IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. EDWARD JONES ZAVALA, Defendant-Appellant, Respondent on Review.	Lincoln County Circuit Court No. 122847, 130820 CA A154491 (Control); A154492 SC S064072

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 Lincoln County
Honorable THOMAS O. BRANFORD, Judge

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

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INTRODUCTION

Oregon Evidence Code (OEC) 403 allows trial courts to exclude relevant evidence if its probative value is substantially outweighed by considerations such as the danger of unfair prejudice or the needless presentation of cumulative evidence. During the bench trial in this child-sex-abuse prosecution, defendant did not object under OEC 403 to testimony the state presented about an uncharged incident of inappropriate sexual conduct by the defendant against one of the victims. The Court of Appeals nonetheless held that the trial court had committed plain error by not conducting an on-the-record balancing under OEC 403. Because it could not tell whether the trial court would have admitted the evidence anyway, it remanded for the court to conduct the balancing.

As the state argues in *State v. Baughman* and *State v. Mazziotti*, which are being heard together with this case, the narrower balancing required by OEC 404(4), not ordinary OEC 403 balancing, applies to evidence of uncharged misconduct by a criminal defendant. But this court need not resolve that issue for purposes of this appeal. Even assuming OEC 403 balancing applies, the Court of Appeals' ruling was wrong for three main reasons.

First, trial courts have no duty to conduct OEC 403 balancing unless a party asks them to do so. A contrary rule would be unworkable, because it would require trial courts to comb through evidence on their own to see if any part might be objectionable. Because trial courts have no duty to apply OEC 403 without a request from a party, the trial court here did not err—much less plainly err—in admitting the evidence without balancing.

Second, the claim of error requires speculation about matters outside the record, which is not appropriate in plain-error review. There is no way to tell on this record whether the trial court in fact considered the OEC 403 factors and decided to admit the evidence anyway. The record also does not rule out the possibility that defendant made a strategic decision not to object to the evidence. Because defendant's claim on appeal would require the reviewing court to choose between competing inferences about these matters, there was no plain error.

Finally, defendant did not show that the trial court would have excluded the evidence if it had conducted OEC 403 balancing. An error that may well have been harmless—especially one that requires a remand to determine if it was harmless—is not one that warrants overlooking defendant's failure to preserve it.

If this court nonetheless concludes that the trial court plainly erred and that it was appropriate for the Court of Appeals to correct it, the court still

should tailor the remedy for the reasons argued in *Baughman* and *Mazziotti*. Any remand should be limited to determining whether the evidence's probative value is so substantially outweighed by the danger of unfair prejudice that, as a matter of law, admitting the evidence rendered the trial fundamentally unfair.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First question: Does a trial court have a duty to make an on-the-record balancing determination even if no party has requested one?

First proposed rule: No. A trial court has a duty to balance only upon request. A trial court does not err by failing to conduct balancing absent that request.

Second question: If a trial court does have a duty to balance even without a request, under what circumstances would it be appropriate for an appellate court to correct the failure to balance as plain error?

Second proposed rule: Plain-error correction is appropriate only if, at a minimum, the existing record definitively establishes that (1) the trial court did not perform the balancing; (2) the defendant did not make a strategic decision not to object to the evidence; and (3) the trial court would have excluded the evidence if it had performed the balancing.

Third question: If—as the Court of Appeals held—the remedy for plain error is a limited remand for balancing, what type of balancing should the trial court conduct on remand?

Third proposed rule: The balancing should be conducted under the rule set forth in OEC 404(4). That rule narrows the scope of OEC 403 balancing and permits exclusion only if the evidence's probative value is so substantially outweighed by the danger of unfair prejudice that, as a matter of law, admitting the evidence would render the trial fundamentally unfair. The use of

> evidence for a nonpropensity purpose, as in this case, generally does not have that effect.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

A. Trial court proceedings

Defendant was charged with sexually abusing and his former girlfriend's eight- and ten-year-old daughters. (ER 1; Tr 67, 197). Two charges involved (one for touching her inner thigh near her vagina over her clothing, and the other for causing her to touch defendant's penis) and one charge involved (for touching her inner thigh and vagina over her clothing). (ER 1).

At defendant's bench trial, one disputed issue was whether the charged touching was sexual contact or merely an accidental slip while defendant was playing with the victims. (Tr 18-20). The state had to prove that the contact was "for the purpose of arousing or gratifying the sexual desire of" defendant. ORS 163.305(6). To do so, it introduced (among other evidence) testimony about a contemporaneous incident involving defendant and that was not part of the charges. A former coworker of the victims' mother testified that while she was visiting their residence, she saw defendant pull into his lap, rub her thighs and buttocks, tickle her, and fondle her breasts. (Tr 36). The witness believed that defendant's conduct was inappropriate, and she reported it to the victims' mother the next day. (Tr 36-38).

Defendant objected to the witness's testimony about her observations, arguing that it was inadmissible uncharged-misconduct evidence. (Tr 55-58). The trial court stated that the evidence appeared to be admissible to prove defendant's sexual predisposition under *State v McKay*, 309 Or 305, 308, 787 P2d 479 (1990). But the court invited the parties to conduct legal research and raise the issue later for a final ruling. (Tr 58-59).

Defendant did not re-raise the issue or seek a final ruling. Defendant elicited evidence on cross-examination of the victims' mother about how her former coworker had disclosed her concerns about inappropriate touching. (Tr 248-60). In his closing argument, defense counsel noted that the trial court never made a final ruling on the uncharged misconduct evidence and argued that the evidence bolstered defendant's theory that he merely had been engaged in horseplay and tickling that was misinterpreted. (Tr 707-09). The trial court found defendant guilty on all three counts of first-degree sexual abuse. (ER 5-7).

B. The Court of Appeals' decision

Defendant appealed, challenging the admission of the uncharged misconduct evidence. Defendant argued that *McKay*'s sexual-predisposition-for-the-victim theory violated the rule against character evidence in OEC 404(3) and that, to the extent that the evidence was admissible for the limited purpose of proving intent, the trial court erred by failing to apply the procedural

requirements described in *State v. Leistiko*, 352 Or 172, 282 P3d 857 (2012), and *State v. Pitt*, 352 Or 566, 293 P2d 1002 (2012). Defendant also claimed that the trial court violated his due process rights by admitting the challenged evidence. The state responded that defendant failed to preserve his arguments, that defendant's claims failed on their merits, and that any error was harmless. The Court of Appeals affirmed without opinion. *State v. Zavala*, 270 Or App 351, 350 P3d 234 (2015).

Defendant petitioned for reconsideration based on *State v. Williams*, 357 Or 1, 346 P3d 455 (2015). In *Williams*, this court held that due-process principles require a trial court, on request, to conduct balancing to protect a defendant's right to a fair trial from the use of overly prejudicial uncharged misconduct evidence offered for propensity purposes. Defendant argued that *Williams* mandated reversal either because balancing required exclusion as a matter of law or because the trial court erred by failing to engage in balancing. The state responded that a *Williams* balancing claim must be preserved and that a trial court has a duty to balance only on request.

The Court of Appeals granted defendant's petition, withdrew its former disposition, vacated defendant's convictions, and remanded the case. *State v. Zavala*, 276 Or App 612, 368 P3d 831 (2016). Although defendant had not asked the court to conduct plain-error review, the court held that the trial court committed plain error by failing to conduct balancing. *Id*. at 616-18. It

exercised its discretion to correct this error, ordering a limited remand for the trial court to conduct balancing and then—depending on whether the evidence was admissible—either reinstate the convictions or order a new trial. *Id*. at 622.

SUMMARY OF ARGUMENT

The trial court properly admitted the former coworker's testimony without an on-the-record balancing of the testimony's probative value and potential for unfair prejudice. A court need not conduct OEC 403 balancing without a specific request from a party to do so. That rule is supported by this court's precedents, a correct understanding of the trial court's role in the adversarial process, and a common-sense assessment of the practical realities that trial courts face when a party seeks to admit unobjected-to evidence. Although a defendant may have a due process right to ask a trial court to exclude unfairly prejudicial evidence, the trial court does not have to engage in discretionary balancing if the defendant does not choose to exercise that right.

Even if the court had a duty to balance without a request, its failure to do so here did not constitute plain error. Evidentiary error is plain only if, among other things, it does not require speculation about matters outside the record and it affected the party's substantial rights. Here, for a reviewing court to find error it would have to speculate about (1) whether the trial court in fact conducted OEC 403 balancing and decided to admit the evidence but did not explain that on the record and (2) whether defendant made a strategic decision

not to object to admission of the evidence. Defendant also did not show that any error affected his substantial rights, because the evidence might well have been admitted even if he had raised an OEC 403 objection. Indeed, because evidence like the testimony here is routinely admitted for nonpropensity purposes, the trial court may have had no choice but to admit it.

And even if the trial court plainly erred, the Court of Appeals abused its discretion in determining that this was one of the rare and exceptional cases where an unpreserved error should be corrected. It does not serve the ends of justice to correct an error that may well have been harmless. It also does not serve the principles behind preservation to require additional proceedings when the claimed error easily could have been avoided if defendant had raised the issue at trial.

If the court does affirm the Court of Appeals' decision to remand this matter for the trial court to engage in balancing, it should tailor the order to ensure that the court applies the correct standard on remand. That standard is the subject of the briefing in the *Baughman* and *Mazziotti* cases that are being heard together with this one.

ARGUMENT

A. Because defendant did not request balancing under OEC 403, the trial court did not err, let alone plainly err, in admitting the evidence without balancing.

OEC 403 allows a trial court to exclude relevant evidence based on a balancing test:

> 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 considerations of undue delay or needless presentation of cumulative evidence.

ORS 40.160.

Nothing in the text of that rule or this court's case law suggests that trial courts must conduct balancing on their own, without a request from a party. On the contrary, when this court has discussed OEC 403, it has taken care to note that a court must engage balancing only upon a party's request. In *Williams*, for example, the court stated that "*[w]hen a party objects*, under OEC 403, to 'other acts' evidence offered under OEC 404(4), a trial court must engage in the balancing anticipated by OEC 403." 357 Or at 19 (emphasis added). And the court has used similar phrasing in other cases both before and after *Williams*. *See, e.g.*, *State v. Turnidge*, 359 Or 364, 430, 374 P3d 853 (2016) (admissibility may depend "on a trial court determination, *in response to a proper motion*, that the probative value of the evidence outweighs the danger of unfair prejudice under OEC 403") (emphasis added); *Green v. Franke*, 357 Or 301, 317 n 11,

350 P3d 188 (2015) ("If, on a new trial in this case, the state were to offer other crimes evidence with respect to one or more victims to prove a charge involving a different victim, the trial court would be required to address *any objection that defendant might make* under OEC 403.") (emphasis added); *State v. Shaw*, 338 Or 586, 614, 113 P3d 898 (2005) ("Under OEC 403, evidence introduced *over a defendant's objection* is not unfairly prejudicial simply because it is harmful to the defense.") (emphasis added).

Those decisions reflect the practical realities that trial courts face. The parties, not the court, will usually have the information that would bear on the factors a court would consider under OEC 403. And a rule that required trial courts to engage in OEC 403 balancing without a request would be unworkable. Trials would grind to a halt if, even when no party objected, courts could not admit an exhibit without first scrutinizing every page to see if it might have anything unfairly prejudicial or confusing, or if courts had to pause after every line of testimony to consider whether it might mislead the jury or be needlessly cumulative. It would be all the more unmanageable if the courts had to conduct that sort of balancing explicitly and on the record. Because the parties are in the best position to determine if there are grounds for an objection and to supply the court with the information it will need to conduct the balancing, it is up to the parties to decide when to request OEC 403 balancing. A trial court cannot be expected to weigh the OEC 403 factors absent a specific request.

That rule also respects the trial court's proper role in the adversarial system. The adversarial system relies on the parties to develop the evidentiary record, including the reasons for admitting or excluding evidence, and discourages trial courts from injecting themselves into that process. *See State v. Mains*, 295 Or 640, 655-56, 669 P2d 1112 (1983). "An Oregon jury trial is an adversary proceeding based on the rationale that the *opposing parties*, motivated by self-interest, will assure a full and thorough presentation of the issues and relevant evidence." *Id*. at 655 (emphasis added).

Thus, trial courts generally have no duty to strike testimony or exclude evidence on their own initiative, even if there were grounds for a party to object. *See State v. Miranda*, 309 Or 121, 127, 786 P2d 155 (1990); *Crawford v. Jackson*, 252 Or 552, 554-55, 451 P2d 115 (1969). In *Crawford*, for example, this court summarily rejected an unpreserved claim that the trial court should have stepped in when counsel failed to object to evidence. 252 Or at 554-55. The court explained that, "[i]f a valid objection exists to the reception of particular evidence, counsel may well refrain from making the objection because he wants the evidence in the record" and that "he [later] should not be allowed to blame the court for what he has himself done." *Id*. at 555.

While there might be some evidentiary rules that trial courts have a duty to enforce on their own, the ordinary OEC 403 balancing discussed here is not one of them. Some types of evidence are categorically inadmissible, and it may

appropriate for trial courts to exclude them even if no party has objected. *See, e.g.*, *State v. Bouse*, 199 Or 676, 710, 264 P2d 800 (1953), *overruled on other grounds by State v. Fischer*, 232 Or 558 (1962); *cf. State v. Milbradt*, 305 Or 621, 630, 756 P2d 620 (1988) (suggesting that trial courts *sua sponte* cut off impermissible vouching testimony); *State v. Brown*, 297 Or 404, 442, 687 P2d 751 (1984) (holding that OEC 403 categorically excludes polygraph evidence). In those circumstances, there is no discretion for the trial court to weigh competing factors, and there may be no need for the parties to supply information to the court about the relevant considerations.

But ordinary OEC 403 balancing involves a discretionary call about case-specific circumstances, not categorical rules of law. *See, e.g.*, *Williams*, 357 Or at 19 (noting that under OEC 403, nonpropensity evidence "generally will be admissible as long as *the particular facts of the case* do not demonstrate a risk of unfair prejudice that outweighs the probative value of the evidence") (emphasis added). When, as here, no categorical rule would exclude the evidence, it is unrealistic to expect a trial court to conduct OEC 403 balancing on its own.

It makes no difference that the balancing, if requested, may be required as a matter of due process. Even if a defendant is entitled to an *opportunity* to request balancing, it does not follow that the court must perform the balancing absent a request. There are many constitutional rights that defendants can

forfeit by not exercising them, or by not exercising them in a timely manner. For example, a defendant has the right to be tried in the county where the offense was committed, but forfeits that right if he does not raise it in a pretrial motion. *State v. Mills*, 354 Or 350, 371-72, 312 P3d 515 (2013). A defendant also has the right to testify on his own behalf, but forfeits that right if he does not exercise it before the defense rests. *State v. Lotches*, 331 Or 455, 484, 17 P3d 1045 (2000). Any constitutional right to balancing is similarly forfeited if no timely objection is asserted. A defendant who has not requested balancing has not been denied balancing.

Because OEC 403 requires balancing only upon request, a court's failure to balance without a request is not error at all, let alone plain error. Without a request, the balancing question is not at issue in the case. In that respect the situation is like the one the United States Supreme Court confronted under the federal plain-error rule in *Musacchio v. United States*, __US __, 136 S Ct 709, 193 L Ed 2d 639 (2016). In *Musacchio*, the Court held that a trial court's failure to enforce an unraised statute-of-limitations defense cannot be plain error, because the defense "becomes part of a case only if the defendant puts the defense in issue." *Id.* at 718. "When a defendant does not press the defense, then, there is no error for an appellate court to correct—and certainly no plain error." *Id.* So too here: When no party requests OEC 403 balancing, the question whether the evidence's probative value is substantially outweighed by

the danger of unfair prejudice or other considerations never becomes an issue in the case, and admitting the evidence without balancing is not error.

In this case, defendant did not ask the trial court to conduct OEC 403 balancing with respect to the testimony about the uncharged misconduct. Because the trial court was not required to conduct that balancing on its own initiative, it did not err in admitting the testimony without balancing. This court should reverse the Court of Appeals' decision and reinstate the judgment of conviction on that basis alone.

B. Even if a trial court must conduct OEC 403 balancing without a request, the trial court did not commit plain error here, and in any event the Court of Appeals abused its discretion in correcting the error.

As a general rule, an appellant cannot raise an issue on appeal if it was not asserted in the trial court. ORAP 5.45(1) ("[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court"). Similarly, the Oregon Evidence Code provides that "[e]rror may not be predicated upon a ruling which admits * * * evidence unless," among other things, "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." ORS 40.025(1). That preservation requirement promotes the "efficient administration of justice and the saving of judicial time" by giving

trial courts a chance to avoid or correct the claimed error without the need for an appeal. *Peeples v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008).

Because of the importance of preservation, a reviewing court has discretion to excuse a party's failure to raise an issue only in narrow circumstances. Under the Oregon Rules of Appellate Procedure, the court may—but need not—do so for "an error of law apparent on the record," often referred to as plain error. ORAP 5.45(1); *State v. Terry*, 333 Or 163, 180, 37 P3d 157 (2001). The Oregon Evidence Code similarly allows, but does not require, a court to notice unpreserved "plain errors affecting substantial rights." ORS 40.025(4).

Applying the plain-error doctrine requires two steps. First, the reviewing court must determine whether the claimed error is "plain," meaning that (1) it is an error of law, as opposed to an error of fact or discretion; (2) the error is obvious and not reasonably in dispute; and (3) the court need not choose between competing inferences about matters outside the record. *See State v. Reyes-Camarena*, 330 Or 431, 435, 7 P3d 522 (2000). When, as here, the claimed error is evidentiary, the court must also determine that (4) the error affected the appellant's substantial rights. ORS 40.025(4).

Second, if the reviewing appellate court determines that plain error exists, it then must decide whether to exercise its discretion to address it and, if the court chooses to address the error, it must explain its reasons for doing so.

Reyes-Camarena, 330 Or at 435. This court has emphasized that a reviewing court should correct unpreserved error only in "rare and exceptional cases." *State v. Gornick*, 340 Or 160, 166, 130 P3d 780 (2006).

Even if the trial court committed an obvious error of law by failing to conduct balancing on its own initiative, this court nonetheless should reverse the Court of Appeals' decision, for three independent reasons. First, to find error here would require making assumptions about matters outside the record, such as whether the trial court in fact conducted the balancing but did not document it on the record, and whether defendant made a strategic decision not to object to the evidence. Second, defendant did not show that the error affected his substantial rights because he did not show that the trial court would have excluded the evidence if it had conducted balancing. Finally, the Court of Appeals did not give adequate reasons for exercising its discretion to correct the error despite the normal preservation requirement.

1. A claim that failure to balance was plain error would require the reviewing court to choose between competing inferences about matters outside the record.

An error is not plain unless it appears "on the record." ORAP 5.45. That requirement is met only if "the reviewing court need not go outside the record to identify the error or choose between competing inferences, and the facts constituting the error are irrefutable." *Reyes-Camarena*, 330 Or at 435 (quotation marks, brackets, and ellipses in original omitted).

An unpreserved OEC 403 objection generally cannot meet this requirement, because the reviewing court almost always must speculate about matters outside the record. Among the extrarecord matters that the court must resolve are (1) whether the trial court in fact considered the OEC 403 factors and (2) whether the defendant made a strategic decision not to assert the objection.

First, in most cases—as here—where no OEC 403 objection was made, the record will be silent on whether the trial court considered the OEC 403 factors but decided on balance to admit the evidence. It is possible that the trial court did, in fact, consider the risk of unfair prejudice but decided that it did not substantially outweigh the evidence's probative value and did not say anything about the balancing on the record. That is particularly plausible here, because the evidence at issue—evidence of past sexual contact between defendant and one of the victims—is routinely admitted in child-sex-abuse prosecutions to prove the defendant's sexual interest in the victim. *See, e.g., State v. McKay*, 309 Or 305, 307-08, 787 P2d 479 (1990).

If the trial court in fact conducted OEC 403 balancing, its failure to say so on the record would not by itself constitute plain error. In *State v. Bucholz*, 317 Or 309, 321, 855 P2d 1100 (1993), this court held that a trial court's failure to make an express finding in support of consecutive sentences was not an error apparent on the record, because the court might have been able to make the

necessary findings if the defendant had asked for them. Likewise, if the only problem was that the trial court did not explain the OEC 403 balancing on the record, that would not be an error apparent on the record. Thus, unless the trial court affirmatively stated that it was *not* conducting OEC 403 balancing, the reviewing court cannot conclude that the trial court failed to balance.

Second, the record generally will not reveal whether the defendant made a strategic decision not to assert an OEC 403 objection. If the defendant made a strategic decision not to object, "reviewing courts will not provide refuge from that deliberate choice on direct appeal." *State v. Steen*, 346 Or 143, 155, 206 P3d 614 (2009). And even if the record is silent on whether the defendant made such a choice, any error cannot be plain because it would require the appellate courts to speculate about matters outside the record.

There are many reasons a defendant might choose not to object to the admission of evidence even though there is a basis for an objection under the Oregon Evidence Code. The defendant may want to make use of the objectionable evidence to bolster his or her case. Here, for example, defendant argued that the evidence of the other tickling incident showed that he had no sexual motive, because he would not have engaged in sexual misconduct in public. (Tr 707-09). Or the defendant may determine that the objectionable evidence is unimportant and not worth interrupting the trial for. Or the defendant may worry that an objection will annoy or distract the court or jury.

Or the defendant may be planning to argue about the evidence's significance in closing statements and does not want to give the prosecution a preview of the arguments that will be presented later.

There is no plain error unless the record definitively refutes every possible strategic reason defendant *might* have had not to raise an OEC 403 objection. Otherwise, the court must choose among competing inferences about whether defendant in fact made a strategic decision. *See Gornick*, 340 Or at 169-70. And if it is possible that defendant made a tactical decision to not object to the admission of the evidence, this court should not allow him to obtain a reversal based on a plain-error challenge to its admission. *See State v. Fults*, 343 Or 515, 523, 173 P3d 822 (2007) (identifying "the possibility that defendant made a strategic choice not to object to the sentence" as consideration in deciding whether to exercise discretion to review for plain error). Here, the record suggests that defendant chose not to object to the coworker's testimony because he wanted to make use of it in his closing argument. (Tr 707-09). But at a minimum, the record does not refute the *possibility* that defendant made a strategic decision not to object. Thus, there was no plain error.

The Court of Appeals acknowledged that it had to go outside the record here. It explained that it ordered a conditional remand rather than an outright reversal because "we have an inadequate record on which to conduct plain error

review." *Zavala*, 276 Or App at 622. That is a contradiction in terms. If the record was inadequate to conduct the review, then by definition there was no plain error.

2. Defendant did not show that any error affected his substantial rights, because he did not show that the trial court would have excluded the testimony after balancing.

For unpreserved claims of evidentiary error, OEC 103(4) limits plain-error review to errors "affecting substantial rights." ORS 40.025(4).[1] The language of this rule parallels Federal Rule of Criminal Procedure 52(b), which allows an appellate court to consider an unpreserved "plain error that affects substantial rights." The United States Supreme Court has interpreted the affects-substantial-rights language in the federal rule as generally requiring that the error "have been prejudicial: It must have affected the outcome of the district court proceedings." *United States v. Olano*, 507 US 725, 734, 113 S Ct 1770, 123 L Ed 2d 508 (1993). And unlike in the usual harmless-error analysis, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

[1] As noted below, in a non-evidence case, the same considerations inform the reviewing court's discretion whether to correct plain-error review. Under OEC 103(4), however, the reviewing court cannot even consider whether to exercise its discretion until the defendant makes this threshold showing. Ultimately, the outcome should be the same in either kind of case.

This court appeared to adopt a similar approach in *Lotches*. In that case, the trial court had admitted the victim's dying declaration that he loved his family and did not want to die. 331 Or at 492. On appeal, the defendant argued for the first time that the evidence should have been excluded under OEC 403. *Id.* at 493. This court recognized that the statement was "inflammatory" and that its minimal probative value might have been substantially outweighed by its unfair prejudicial effect. *Id.* Nonetheless, the court declined to find plain error because the matter was not "so obvious that it is not reasonably open to dispute." *Id.* Thus, to establish prejudice, a defendant must show that the challenged evidence's probative value was so obviously outweighed by its unfair prejudicial effect that the trial court would have had to exclude the evidence if had conducted balancing.

Defendant did not meet that burden here. As the Court of Appeals explained, "defendant may not have been at all prejudiced by the trial court's failure to conduct OEC 403 balancing, if in fact the court would have admitted the evidence." *Zavala*, 276 Or App at 621. The Court of Appeals noted that, given "the range of discretion the trial court would have had in conducting the required OEC 403 balancing," it is "speculative" that the trial court would have excluded the evidence, and thus any error "may very well" have been harmless. *Id.* at 621-22.

If anything, the Court of Appeals understated the likelihood that any error here was harmless. The trial court may well have had no choice but to admit the testimony at issue here under a proper application of OEC 403. As explained earlier, the state offered the testimony about a separate incident where defendant engaged in inappropriate sexual behavior with to establish defendant's sexual motive for the charged misconduct, which was an element of the crime that was in dispute. *See* ORS 163.305(6), 163.427. This is a well-established nonpropensity theory of relevance. *See* ORS 40.170(3). And as this court stated in *Williams*, evidence of other bad acts that is offered for nonpropensity purposes "generally will be admissible." 357 Or at 19. The trial court might well have abused its discretion if it had excluded the testimony that the state offered.

In any event, because defendant did not show that the testimony was obviously unfairly prejudicial and would have been excluded upon proper objection, he did not establish plain error.

3. Even if there was plain error, the Court of Appeals abused its discretion in correcting it.

A defendant who shows that the trial court committed plain error is not entitled to relief. The Court of Appeals must decide whether the error is so serious that it should exercise its discretion to correct it notwithstanding the lack of preservation. Factors that the court should consider include the gravity

of the error, the ends of justice in the particular case, and whether the policies behind the general rule of preservation were served in another way. *Ailes v. Portland Meadows, Inc*., 312 Or 376, 382 n 6, 823 P2d 956 (1991). A decision to correct an unpreserved error must be made with "utmost caution" and only in "rare and exceptional cases." *Gornick*, 340 Or at 166.

Here, the Court of Appeals gave two reasons for correcting the unpreserved error: (1) "the error was grave and the ends of justice incline toward correcting it" because the issue related to due process; and (2) correcting the error would not undermine the policies behind preservation because, before *Williams*, "the essential role of OEC 403 balancing was not manifest." *Zavala*, 276 Or App at 618. Both reasons are incorrect.

First, regardless of whether the issue related to due process, the ends of justice are not promoted by correcting an error that the Court of Appeals acknowledged "may very well" have been harmless. *Id.* at 621. For the reasons explained above, an unpreserved error that may well have been harmless is not one of the rare and exceptional circumstances where a reviewing court should excuse the failure to raise it in the trial court. Plain-error correction should be saved for cases where there was indisputably a miscarriage of justice, not cases where justice may well have been served.

Thus, it is not appropriate for the Court of Appeals to correct an error without a showing that error in fact changed the outcome of the underlying

criminal case. *See State v. Ramirez*, 343 Or 505, 513-14, 173 P3d 817 (2007), *adh'd to as modified on recons*, 344 Or 195 (2008). This is different from normal harmless-error analysis: the burden is on the defendant to prove that there *was* prejudice, not on the state to prove that the error was harmless. *See Olano*, 507 US at 734. And as explained above, defendant did not show prejudice here.

Second, even if *Williams* clarified the constitutional significance of OEC 403 balancing, nothing prevented defendant from asking for that balancing here. Had he done so, there is "no reason to think that the judge would not have followed correct procedure." *Fults*, 343 Or at 523 n 5. Even if, before *Williams*, the trial court would not have understood that defendant had a due-process right to balancing, it still might well have ruled in a way that obviated the need for an appeal and limited remand. The court might have conducted the balancing and overruled the objection on the spot, for example. Or, because this was a bench trial, the court might have made it clear that it would reach the same decision to convict even without excluding the challenged evidence. Courts frequently rule in a way that avoids creating unnecessary issues for further litigation, such as by assuming without deciding a contested legal position and explaining why it is irrelevant. Alternatively, in the face of an objection the state might have decided to withdraw the evidence, figuring that it was not important enough to warrant creating an issue for later appeal. *See*

State v. Cox, 337 Or 477, 500, 98 P3d 1103 (2004). By failing to object, defendant deprived the trial court and the state of an opportunity to avoid the very error now claimed. The policies behind the preservation rule— allowing trial courts and parties to avoid or correct error and avoiding unnecessary appeals and remands—were not at all served by defendant's actions.

This court reached a similar conclusion in *Bucholz*, which involved a trial court's failure to make the findings required to impose consecutive sentences for crimes that arose out of a continuous course of conduct. 317 Or at 320. Although the defendant had not objected, the Court of Appeals found that the lack of findings was plain error. *Id.* But this court reversed, explaining that it was inappropriate to excuse the defendant's failure to preserve the issue when, if he had called the issue to the trial court's attention, the court easily could have avoided the error. *Id.* at 321. Here too, defendant's failure to object at trial should not give him a opportunity to prolong these proceedings further.

Although the Court of Appeals' decision to correct plain error is reviewed only for abuse of discretion, this court has not hesitated to reverse when the Court of Appeals' explanation for its decision threatens to undermine the strong policies favoring preservation. *See, e.g.*, *Fults*, 343 Or at 523; *Ramirez*, 343 Or at 513-14. The court should do so here as well.

C. If a remand is required, the balancing should be done under the standard articulated in *Baughman* and *Mazziotti*.

The arguments in the first part of this brief assume that, had defendant timely objected to the coworker's testimony, the trial court would have applied ordinary OEC 403 balancing. This court can resolve the case on that assumption if it accepts any of the arguments above. But as explained in the state's briefing in *Baughman* and *Mazziotti*, the assumption is incorrect. The state will not repeat its arguments in those cases at length here. Nonetheless, if this court affirms the Court of Appeals' decision to correct plain error, it should apply the rulings in *Baughman* and *Mazziotti* in formulating a remedy.

OEC 404(4) limits the extent to which OEC 403 applies to evidence like the testimony at issue here—relevant evidence of other bad acts by a criminal defendant. A trial court may apply OEC 403 only "to the extent required by" the Due Process Clause. ORS 40.170(4)(a). As the state's briefs in *Baughman* and *Mazziotti* explain, this means that the balancing a trial court does for this kind of evidence is narrower than the normal OEC 403 balancing. The court may exclude evidence under this narrower balancing only if its probative value is so substantially outweighed by the danger of unfair prejudice that, as a matter of law, admitting the evidence would render the trial fundamentally unfair.

Here, the coworker's testimony was probative of defendant's sexual interest in and was not so unfairly prejudicial as to render his trial

fundamentally unfair. It is not fundamentally unfair to admit uncharged-misconduct evidence when, as here, the evidence was offered for nonpropensity purposes. *See, e.g.*, *Estelle v. McGuire*, 502 US 62, 68-70, 112 S Ct 475, 116 L Ed 385 (1991) (intent); *Dowling v. United States*, 493 US 342, 352, 110 S Ct 668, 107 L Ed 2d 708 (1990) (plan); *State v. Moore/Coen*, 349 Or 371, 391-92, 245 P3d 101 (2010) (reckless mental state).

Because the narrower balancing allowed by OEC 404(4) does not involve a discretionary determination by the trial court, this court can rule on the issue as a matter of law. But if the court decides to remand to the trial court, it should instruct the trial court to apply the narrower balancing test described above.

Finally, because this was a bench trial, a new trial may not be necessary even if the trial court on remand decides to exclude the testimony at issue. The court may consider the rest of the evidence presented at the original trial without hearing it all over again. If it finds defendant guilty without considering the excluded testimony, it should enter a judgment of conviction. There is no reason to require the parties to retry the rest of the case.

CONCLUSION

This court should reverse the decision of the Court of Appeals and affirm defendant's conviction.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 22, 2016, I directed the original Brief on the Merits of Petitioner on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Erica Herb, 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 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 6,702 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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