. *People v. Albarran*, 149 Cal App 4th 214, 57 Cal Rptr 3d 92 (2007), is illustrative. There, the court held that evidence of the defendant’s uncharged misconduct was admitted in violation of due process:

Certain gang evidence, namely the facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate purpose in this trial. * * * As we have concluded elsewhere, the prosecution did not prove that this gang evidence had a bearing on the issues of intent and motive. We thus discern no permissible inferences that could be drawn from this evidence. From this evidence there was a real danger that the jury would improperly infer that whether or not [the defendant] was involved in [the charged shootings], he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus should be punished. Furthermore, this gang evidence was extremely and uniquely inflammatory, such

that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues. In our view, looking at the effect of this evidence on the trial as a whole, we believe that this prejudicial gang evidence was of such a quality as necessarily prevents a fair trial.

57 Cal Rptr 3d at 105-06 (footnotes, internal quotation marks and citations omitted).

Unlike the gang evidence in *Albarran*, the evidence here was directly relevant to a necessary element of the state's case; it was neither duplicative nor unduly prejudicial. Certainly it was not so manifestly and unfairly prejudicial as to violate defendant's due process rights.

In sum, admission of the other-acts evidence at issue here did not violate the defendant's due process rights. The trial court properly admitted it under OEC 404(4).⁶

⁶ Even though the underwear evidence was admissible under OEC 404(4), defendant may argue that the trial court nevertheless erred under *State v. Leistiko*, 352 Or 172, 186, 282 P3d 857 (2012) by admitting the evidence without instructing the jury that it was not to consider the evidence unless and until it finds the charged acts occurred. But that argument is not preserved—defendant did not request a *Leistiko*-like instruction at trial—and, in any case, is without merit.

In *Leistiko*, the issue was whether evidence was admissible under OEC 404(3). But in this case the evidence was admitted under OEC 404(4). As explained above, in adopting the latter rule, the legislature expressly permitted the admission of a criminal defendant's other acts to prove any fact of consequence, including the charged *act*. Furthermore, *Leistiko* explained that the instruction was required when the 404(3) evidence of similar past conduct is probative of intent *based on the doctrine of chances*. But that doctrine is simply not implicated given the facts of this case. And in all events, the court's failure

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sua sponte to give the instruction cannot qualify as *plain error* because it is certainly not “obvious” that it was required to do so. Moreover, counsel may well have *chosen* not to request a *Leistiko* instruction. *State v. Gornick*, 340 Or 160, 130 P3d 780 (2006) (error not plain where counsel may have chosen not to object). *See also* OEC 105 (counsel must request limiting instructions); *State v. Clegg*, 332 Or 432, 442-43, 31 P3d 408 (2001) (defendant forfeited any right to a limiting instruction absent a timely request); *State v. Stevens*, 328 Or 116, 138, 970 P2d 215 (1998) (same). For tactical reasons, defense counsel frequently choose not to request such limiting instructions. *See* Laird C. Kirkpatrick, *Oregon Evidence* § 105.03, 65 (6th ed 2013) (noting that counsel may prefer not ask for limiting instructions “to avoid emphasizing the evidence or alerting the jury to its possible prohibited use.”).

CONCLUSION

Based on the foregoing arguments, this court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ David B. Thompson

DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorneys for Plaintiff-Respondent/
Petitioner on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 27, 2014, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Kristin A. Carveth, attorneys for appellant/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 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 6,490 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/ David B. Thompson

DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorney for Plaintiff-Respondent/
Petitioner on Review
State of Oregon

DBT:blt/5125747