IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

PETITIONER'S REPLY BRIEF ON THE MERITS

Appeal from the Judgment of the Circuit Court
for Lincoln County
Honorable Thomas O. Branford, Judge

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

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STATEMENT OF THE CASE

In his opening brief on the merits, defendant argued that the Court of Appeals properly exercised its discretion under the plain error doctrine to correct the trial court's erroneous admission of propensity evidence in the absence of OEC 403 balancing required by *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), but that it erred when it ordered a limited remand for a hearing rather than a new trial. Specifically, he argued that the proper remedy in all cases tried before *Williams* in which the court admitted propensity evidence without OEC 403 balancing, is reversal and remand for a new trial regardless of whether the defendant preserved the OEC 403 objection.

In its response, the state argues that (1) in cases in which the defendant asserts an error under the plain error doctrine, that doctrine entirely supersedes the harmless error rule, and the Court of Appeals cannot exercise its discretion unless it first determines that the error was prejudicial, and (2) in all cases tried before *Williams* in which the trial court failed to conduct OEC 403 balancing before admitting propensity evidence, the proper remedy is a limited remand. The state is incorrect on both points because (1) the state's proposed rule for plain error review leads to troubling consequences, and (2) the cases on which the state relies in support of its argument for a limited remand are distinguishable from this case.

Argument

I. In cases in which a defendant requests plain error review, the plain error doctrine does not supersede the harmless error rule.

As this court explained in *State v. Vanornum*, 354 Or 614, 630, 317 P3d 889 (2013), Oregon's plain error test is a two-step process. First, the court determines whether the error is plain, that is, whether it satisfies the elements of plain error under ORAP 5.45(1). *Id.* Second, if the error satisfies the elements of plain error, the reviewing court then determines whether to exercise its discretion to correct the error. *Id.* at 630; *see also State v. Ramirez*, 343 Or 505, 511, 173 P3d 817 (2007) (describing the ordinary approach under plain error as a two-step analysis). The exercise of discretion "entails making a prudential call that takes into account an array of considerations, such as the competing interests of the parties, the nature of the case, the gravity of the error, and the ends of justice in the particular case." *Vanornum*, 354 Or at 630.

The state has proposed a rule that in all cases in which the defendant requests plain error review, the plain error doctrine entirely supersedes the harmless error rule. That is something that this court has never held. The state's rule leads to two troubling consequences.

A. The state's proposed rule improperly restricts the Court of Appeals ability exercise its discretion under the plain error doctrine.

Application of the state's proposed rule would significantly restrict the Court of Appeals exercise of discretion to review plain error; it would effectively require the Court of Appeals to find not only that an error is plain, but that the error was prejudicial before it could exercise discretion to correct it. This court has never placed such restrictions on the exercise of the Court of Appeals discretion. To be sure, an appellate court may consider whether an error is ultimately prejudicial when determining whether to exercise its discretion. But that is only one of many factors that the appellate court considers when reviewing a claim under the plain error doctrine.

This court's decision in *Ramirez* shows that the prejudicial nature of the error is a factor to consider in the exercise of discretion, but not a predicate finding that must be made before discretion may be exercised. In *Ramirez*, the defendant was convicted of *inter alia*, assault in the first degree for accosting a woman who, as a result, lost her right eye. *Id.* at 508. He was sentenced to an upward departure term for the first-degree assault conviction based on the court's finding that he caused permanent injury to the victim. *Id.* The defendant did not object to the court, rather than a jury, finding that departure fact. *Id.*

On appeal, in the Court of Appeals, the defendant argued that the trial court erred under *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004), when it imposed a departure sentence based on facts that the defendant did not admit and that had not been found by a jury. *Ramirez*, 343 Or at 509. The defendant acknowledged that he had not preserved that issue in the trial court and asked the Court of Appeals to address the error as plain error. *Id.* The Court of Appeals found the error to be plain and exercised its discretion to review it, citing the interest of the parties ("the state has no valid interest in requiring defendant to serve an unlawful sentence") and the gravity of the error (the defendant has a "significant liberty interest at stake"). *Id.* at 511.

On review, this court addressed two of the factors that the Court of Appeals cited for exercising its discretion to correct the error and two other factors and concluded that the court had erred in exercising its discretion. *Id.* at 512-13. First, contrary to the Court of Appeals conclusion, the competing interests of the parties did not establish that correction of the error was appropriate because there was "no legitimate debate that the victim suffered a permanent injury," and "a second hearing would only confirm that the departure sentence was warranted." *Id.* at 513. Thus, the defendant's interest in a second sentencing hearing was "minimal, if not nonexistent." *Id.* And the state has a "significant interest in avoiding a second, unnecessary sentencing hearing." *Id.*

Second, the error was not grave because "no reasonable factfinder (whether a judge or a jury) could conclude anything other than that the victim suffered a permanent injury." *Id.* Thus, the gravity of the error did not support the Court of Appeals exercise of discretion.

Third, the ends of justice did not warrant the Court of Appeals' exercise of discretion because when "the evidence on a sentencing factor is overwhelming, it would not advance the ends of justice to remand for an unnecessary hearing." *Id.* at 514. Finally, this court concluded that the Court of Appeals' reliance on the fact that the state had no valid interest in requiring a defendant to serve an unlawful sentence was undercut by a record that "all but demand[ed] imposition of precisely the sentence that the trial court elected to impose" in the case. *Id.*

Ramirez demonstrates that when an appellate court decides whether to exercise its discretion to correct an error on appeal, the prejudicial impact of the error weighs in the various discretionary factors that the reviewing court considers, but that factor is not dispositive. Although this court concluded that the Court of Appeals had erred by exercising its discretion in *Ramirez* because any error had not prejudiced the defendant, it did so by analyzing the factors on which the Court of Appeals had relied to exercise its discretion. This court did not simply conclude that the Court of Appeals had erred because the error had

not prejudiced the defendant. Rather, the court carefully reviewed each of the factors on which the Court of Appeals had relied.

The Court of Appeals has similarly considered the likelihood that the error affected the verdict when deciding whether to exercise its discretion under the plain error doctrine, but it has never held that it could exercise its discretion *only* if it first found that the error was prejudicial. *See, e.g., State v. Inman*, 275 Or App 920, 929-30, 366 P3d 721 (2015) (*en banc*) (citing *Ramirez* for the proposition that "[i]n determining whether any error was grave, we consider the likelihood that the error affected the outcome of the proceeding below"); *State v. Pergande*, 270 Or App 280, 285-86, 348 P3d 245 (2015) (citing fact that jury's credibility determinations were likely affected by improper testimony as reason to exercise discretion to correct the error); *State v. Roelle*, 259 Or App 44, 50, 312 O3d 555 (2013) (discussing the likely effect of erroneously admitted other acts evidence in analyzing the gravity of the error).

B. The state's proposed rule alleviates the state's burden of proof in cases involving federal constitutional errors.

The state's proposed rule would alleviate the state of its burden of proof in cases in which the defendant has asserted a violation of a federal constitutional right. In a normal case, when a defendant correctly asserts that one of his federal constitutional rights has been violated, the appellate court must reverse unless the *state* establishes that the error was harmless beyond a

reasonable doubt. *Chapman v. California*, 386 US 18, 24, 87 S Ct 824 17 L Ed 2d 705 (1967). The state's proposed rule would remove that burden of proof in cases in which the defendant asserts a federal constitutional error under the plain error doctrine. That is troubling, particularly in cases such as this one where the constitutional magnitude of the asserted error did not become apparent until after the defendant's trial.

As defendant argued in his opening brief on the merits, once the appellate court concludes that an error constitutes plain error and that it warrants the court's exercise of discretion to correct, the court is in the same analytical position as when it is addressing a preserved error. The final consideration for the appellate court to conclude that an error warrants reversal is to determine whether the error was harmless. And if the error is a federal constitutional error, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. *Chapman*, 386 US at 24.

C. Defendant is entitled to reversal and remand for a new trial.

Harmless error is a factor for the appellate court to consider when deciding whether to exercise its discretion to correct an error under the plain error doctrine. But it is not the only factor, and it is not dispositive. Once the court decides to exercise its discretion to correct a plain error, then, as in a case in which the error is preserved, the final step for the reviewing court is to determine whether the error was harmless. Where—as here—the reviewing

court cannot say that the plain error had little likelihood of affecting the verdict, the harmless error rule both applies and warrants reversal for a new trial.

Defendant's case was tried before this court decided *Williams*. At trial, the state introduced and the court admitted, *over defendant's objection*, evidence offered only for a propensity purpose. Defendant did not request that the trial court conduct OEC 403 balancing before admitting the evidence, because to do so under the law in effect at that time would have been futile.

On appeal, defendant asserted that under *Williams*, the admission of the evidence in the absence of OEC 403 balancing violated his right to due process. The Court of Appeals correctly concluded that the error satisfied the elements of plain error. *See Williams*, 357 Or at 18-19 (stating that "the only way that a court can ensure that the admission of 'other acts' evidence is not unfairly prejudicial and violation of 'fundamental concepts of justice' is to conduct OEC 403 balancing"). The next question was whether the error warranted the Court of Appeals exercise of discretion to correct.

As defendant argued in his opening brief on the merits, the admission of propensity evidence in the absence of OEC 403 balancing is of constitutional magnitude. Due process requires that trial courts conduct OEC 403 balancing before admitting propensity evidence under OEC 404(4). Prior to this court's decision in *Williams*, the gravity of that error was not apparent. After *Williams*,

it was. Thus, correcting the error on appeal does not "subvert the principles of preservation without materially promoting the interests of justice." *See, e.g.*, *State v. Blasingame*, 267 Or App 686, 694, 341 P3d 182 (2014), *rev den*, 357 Or 299 (2015) (court declined to exercise its discretion to correct due process error in jury instructions because to do so would "substantially subvert principles of preservation without materially promoting the interests of justice"). Rather, in cases such as this, where a trial error takes on constitutional significance after the case has been appealed, and it would have been futile for the defendant to object at trial, the gravity of the error and the ends of justice warrant the appellate court's exercise of discretion to correct the error.

Finally, under either the state or the federal harmless error rule, defendant is entitled to a new trial. As defendant argued in his opening brief on the merits, because the Court of Appeals was unable to affirmatively conclude that there was little likelihood hood that the error affected the verdict, the error cannot be deemed harmless. And, as the Court of Appeals has concluded in cases in which the error is preserved, it is nearly impossible for the state to show that the admission of other acts evidence without OEC 403 balancing is harmless beyond a reasonable doubt. Thus, under either standard and for the reasons articulated in his opening brief on the merits, defendant is entitled to reversal remand for a new trial.

II. The appropriate remedy for a trial court's failure to conduct OEC 403 balancing is to remand for a new trial, not remand for after-the-fact balancing.

In its respondent's brief on the merits, the state argues that a "large body of Oregon and federal case law ordering limited remands to address procedural and analytical constitutional claims of error, including evidentiary claims of error" demonstrate that a limited remand is appropriate in this case. Resp BOM at 8. But the cases on which the state relies are distinguishable from this case because they involved issues that were litigated pretrial and not the midtrial introduction of evidence. In those cases, the limited remand was necessary in the interest of fairness either because on appeal, the court promulgated an entirely new procedure for trial courts to employ, or the factual record was not sufficiently developed for the appellate court to rule on the issue.

For example, in *State v. Mills*, 354 Or 350, 312 P3d 515 (2013), this court remanded the case for a limited hearing because it overruled prior precedent and concluded that Article I, section 11, of the Oregon Constitution did not require the state to prove venue beyond a reasonable doubt as a material allegation in criminal cases. *Id.* at 371. This court then established an entirely new procedure for defendants to challenge venue before trial through a motion and pretrial evidentiary hearing. *Id.* at 372.

Because the court had overruled precedent and established a new pretrial procedure, it would have been "unfair" to "hold that [the defendant] forfeited

the opportunity to challenge venue, in light of the fact that the law in effect at the time of trial permitted him to wait until the state rested to raise the issue." *Id.* at 373. Thus, the limited remand was appropriate and necessary to ensure fairness to the defendant. *See also State v. Probst*, 339 Or 612, 628-30, 124 P3d 1237 (2005) (court overruled precedent and held that burden of persuasion is on a defendant who collaterally attacks the validity of a prior conviction; remand for a hearing was necessary to give the defendant an opportunity to meet that burden).

The only remedy that ensures fairness to defendant in this case is reversal and remand for a new trial. As discussed in defendant's opening brief on the merits, because the law changed while defendant's case was on appeal, it became apparent after his trial that there was an error in his case that was of constitutional magnitude. And, as articulated in defendant's opening brief, because that error was so intricately intertwined with the trial, a limited remand for a hearing rather than a new trial is an inappropriate remedy.

Similarly, in *State v. Babson*, 355 Or 383, 326 P3d 559 (2014), the defendants were convicted of trespassing after they violated a rule adopted by the Legislative Administrative Committee (LAC) that prohibited the overnight use of the steps of the state capitol. *Id.* at 386. On review, this court concluded that the trial court erred when it did not permit the defendants to question the LAC co-chairs at trial. *Id.* at 431. Because of that error, the factual record was

insufficient for this court to rule on the defendants' constitutional as-applied challenges to the rule. *Id.* The court consequently remanded the case to the trial court to allow the defendants to question the co-chairs of the LAC and for the trial court to determine whether the rule was unconstitutional as applied to the defendants. *Id.* at 434.

The limited remand in *Babson* was necessary because the factual record was not sufficiently developed for this court to rule on the defendants' constitutional challenges. That is similar to when an appellate court reverses a case involving a motion to suppress and orders a limited remand because the trial court failed to make factual findings necessary for the appellate court to address the asserted error on appeal. *See, e.g., State v. Paulson*, 313 Or 346, 833 P2d 1278 (1992) (where state appealed trial court's grant of the defendant's motion to suppress, remand for factual findings was appropriate because the trial court had incorrectly relied on case law and did not make factual findings necessary to determine the consent issue and instead ruled on the motion as a matter of law); *State v. Hayes*, 186 Or App 49, 56-57, 61 P3d 960 (2003), *rev den*, 339 Or 230 (2005) (where the trial court's exploitation inquiry was based on an erroneous legal assumption, the court vacated and remanded for the trial court to reconsider whether the defendant's consent was the product of police exploitation).

The circumstances of this case are different than those in *Babson* and *Paulson*. At the time of defendant's trial, even if defendant had requested that the trial court conduct OEC 403 balancing before it admitted the propensity evidence, it would have been futile. The error did not become apparent until after this court's decision in *Williams*. As explained in defendant's opening brief on the merits, a limited remand for the trial court to conduct OEC 403 balancing *after* the defendant has been tried and found guilty is inappropriate because a trial court's decision to admit or exclude evidence in the face of an OEC 403 objection is too intricately intertwined with the trial.

The cases on which the state relies to support its argument for a limited remand are distinguishable. Those cases either involved circumstances in which the court overruled prior precedent and a limited remand was necessary in the interests of fairness, or the factual record was insufficient for the appellate court to rule on the issue and limited remand was necessary for further development of the record. Importantly, unlike this case, they did not involve a mid-trial evidentiary ruling on evidence. For the reasons discussed in defendant's opening brief on the merits, the only way to ensure fairness to defendants whose cases were tried before *Williams*, and in which propensity evidence was admitted without the trial court conducting OEC 403 balancing, is for this court to remand for a new trial.

CONCLUSION

Defendant respectfully requests that this court reverse the Court of Appeals decision to order a limited remand in this case and remand to the trial court for a new trial.

Respectfully submitted,

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

Brief length

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 3,268 words.

Type size

I 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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 31, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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