

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Petitioner on Review,

v.

BRETT NICHOLAS MAZZIOTTI,

Defendant-Appellant,
Respondent on Review.

Lane County Circuit
Court No. 201218698

CA A153713

SC S064085

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 Lane County
Honorable JOSEPHINE H. MOONEY, Judge

Opinion Filed: March 9, 2016
Author of Opinion: Sercombe, P.J.
Before Sercombe, Presiding Judge, and Hadlock, Chief Judge,
and Tookey, Judge..

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**BRIEF ON THE MERITS OF
PETITIONER ON REVIEW, STATE OF OREGON**

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

OEC 404(4) supersedes the character-evidence rule in OEC 404(3) and makes relevant evidence of a defendant’s “other acts” admissible subject to OEC 403 balancing “to the extent required by the United States Constitution or the Oregon Constitution.” In *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), this court held that the Due Process Clause requires a court, on request, to conduct some form of balancing under OEC 403. *Williams* expressly left unresolved whether that balancing is narrower and different than ordinary OEC 403 balancing.

This case presents the following questions to which the state proposes the following answers:

First question presented: Is the balancing required as a matter of due process under OEC 404(4)(a) narrower than ordinary OEC 403 balancing?

First proposed rule: Because OEC 404(4)(a) allows a trial court to apply OEC 403 only “to the extent required” by due process, the court is limited to determining whether the probative value of the evidence is so outweighed by its unfair prejudicial effect that, as a matter of law, its admission would render the trial fundamentally unfair.

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

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

HISTORICAL AND PROCEDURAL FACTS

A. Defendant's crimes

In August 2012, defendant, who did not have a license and had been driving without one for 15 years, gave a ride on his motorcycle to a passenger, (Tr 325, 427). When defendant went to pick up at her apartment in Eugene, asked defendant whether he was “all legit?”—meaning did he have a driver’s license and insurance—and defendant replied “yeah.” (Tr 103-04). was wearing shorts, a low-cut short-sleeve blouse, and sandals. (Tr 102). asked defendant if she needed to change her clothing, and he stated “No you’re fine.” (Tr 103). Defendant then drove his motorcycle—with on the back—out of town and into the countryside. At one point, defendant drove approximately 95 to 100 miles per hour. (Tr 259-60, 265). At another point, he drove approximately 70 to 80 miles per hour while passing a vehicle in an unsafe location and manner. (Tr 287-89, 292-93).

Defendant crashed his motorcycle into a car that pulled out in front of him, throwing defendant and off the motorcycle. (Tr 116-18, 236). sustained several injuries. (Tr 119, 126-30, 139, 175). Defendant did not help her; instead he yelled and cursed at the driver of the car that had pulled out in

front of him, carried to the side of the road, removed his motorcycle from the road, and then hitched a ride with a passing motorist and left the scene without exchanging information with or the driver of the other vehicle involved in the accident. (Tr 118-20, 131, 134-35, 176, 179, 219-22, 236-37, 243). was transported by ambulance to a hospital for treatment. (Tr 131, 194).

Defendant was charged with reckless endangerment, reckless driving, failure to perform the duties of a driver to injured persons, and failure to perform the duties of a driver when property is damaged. (TCF, Indictment). The state's theory was that defendant committed reckless driving and reckless endangerment by his unsafe driving before he and had reached the scene where the collision would occur. (*See* Tr 76, prosecutor's opening statement stating theory).

At trial, defendant contested whether he acted with a reckless mental state. (*See* Tr 85-91, containing defendant's opening statement). Defendant testified that he had over 15 years of experience of driving motorcycles, that he was driving safely and cautiously on the day in question and knows those roads well, that he is a defensive driver and is always aware of the risks that others motorists may pose, that his driving did not pose any risks to and that he did not disregard any risks. (Tr 359, 370-72, 421-22),

Defendant also argued that he complied with his duties of a driver by moving the victim out of the road and by leaving his motorcycle, which contained his insurance information, at the scene. (*See* Tr 93-97, containing defendant's opening statement). And defendant testified that he knew that law enforcement should be able to access his insurance information by running the license plate on his motorcycle, because he had been pulled over by the police in the past and they had been able to obtain his insurance information by running a license-plate check. (Tr 418).

B. The trial court admitted other-acts evidence to prove defendant's reckless mental state.

Before opening statements, the prosecutor moved to admit evidence of defendant's two prior reckless-driving incidents and associated convictions to show that defendant acted with a reckless mental state. (Tr 22, 29); *see also* ORS 161.085(9) ("'[r]ecklessly' * * * means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists."). The prosecutor made an offer of proof of both incidents.

The first incident occurred in Eugene in November 2000, and began when an officer stopped defendant for failing to stop at a stop sign. (Tr 22-23). When the officer approached defendant's car, defendant drove away and was pursued by the officer. (Tr 24). A second police officer joined the chase and

twice unsuccessfully attempted maneuvers to stop defendant; defendant increased his speed to roughly 55 miles per hour. (*Id.*). Defendant led the police into a residential neighborhood, made two immediate turns at a high rate of speed, and pulled into his garage where he was arrested. (Tr 25). Defendant was convicted of reckless driving and attempting to elude for that incident and placed on probation for 18 months, and sentenced to serve time in jail. (Tr 22; TCF, Ex 23, Judgment).

The second incident occurred in Eugene just over a year later in February 2002. (Tr 22). Defendant drove his car in a residential area through a stop sign at a high rate of speed (roughly 40 miles per hour), lost control, and nearly struck a police officer who was standing at the intersection. (Tr 26). Defendant drove away and accelerated down the street, failed to negotiate a turn, and crashed his car. (Tr 27). Defendant abandoned the car and fled but was apprehended by the police. (*Id.*). Defendant was convicted of reckless driving for that incident, placed on probation for one year, and sentenced to serve time in jail. (Tr 22; TCF, Ex 24, Judgment).

The prosecutor argued that that evidence was admissible to prove defendant's reckless mental state. She argued that the evidence tended to prove that defendant had a subjective awareness of the risks of driving at excessive speeds and in an unsafe manner but chose to disregard those risks. (Tr 38-44). The prosecutor cited caselaw upholding the admission of other-acts evidence of

a defendant's past driving-under-the-influence-of-intoxicants (DUI) incidents and sanctions to prove the defendant's extreme indifference or reckless mental state for vehicular manslaughter or assault charges involving drunk driving, because the evidence had a tendency to prove the defendant's subjective awareness of the risks associated with drunk driving. *See State v. Cavaner*, 206 Or App 131, 135 P3d 402, *rev den*, 341 Or 197 (2006); *State v. Johnstone*, 172 Or App 559, 19 P3d 966 (2001).

Defendant objected. He argued that the prior incidents were not sufficiently similar to the charged crimes to be probative of his mental state and that, even if they were, the evidence should be excluded because it was, on balance, more prejudicial than probative. (Tr 31-34). The prosecutor countered that OEC 404(4)(a) balancing was limited to due-process balancing. (*See* Tr 43, asserting that there was no balancing "unless there[is] some sort of constitutional issue at stake").

The trial court ruled that the other-acts evidence was relevant and admissible to prove defendant's reckless mental state for the reckless-endangerment and reckless-driving charges. (Tr 60). In doing so, the court did not expressly discuss the balancing claim.

The state presented the other-acts evidence at trial. (Tr 298-309; TCF, Ex 23 & Ex 24, Judgments). In its cross-examination of defendant, the state elicited evidence that he had several prior convictions to impeach defendant's

credibility. (Tr 424-26). The parties agreed to a jury instruction addressing the proper use of the other-acts and impeachment evidence. (Tr 455-58). The trial court gave the instruction, which stated:

If you find that the defendant has been previously convicted of a crime, you may consider this conviction only for its bearing if any on the credibility of the defendant. Specifically you may not use this evidence for the purpose of drawing the inference that because the defendant was convicted of a previous crime that the defendant may be guilty of the crime charged in this case. With this limited exception[:] you may consider the evidence of other incidents of driving recklessly only for the relevance if any * * * [that] [y]ou may find such incidents have to defendant's state of mind or recognition of [the] risks on [the date of the charged crimes]. You may not use such evidence for any other purpose in your assessment of the evidence in your deliberations.

(Tr 471; formatting altered). Defendant was convicted all charges.

C. The Court of Appeals reversed defendant's convictions and remanded for a new trial.

Defendant appealed and initially challenged the admission of the other-acts evidence under the character rule in OEC 404(3). But after this court issued its decision in *Williams*—which was after defendant filed his opening brief—defendant filed a supplemental brief asserting that, under *Williams*, the trial court erred by failing to conduct ordinary OEC 403 balancing.

In response, the state argued that OEC 404(4)(a) balancing is limited to the due-process determination, which presents a question of law for the appellate court to resolve, and that the admission of the other-acts evidence did

not violate due process. And the state asserted that, regardless, the trial court had implicitly conducted ordinary balancing.

The Court of Appeals reversed defendant’s convictions, because the trial court failed to conduct ordinary balancing. *State v. Mazziotti*, 276 Or App 773, 369 P3d 1200 (2016). The court explained that it had already determined that OEC 404(4)(a) mandates ordinary balancing, which “requires an exercise of discretion by the trial court in the first instance.” *Id.* at 780.¹ And the court rejected the state’s argument that the trial court implicitly conducted ordinary balancing, noting that it was inferable that the trial court had concluded that OEC 404(4)(a) precluded ordinary balancing. *Id.* at 777-79.

The court remanded for a new trial. In *State v. Zavala*, 276 Or App 612, 619-22, 368 P3d 831 (2016), the Court of Appeals explained that it will order a different remand for a *Williams* balancing-related error depending on whether the claim was preserved. For an unpreserved claim, the court will order a limited remand for balancing and for reinstatement of the convictions if the

¹ After *Williams*, the Court of Appeals rejected the state’s argument that due-process balancing is narrower than ordinary balancing. Although *Williams* expressly left that issue open, the Court of Appeals interpreted *Williams* as holding that due-process balancing and ordinary balancing are identical. *State v. Brumbach*, 273 Or App 552, 563 n 11, 359 P3d 490 (2015), *rev den*, 359 Or 525 (2016). The *Brumbach* court relied on the statement from *Williams* that OEC 403 balancing is “the only way that a court can ensure that the admission of ‘other acts’ evidence is not unfairly prejudicial and a violation of ‘fundamental concepts of justice.’” 357 Or at 18-19.

balancing establishes that the evidence was admissible. For a preserved claim, however, the court will order a new trial regardless of whether the balancing on remand establishes that the evidence was admissible, because the court has concluded that the federal constitutional harmless-error doctrine would preclude a limited remand. Because defendant preserved his balancing claim in this case, the court ordered a new trial. *Mazziotti*, 276 Or App at 780-81.

The state petitioned for review on the nature of the legal standard and on whether a limited remand is the proper remedy for preserved *Williams* balancing errors. This court allowed review.²

SUMMARY OF ARGUMENT

The trial court correctly limited itself to due-process balancing rather than ordinary OEC 403 balancing. OEC 404(4)(a) permits trial courts to balance under OEC 403 only “to the extent required by the United States Constitution or the Oregon Constitution.” The pertinent constitutional limitation is the right to a fair trial guaranteed by the Due Process Clause in the

² On review, the state does not challenge the Court of Appeals’ conclusion that the trial court did not conduct ordinary balancing. Although a court normally implicitly conducts ordinary balancing when it admits evidence over a preserved OEC 403 objection, it is debatable whether that principle applies. Defendant raised an ordinary OEC 403 argument, the prosecutor countered that due-process balancing is narrower, and the trial court admitted the evidence without articulating which rule it applied. Given the affirmative suggestion in the record that the trial court may have been conducting due-process balancing, the state assumes that the court implicitly conducted narrower due-process balancing rather than ordinary OEC 403 balancing.

Fourteenth Amendment to the United States Constitution. The result is that OEC 404(4)(a) limits the application of OEC 403 to the question whether the probative value of the evidence is so outweighed by the unfair prejudice that its admission would render the trial fundamentally unfair.

Due-process balancing is narrower than ordinary balancing. OEC 403 does not codify the test for determining whether the admission of evidence would violate due process. OEC 403 gives trial courts discretion to exclude evidence when its probative value is substantially outweighed by the “danger” of unfair prejudice and by other considerations, such as “confusion of the issues,” “misleading the jury,” “undue delay,” and “needless presentation of cumulative evidence.” Other courts have held that the broad discretion afforded by Rule 403 serves due process as a prophylactic measure because it authorizes the exclusion of a broad range of prejudicial evidence that necessarily subsumes evidence that is so unfairly prejudicial that admitting it would violate due process. But OEC 404(4)(a), in contrast, permits the trial court to exclude evidence under OEC 403 only when its admission would, as a matter of law, render the trial fundamentally unfair. Ordinary balancing is broader than that, because it can authorize exclusion even short of a due-process violation and because it involves an exercise of discretion and is reviewed as such on appeal.

The trial court correctly concluded that the admission of the other-acts evidence would not violate due process. Due-process balancing will virtually

always result in the admission of other-acts evidence that is offered for a nonpropensity purpose. Defendant's prior reckless-driving incidents and the resulting convictions were relevant to prove his reckless mental state, because that evidence had a tendency to prove that he was subjectively aware of the dangers associated with driving at excessive speeds and in an unsafe manner. That was not a propensity theory and would have passed muster under OEC 404(3). But regardless—and even if that was a propensity theory for proving defendant's mental state—the evidence was admissible because its admission did not render the trial fundamentally unfair.

If this court rejects the state's argument that OEC 404(4)(a) is limited to due-process balancing and concludes that a remand is necessary, the proper remedy is a limited remand for the trial court to perform balancing. If the outcome of that balancing establishes that the evidence was admissible, the trial court should reinstate defendant's convictions. Article VII (Amended), section 3, of the Oregon Constitution would mandate a limited remand. And that approach would not violate the federal constitutional harmless-error rule, because a failure to conduct balancing is not, itself, a constitutional violation and because, in all events, a prior failure-to-balance error would be harmless beyond all doubt if the balancing determination on remand establishes that the evidence was, in fact, admissible.

ARGUMENT

A. The trial court correctly admitted the other-acts evidence under OEC 404(4), because its admission did not violate due process.

OEC 404(4) provides:

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];*
- (b) The rules of evidence relating to privilege and hearsay;
- (c) The Oregon Constitution; and
- (d) The United States Constitution.

(Emphasis added).

Williams held that OEC 404(4) supersedes OEC 404(3)³ and governs the admission of evidence of a criminal defendant’s “other crimes, wrongs or acts.”

The evidence is admissible if relevant under OEC 401, subject to the application of OEC 403 to the extent required by due process. *Williams* recognized that, under OEC 404(4), “other acts” evidence will sometimes be admissible to prove a defendant’s propensity to commit the crime. 357 Or at 20.

³ OEC 404(3) provides that “[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith” but may be admitted “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

The other-acts evidence in this case was relevant. OEC 401 defines relevant evidence as “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.” “The threshold for relevance is very low.” *State v. Lewis*, 352 Or 626, 635, 290 P3d 288 (2012). Here, the state had to prove defendant’s reckless mental state. The evidence of defendant’s reckless-driving incidents and convictions had at least a tendency to prove that defendant was subjectively aware of but consciously chose to disregard the risks posed by his unsafe driving. The evidence satisfied the minimal-relevancy standard in OEC 401.

The question is what form of balancing was the trial court required to perform when it applied OEC 403 “to the extent required by” due process? *Williams* flagged the issue whether the balancing authorized under OEC 404(4)(a) is narrower than ordinary balancing. 357 Or at 19 n 17. But because the defendant in that case did not raise an OEC 403 claim on review, the court did not review the trial court’s OEC 403 ruling. *Id.* at 23. Consequently, *Williams* expressly left open the issue “whether ‘due process’ balancing differs from ‘traditional’ or ‘subconstitutional’ balancing.” *Id.* at 19 n 17.⁴

⁴ Federal caselaw interpreting the federal propensity provisions (FRE 413-15) is of limited utility, because the federal evidence code requires ordinary discretionary balancing under FRE 403 as a statutory matter. *Martinez*
Footnote continued...

It does. Due-process balancing is narrower than ordinary balancing. As explained below, OEC 404(4)(a) balancing is limited to determining whether the probative value of the evidence is so substantially outweighed by its unfair prejudicial effect that—as a matter of law—admitting the evidence would render the trial fundamentally unfair. Because the admission of the other-acts evidence in this case did not have that effect, this court should reverse the Court of Appeals’ decision and affirm the trial court’s judgment.

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

OEC 403 provides that 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.” But by its terms, OEC 404(4)(a) makes OEC 403 applicable only “to the extent required by the United States Constitution or the Oregon Constitution.” Therefore, the limited OEC 403 balancing that is authorized by the plain text of OEC 404(4) is “due process balancing.” OEC 404(4) limits application of OEC 403 to determining whether the “admission of the [challenged evidence] [would be] unfairly prejudicial to the degree that its admission” would violate due process. *State v. Moore/Coen*,

(...continued)

v. Cui, 608 F3d 54, 60 (1st Cir 2010). That caselaw demonstrates that ordinary balancing satisfies due process but does not establish that the balancing required by due process is identical to ordinary balancing.

349 Or 371, 392 n 12, 245 P3d 101 (2010). That due-process balancing is narrower than ordinary balancing.

Although OEC 403 may serve to protect a defendant’s due-process rights in some circumstances, due process is not implicated in every single application of OEC 403. The United States Supreme Court has “defined the category of infractions that violate [the Due Process Clause requirement of] ‘fundamental fairness’ very narrowly” and stressed that “[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.” *Dowling v. United States*, 493 US 342, 352, 110 S Ct 668, 107 L Ed 2d 708 (1990). More to the point, “the Due Process Clause does not permit * * * a finely-tuned review of the wisdom of state evidentiary rules.” *Marshall v. Lonberger*, 459 US 422, 438 n 6, 103 S Ct 843, 74 L Ed 2d 646 (1983). Instead, due process is violated *only* when the admission of evidence is so extremely unfair that it violates fundamental concepts of justice. *United States v. Lovasco*, 431 US 783, 790, 97 S Ct 2044, 52 L Ed 2d 752 (1977).

It is possible that other-acts evidence will have that effect in a case when the evidence ““goes only to character and there are *no* permissible inferences the jury may draw from it.”” *Williams*, 357 Or at 20 (emphasis original). But “the facts must be extreme before the admission of the evidence will amount to a denial of due process” and “courts rarely conclude that the admission of [other-acts evidence] constituted a violation of the substantive due process

right.” Edward J. Imwinkelried, 1 *Uncharged Misconduct Evidence*, § 10:16 (2014).

In contrast, OEC 403 provides trial courts with a measure of discretion to exclude relevant evidence not only when its probative value is substantially outweighed by the danger of unfair prejudice, but also to prevent “confusion of the issues,” “misleading the jury,” “undue delay,” and “needless presentation of cumulative evidence.” The “danger of unfair prejudice” is not necessarily equivalent to “fundamental unfairness.” Moreover, OEC 403 permits exclusion based on other concerns—*viz.*, the danger of confusion and considerations of delay and cumulativeness—that are not of constitutional import. A due-process violation occurs only when the admission of the evidence, as a matter of law, renders the trial fundamentally unfair. Ordinary balancing is far broader than that, because it could authorize exclusion even for reasons that have nothing to do with ensuring a fair trial.

The distinction between the balancing tests is also reflected by the fact that one test involves an exercise of discretion whereas the other test does not. Due-process balancing is performed as a matter of law—it presents a pure legal question that can yield only one correct answer. Appellate courts review a due-process evidentiary ruling for errors of law. *See, e.g., Dowling*, 493 US at 352-54 (applying standard); *Estelle v. McGuire*, 502 US 62, 67–70, 112 S Ct 475, 116 L Ed 2d 385 (1991) (same). Conversely, OEC 403 ordinary balancing

involves an exercise in discretion which sometimes will allow a trial court to decide *either* to admit or to exclude the evidence in the sound exercise of its discretion. *See, e.g., State v. Titus*, 328 Or 475, 481, 982 P2d 1133 (1999). The appellate court reviews that form of balancing under the deferential abuse-of-discretion standard. *Id.*

That discretion has no role in a due-process determination. The limits imposed on the admission of evidence by the Due Process Clause *cannot* be a function of trial court discretion. A trial court does not have “discretion” to admit or exclude evidence that would render the trial fundamentally unfair, because there is only one legally correct outcome. Instead, due process would require the trial court to exclude that evidence as a matter of law.

Thus, the discretion afforded by OEC 403 theoretically could serve due process as a prophylactic measure: it authorizes the exclusion of a broad range of prejudicial evidence that necessarily subsumes the far narrower range of *unconstitutionally* prejudicial evidence. *Cf. Williams*, 357 Or at 11-12 (reviewing federal cases holding that Rule 403 sufficiently safeguards right to fair trial in relation to evidentiary rules authorizing admission of propensity evidence). But OEC 404(4) does not permit trial courts to exclude other-acts evidence under OEC 403 *unless* admitting the evidence would violate due process. As a result, OEC 404(4) requires courts to answer directly the question

whether other-acts evidence is so unfairly prejudicial that admitting it would violate due process.

Accordingly, as the Court of Appeals had repeatedly recognized before *Williams*, the due-process balancing that OEC 404(4) permits is different—and more narrow—than the ordinary OEC 403 balancing in which courts typically engage. *See, e.g., State v. Wyant*, 217 Or App 199, 204, 175 P3d 988 (2007), *rev den*, 344 Or 558 (2008) (“OEC 404(4) * * * does not permit * * * balancing under OEC 403, unless it is required by due process considerations”); *State v. Berg*, 223 Or App 387, 399, 196 P3d 547 (2008), *adh’d to as modified*, 228 Or App 754, *rev den*, 346 Or 361 (2009) (rejecting argument that OEC 403 “codifies a due process requirement”).

This court’s decision in *Moore/Coen*—in which it applied OEC 404(4)(a) to overturn a trial court’s balancing ruling excluding evidence—comports with that understanding. The defendant in *Coen* was charged with second-degree manslaughter and DUII after being involved in a head-on automobile collision in which the driver of the other vehicle was killed. *Moore/Coen*, 349 Or at 376. To prove the defendant’s reckless mental state, the state sought to admit evidence that he had participated in a prior DUII diversion program and also had a prior DUII conviction. *Id.* at 378-79. The trial court ruled that the evidence of the diversion was admissible but that the evidence of the conviction was not, because it was cumulative given that the diversion evidence would be

admitted, which meant—in the trial court’s view—that the evidence of the DUII conviction was being offered to prove propensity. *Id.* at 391 n 11. The state appealed.

This court reversed the trial court’s ruling excluding evidence of the defendant’s prior DUII conviction. This court held that the admission of the evidence to prove the defendant’s reckless mental state would not violate due process, and that the trial court had erred by concluding otherwise. *Id.* at 391-92. This court stressed that the trial court was correct to conduct balancing to the extent that it was making the due-process determination but was wrong to conclude that the admission of the evidence would violate due process:

We do not hold that the trial court erred in considering defendant’s argument that admission of the DUII conviction was unfairly prejudicial to the degree that its admission would violate the state and federal constitution. Rather, we hold that the trial court erred in concluding that the evidence would be unfairly prejudicial and therefore violate the due process clause of the constitution.

Id. at 392 n 12. This court did not review the trial court’s ruling for an abuse of discretion but instead appeared to review for errors of law. *Id.* at 391-92 & nn 11 & 12.

Moore/Coen illustrates the limited nature of due-process balancing. There, this court focused narrowly on whether the unfairly prejudicial effect of the evidence outweighed its probative value “to the degree that its admission would violate” due process. And this court reviewed for errors of law. Had this

court applied the more lenient abuse-of-discretion standard, it might have affirmed the ruling, because the trial judge had engaged in a reasoned, measured exercise of discretion by admitting some of the state’s evidence but excluding a portion based on concerns about unfair prejudice. Accordingly, *Moore/Coen* “foreclose[s]” any argument that “due process always requires OEC 403-type balancing” or that OEC 404(4)(a) must be interpreted to permit ordinary balancing. *State v. Jones*, 246 Or App 412, 419, 266 P3d 151 (2011), *vac’d and remanded on other grounds*, 353 Or 208 (2013).

In sum, due-process balancing is narrower—in fact considerably narrower—than ordinary balancing and is less likely to authorize the exclusion of other-acts evidence. The trial court thus correctly limited itself to implicitly conducting due-process balancing. And even if the trial court had not conducted due-process balancing, this court could make that determination in the first instance on appeal. When a trial court fails to conduct due-process balancing, the appellate court still “must review the underlying question,” which is whether the admission of the evidence violated due process. *Cf. United States v. Comito*, 177 F3d 1166, 1170 (9th Cir 1999) (so holding for the due-process balancing test for hearsay in probation-violation hearings); *State v. Johnson*, 221 Or App 394, 404-05, 190 P3d 455, *rev den*, 345 Or 418 (2008) (same probation-violation-hearing context; conducting analysis in the first instance on appeal). A failure to balance can be deemed harmless on appeal

when the admission of the evidence, as a matter of law, did not deny the defendant a fair trial. *Cf. Johnson*, 221 Or App at 404-06 (affirming, because no due-process violation occurred).

2. The admission of the evidence did not render the trial fundamentally unfair.

The trial court correctly admitted the evidence under OEC 404(4)(a). Because the evidence was relevant, it was inadmissible only if its admission would render defendant's trial fundamentally unfair, thereby violating due process. Yet the admission of the evidence could not have violated due process, because the state's theory of proving defendant's mental state was not based on propensity. But even if the state's theory crossed the line into propensity, the evidence was admissible, because the evidence was not so unfairly prejudicial as to violate due process.

a. Because the evidence was relevant for a nonpropensity purpose, its admission did not violate due process.

To begin with, the admission of the other-acts evidence did not render defendant's trial fundamentally unfair, because the evidence was relevant to defendant's reckless-driving and reckless-endangerment crimes under a nonpropensity theory of relevancy.

The Due Process Clause is not violated by the use of other-acts evidence to prove an element of a crime under a nonpropensity theory of relevancy. Both the United States Supreme Court and this court have recognized as much and

summarily rejected due-process challenges when the prosecution offered other-acts evidence that comported with Rule 404(3). *See Estelle*, 502 US at 68-70 (intent); *Dowling*, 493 US at 352-53 (plan); *Moore/Coen*, 349 Or at 391–92 (knowledge); *Lisenba v. California*, 314 US 219, 227-28, 62 S Ct 280, 86 L Ed 166 (1941) (intent and plan); *cf. Spencer v. Texas*, 385 US 554, 563-564, 87 S Ct 648, 17 L Ed 2d 606 (1967) (to prove predicate for recidivist sentence). The relevant opinions “‘stand[] for the proposition that a trial is fundamentally fair, and thus consistent with due process, when [other-acts] evidence is admitted for a *non-character* or sentencing purpose.’” *United States v. Enjady*, 134 F3d 1427, 1431 (10th Cir 1998) (emphasis supplied in *Enjady*).

Williams states that “‘other acts’ evidence that is offered for nonpropensity purposes—*i.e.*, to prove motive, intent, identity, or lack of mistake or accident—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.” 357 Or at 19. With respect, that suggestion does not go far enough. Although in theory there could be cases in which marginally relevant nonpropensity evidence is so unfairly prejudicial that it should be excluded, those cases would be extreme outliers. Because the use of other-acts evidence for a nonpropensity purpose generally does not violate due process, the balance in such cases will virtually always weigh in favor of admission.

That principle is dispositive. The other-acts evidence at issue was relevant to prove defendant's reckless mental state under a nonpropensity theory of relevancy. A person acts "recklessly" if the person "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." ORS 161.085(9).

Recklessness was an element of defendant's reckless-driving and reckless-endangerment offenses. To prove the reckless-driving charge, the state had to prove that defendant "*recklessly dr[ove] a vehicle upon a highway * * ** in a manner that endanger[ed] the safety of persons or property." ORS 811.140(1) (emphasis added). To prove the reckless-endangerment charge, the state had to prove that defendant "*recklessly engage[d] in conduct which create[d] a substantial risk of serious physical injury to another person.*" ORS 163.195(1) (emphasis added). The state thus had to prove that defendant was aware of, and consciously disregarded, a substantial and unjustifiable risk that his driving endangered the safety of persons or property and created a substantial risk of serious physical injury to his passenger.

The other-acts evidence was relevant to prove defendant's subjective awareness of the risks of driving at excessive speeds and in an unsafe manner. Defendant had been held criminally liable for driving at excessive speeds in a manner that endangered the safety of persons or property on two prior occasions (one of which involved defendant crashing his car and both of which

resulted in police pursuits). That evidence at least slightly increased the probability that defendant was aware of the dangers of driving at excessive speeds and in an unsafe manner. As a matter of logic, that evidence supported the inference that, when defendant drove at an unsafe speed and in an unsafe manner in this case, he was aware of the risks but chose to ignore them.

That is a nonpropensity theory of relevancy that would have been valid under OEC 404(3). It is not a theory that, because defendant drove recklessly in the past, he must have done so here. Rather, it is that defendant inferably learned from his prior reckless-driving incidents, arrests, convictions, and punishments about the dangers of reckless driving and thus had a subjective awareness of those risks.

Based on substantially identical reasoning, “many courts have admitted evidence of a defendant’s earlier drunk driving incidents to establish recklessness in vehicle homicide cases.” 1 Imwinkelried, *Uncharged Misconduct Evidence* § 5:39. That was the reasoning that this court employed in *Moore/Coen*. The defendant there was charged with vehicular manslaughter based on an incident in which he had been driving while intoxicated. This court reversed the trial court’s ruling excluding evidence of the defendant’s prior DUII conviction, because the evidence was relevant to prove the defendant’s reckless mental state. 349 Or at 387, 391-92. The evidence had a tendency to

prove that the defendant was subjectively aware of the risks of driving while intoxicated but consciously chose to disregard those risks.

The Court of Appeals repeatedly has recognized and applied that subjective-awareness theory in deeming admissible other-acts evidence of DUII arrests, convictions, probation conditions, and diversion programs to prove a defendant's recklessness or extreme indifference for vehicular manslaughter or assault charges involving intoxicated driving. *See, e.g., State v. Berliner*, 232 Or App 539, 222 P3d 744 (2009), *rev den*, 348 Or 291 (2010); *Wyant*, 217 Or App 199; *Cavaner*, 206 Or App 131; *State v. Hardman*, 196 Or App 522, 102 P3d 722 (2004), *State v. Hopkins*, 173 Or App 1, 21 P3d 134 (2001), *rev den*, 333 Or 655 (2002); *Johnstone*, 172 Or App 559. In doing so, the court has explained that the subjective-awareness theory is not subject to the doctrine-of-chances analysis set forth in *State v. Johns*, 301 Or 535, 725 P2d 312 (1986). *Johnstone*, 172 Or App at 564.

In this case, the trial court properly applied similar reasoning to admit the evidence of defendant's past reckless-driving incidents and convictions to prove his reckless mental state. That evidence had a tendency to prove that defendant was subjectively aware of the risks of driving at excessive speeds and in an unsafe manner, particularly given that one of the prior incidents involved a crash, and that both incidents resulted in police pursuits, prosecutions, and convictions.

The evidence thus was relevant and admissible under a nonpropensity theory to prove defendant's reckless mental state. For that reason, standing alone, the admission of the evidence did not violate due process. The use of other-acts evidence to prove an element of the crime under a nonpropensity theory is not fundamentally unfair. Beyond that, the circumstances of this case, which are discussed in the next section, confirm that no due-process violation occurred.

b. Even if the state's mental-state theory crossed the line into propensity, the admission of the evidence did not violate due process.

Williams left open whether due process precludes the use of other-acts evidence to prove propensity in a case when a defendant is charged with crimes other than child sexual abuse. 357 Or at 17. But such a categorical rule would not comport with the principles of due process. The Due Process Clause prohibits the admission of evidence only if it would render a particular trial fundamentally unfair. That requires a fact-specific analysis in each case, rather than a categorical rule of evidence that applies only to certain types of cases. *See Spencer*, 385 US at 564 (Due Process Clause does not “establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure”). The critical point is that OEC 404(4)(a) balancing is available to ensure that “‘potentially devastating evidence of little probative value will not reach the jury.’” *Williams*, 357 Or at 12. Although evidence offered solely to

prove a defendant's propensity to act in a particular way may often fail the due-process balancing test, no categorical rule is appropriate.

The circumstances of this case demonstrate that—regardless of whether the state's theory was a propensity theory—no due-process violation occurred. Because the other-acts evidence was highly probative and not unfairly prejudicial, its admission did not render defendant's trial fundamentally unfair.

The evidence was highly probative. One of the key disputed issues was whether defendant acted with a reckless mental state. Defendant asserted that he did not. Evidence of the two prior incidents—in conjunction with the resulting prosecutions and convictions—was highly probative to rebut that defense and made defendant's contention that he lacked the requisite mental state on this occasion particularly unbelievable. *See United States v. LeMay*, 260 F3d 1018, 1028 (9th Cir 2001) (noting “the frequency of the prior acts” as consideration).⁵

Moreover, because the other-acts evidence was relevant to prove defendant's mental state, the state's need for the evidence was substantial. *See*

⁵ *Williams* noted that cases like *LeMay* may be helpful in determining whether the risk of unfair prejudice outweighs the probative value of the evidence. 357 Or at 20. *LeMay*, however, involved application of FRE 403, rather than the Due Process Clause, which provides a lower hurdle for admissibility. Nonetheless, evidence that would be admissible under FRE 403 will necessarily be admissible under due process. *Williams*, 357 Or at 17, 19 n 17. The state therefore uses the *LeMay* factors as an aid in its due-process analysis.

id. at 1028-29 (considering need for evidence). “Intent or state of mind is often the most difficult element of a 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. Other-acts evidence “may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.” *Huddleston v. United States*, 485 US 681, 685, 108 S Ct 1496, 99 L Ed 2d 771 (1988) (in prosecution for selling stolen video tapes, evidence of prior attempt to sell stolen appliances was admissible under FRE 404(b) to prove the defendant’s knowledge that the video tapes were stolen).

That concern applies here. “Th[e] element of recklessness is subjective and will rarely be susceptible to direct proof” and “often must be inferred (or not) from objective facts.” *Morehouse v. Haynes*, 350 Or 318, 328, 253 P3d 1068 (2011). Because the other-acts evidence helped to demonstrate defendant’s reckless mental state, the evidence was “helpful or practically necessary” to prove an element of the state’s case. *LeMay*, 260 F3d at 1029 (emphasis omitted).

Weighed against that probative value, nothing about the nature of the challenged evidence rendered its admission fundamentally unfair. The state did not simply denigrate defendant’s character by offering evidence of his past

misdeeds. Instead, defendant argued that he did not act with a reckless mental state, and the state sought to prove otherwise by demonstrating that defendant had a subjective awareness of the risks given his past reckless-driving-related incidents and convictions.

Relatedly, because the state was offering the evidence to prove defendant's mental state, rather than his conduct, the unfair prejudice from the evidence, if any, was minimal. There has been a vigorous debate whether the traditional rule banning propensity evidence *even applies* when it is offered to prove a defendant's mental state. As Professor Imwinkelried has explained, a "wealth of case law" supports the idea that the ban on propensity evidence "comes into play only when the prosecutor offers the [other acts evidence] to support an ultimate inference of conduct." Edward J. Imwinkelried, *The Use of Evidence of An Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St L J 575, 578-79 (1990). If the evidence is offered to prove mental state—even if the intermediate inference is the defendant's propensity to form a particular mental state—many jurisdictions have traditionally admitted the evidence under Rule 404(3). *Id.*

That analysis demonstrates that the use of propensity evidence to prove a defendant's mental state is less likely to violate due process than the use of propensity evidence to prove conduct. The trial court here instructed the jury

that it could only use the challenged evidence on the issue of defendant's reckless mental state. (Tr 471); *see Dowling*, 493 US at 353 (rejecting due-process challenge and stressing importance of limiting instruction). The fact that the other-acts evidence was not offered to prove defendant's conduct strongly suggests that its admission did not render the trial fundamentally unfair.

Furthermore, the evidence was not particularly inflammatory. *Cf. LeMay*, 260 F3d at 1030 (admission of "emotional and highly charged" testimony containing a suggestion that the defendant "had raped [the witness's] infant daughter" was permissible even though evidence was "inflammatory"). And because these were incidents that led to convictions, there was not a "mini-trial" on whether defendant had actually committed the prior acts. *See Williams*, 357 Or at 6 (noting potential concern); *LeMay*, 260 F3d at 1029 (evidence of prior acts was "highly reliable" given that the defendant had been convicted of one charge and admitted the others).

The trial court correctly admitted the other-acts evidence under OEC 404(4). The evidence was highly probative to prove that defendant acted with a reckless mental state, and the admission of the evidence for that purpose did not "so infuse[] the trial with unfairness as to deny due process of law." *Lisenba*, 314 US at 228. Consequently, this court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

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

If OEC 404(4)(a) requires ordinary balancing and a remand is necessary for ordinary balancing or for some other form of balancing, this court should order a limited remand for balancing. If the outcome of that balancing establishes that the evidence was admissible, the trial court should reinstate defendant's convictions. The Oregon Constitution mandates that procedure, and the federal constitution harmless-error rule would not preclude it.⁶

1. The Oregon Constitution would mandate a limited remand.

The Oregon Constitution does not empower the appellate court to reverse a conviction absent a showing of both error and prejudice. Article VII (Amended), section 3, of the Oregon Constitution provides, in part “[i]f the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed,

⁶ A trial court's balancing error (failure to balance or analytical error) in this context may be harmless in one of two ways. First, the error is harmless when the appellate record demonstrates that the admission of the other-acts evidence did not contribute to the verdict. *See generally Chapman v. California*, 386 US 18, 24, 87 S Ct 824, 17 L Ed 2d 705 (1967) (state must demonstrate “beyond a reasonable doubt that the [federal constitutional] error complained of did not contribute to the verdict obtained”). The state acknowledges that the record does not establish harmless error in that way. Second, a balancing error is harmless if, on remand, the trial court conducts balancing and determines that the evidence was, in fact, admissible. That is the form of harmless error at issue.

notwithstanding any error committed during the trial[.]” Applying that provision, this court repeatedly has held that prejudice is a mandatory prerequisite for reversal. *See, e.g., State v. Parker*, 317 Or 225, 233-34, 855 P2d 636 (1993); *State v. Walton*, 311 Or 223, 230, 809 P2d 81 (1991); *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988). “No discretion is permitted by [that] mandate.” *State v. Van Hooser*, 266 Or 19, 24, 511 P2d 359 (1973).

At most, defendant here has shown only a procedural or analytical error. That is, defendant has demonstrated only that the trial court failed to conduct proper balancing to determine whether a due-process violation occurred. But it may well be—and in fact is very likely—that the admission of the evidence did not violate due process. If no due-process violation occurred, then defendant was not deprived of a constitutional right—much less prejudiced—and the Oregon Constitution affirmatively would prohibit a new trial. The proper approach would be a limited remand for balancing to determine whether the evidence was admissible and to make any remaining harmless-error determination.

State v. Smith, 190 Or App 576, 80 P3d 145 (2003), *rev’d on other grounds*, 339 Or 515 (2005), informs the analysis. In *Smith*, the Court of Appeals reversed the defendant’s convictions, because the trial court erred by failing to conduct an adequate inquiry into the defendant’s request for substitute counsel and thus failed to make an adequate record on that issue for appeal.

190 Or App at 578. A dispute arose as to the scope of the remand. The defendant argued that it should be for a new trial. *Id.* The state argued that it should be a limited remand for the trial court to determine whether the defendant's complaints about counsel were legitimate and whether the defendant was prejudiced by anything that counsel did or failed to do. *Id.*

The *Smith* court concluded that the Oregon Constitution mandated a limited remand. The court stressed that Article VII (Amended), section 3, of the Oregon Constitution would not permit the appellate court to order a new trial absent a prejudicial error. *Id.* at 579. The court explained that, although the lack of an adequate record prevented the appellate court from determining whether a constitutional violation had occurred, the lack of a record also meant that the appellate court could not determine whether the defendant suffered prejudice that would warrant a new trial. *Id.* at 580. As a result, the court ordered a limited remand for the trial court to determine whether the defendant was entitled to substitute counsel and, if he was not, to reinstate his convictions:

To remand for a new trial without a showing of prejudice is, in effect, to presume prejudice in substance from proof of error in the procedures designed to protect the substantive right. In *State v. Parker*, 317 Or 225, 233, 855 P2d 636 (1993), the Supreme Court expressly rejected a similar conclusion by this court. We conclude that the state is correct * * * that defendant is not automatically entitled to a new trial as the result of the trial court's error. Rather, we vacate defendant's conviction and remand for the trial court to make the inquiry that it failed to make previously. If it determines that defendant should have received different counsel, it shall order a new trial; otherwise it shall reinstate defendant's conviction.

This procedure is, admittedly, cumbersome, but it carries out the intention of the voters when they adopted section 3 by initiative in 1910.

Id. at 580-81.

In the past, this court has ordered limited remands to have trial courts make unresolved determinations or to reconsider and redo procedurally flawed determinations. *See, e.g., State v. Paulson*, 313 Or 346, 352-53, 833 P2d 1278 (1992) (consent and inevitable-discovery); *State v. McDonnell*, 310 Or 98, 106-07, 794 P2d 780 (1990) (prosecutor decision whether to enter into plea agreement); *State v. Probst*, 339 Or 612, 629-30, 124 P3d 1237 (2005) (constitutional-validity challenge to conviction used for enhancement purposes); *State v. Mills*, 354 Or 350, 373-74, 312 P3d 515 (2013) (venue determination); *State v. Babson*, 355 Or 383, 434, 326 P3d 559 (2014) (free-speech and right-to-assemble determinations).

In *Zavala*, the Court of Appeals held that the Oregon Constitution mandates a limited remand, rather than outright reversal, to remedy a trial court's failure-to-balance error in an unpreserved case, explaining:

Because a *Williams* error is procedural—that is, the court erred by not engaging in the process of conducting OEC 403 balancing—it often will be difficult, if not impossible, to determine whether a defendant has been harmed by the error in a manner that permits reversal under Article VII (Amended), section 3. If the trial court, upon conducting the balancing required by *Williams*, could properly have admitted the challenged evidence, and would have done so, then the defendant suffered no prejudice from the

admission of that evidence at trial, making it inappropriate to set aside the defendant's convictions

276 Or App at 620-21. That reasoning was correct but applies with equal force in a preserved case. When a balancing error in a preserved or unpreserved case requires reversal, the proper remedy is a limited remand for balancing and for reinstatement of the convictions if the prior balancing error was harmless.

The harmless-error determination on remand should operate as follows: If balancing demonstrates that all of the evidence was admissible, that necessarily establishes that the prior balancing error was harmless, and the trial court should reinstate the convictions. If balancing establishes that none of the evidence was admissible, the prior balancing error was not harmless,⁷ and the trial court should order a new trial. If balancing establishes that only some of the evidence was admissible, then the trial court can conduct a harmless-error inquiry to determine whether the improperly admitted evidence contributed to the verdict and then, depending on the results, either reinstate the convictions or order a new trial. *See, e.g., State v. Cartwright*, 336 Or 408, 421, 85 P3d 305 (2004) (limited remand for disclosure of wrongly withheld materials and then for trial court to determine whether error in failing to grant access to materials affected the verdicts).

⁷ If none of the evidence contributed to the verdict, the appellate court would have affirmed on harmless-error grounds rather than reverse and remand for balancing.

2. The federal constitution would not preclude a limited remand.

The Court of Appeals did not order a limited remand in this case, however, because the court has concluded that limited remands are not an option when the balancing claim was preserved. The court has reasoned that a failure to conduct OEC 404(4)(a) due-process balancing “is a federal constitutional error,” which triggers the application of the federal constitution’s harmless-error doctrine. *Zavala*, 276 Or App at 619. In the court’s view, that harmless-error doctrine requires an outright reversal unless the appellate court can determine from the record on appeal that the error was harmless beyond a reasonable doubt. *Id.* The court thus views the federal-constitutional harmless-error doctrine as precluding a limited remand for determining whether the admission of the evidence violated due process and whether any procedural or analytical balancing error was harmless. That reasoning is flawed.

To begin with, a trial court’s balancing error is not a federal constitutional error or a federal constitutional violation. Due process is violated only when a trial court *admits* evidence that is so unfairly prejudicial that *admitting it* violates “fundamental conceptions of justice.” *Williams*, 357 Or at 18. A failure to properly conduct due-process balancing is nothing more than a procedural or analytical error. It is not, itself, a violation of due process or a federal constitutional “error” in any pertinent sense. Unless and until the balancing determination establishes that the admission of the evidence violated

due process, no constitutional violation or error has been established, much less a substantive one that could be deemed prejudicial and require a new trial.⁸

But even if a due-process balancing error is a federal constitutional “error,” the appellate court can use a remand as part of the error-determination and error-correction process. A failure-to-balance error or an analytical balancing error is a procedural or analytical error that can be fully remedied by a limited remand that establishes whether the admission of the evidence violated due process, and whether the defendant suffered prejudice. A defendant is entitled to a new trial only if an error prejudiced him. “To remand for a new trial without a showing of prejudice is, in effect, to presume prejudice in substance from proof of error in the procedures designed to protect the substantive right.” *Smith*, 190 Or App at 580. As a matter of logic, if balancing on remand establishes that the evidence was admissible, then it is clear—beyond *all* doubt—that the balancing error was harmless, because the evidence was admissible. “[T]he defendant [will have] suffered no prejudice from the admission of that evidence at trial, making it inappropriate to set aside the defendant’s convictions.” *Zavala*, 276 Or App at 621.

⁸ If this court concludes that OEC 404(4)(a) requires ordinary balancing as a matter of state law—even though due process does not require ordinary balancing—then a balancing error would be a mere error of state law, and not implicate the federal-constitutional harmless-error doctrine at all.

Limited remands are appropriate to remedy procedural or analytical errors involving preserved federal constitutional claims. *See, e.g., Batson v. Kentucky*, 476 US 79, 100, 106 S Ct 1712, 90 L Ed 2d 69 (1986) (limited remand for equal-protection analytical error); *People v. Johnson*, 38 Cal 4th 1096, 1098-1104, 45 Cal Rptr 3d 1, 136 P3d 804 (2006) (same); *Coleman v. Alabama*, 399 US 1, 10-11, 90 S Ct 1999, 26 L Ed 2d 387 (1970) (limited remand to determine whether denial of counsel at preliminary hearing was harmless); *Wood v. Georgia*, 450 US 261, 272-74, 101 S Ct 1097, 67 L Ed 2d 220 (1981) (limited remand to make due-process determination).

The same holds true when the claim involves a challenge to the admission of evidence and when the constitutional propriety of admitting the evidence hinges on unanswered predicate questions of admissibility. *See United States v. Wade*, 388 US 218, 242, 87 S Ct 1926, 18 L Ed 2d 1149 (1967) (limited remand for determination whether in-court identifications had independent source from unconstitutional post-indictment lineup); *Gilbert v. California*, 388 US 263, 272-74, 87 S Ct 1951, 18 L Ed 2d 1178 (1967) (same unless State Supreme Court determined that separate error mandated new trial); *Bernal v. People*, 44 P3d 184, 193-95, 201 (Colo 2002) (limited remand for due-process analytical error); *United States v. Turner*, 936 F2d 221, 225 (6th Cir 1991) (limited remand to determine whether testimony compelled and, if so,

whether independent source); *United States v. Gregory*, 730 F2d 692, 697-98 (11th Cir 1984) (similar remand).

In *Jackson v. Denno*, 378 US 368, 84 S Ct 1774, 12 L Ed 2d 908 (1964), the United States Supreme Court ordered a limited remand to address a state-trial-court procedural error in failing to determine the voluntariness of the defendant's confession before submitting evidence of it to the jury. The Court remanded to a New York state court for a predicate determination of voluntariness and explained that a new trial would not be necessary if the state-remand proceedings demonstrated that the evidence was admissible:

[i]t does not follow * * * that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. * * * [I]f at the conclusion of [an] evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty. * * * If the jury relied upon [the confession in that circumstance], it was entitled to do so.

378 US at 394. If the remand proceeding demonstrated that the confession was admissible, then "[t]here is no constitutional prejudice" from the prior procedural error. *Id.* The Court explained that, for it to have ordered a new trial "before the outcome of the new hearing on voluntariness is known would not comport with the interests of sound judicial administration and the proper relationship between federal and state courts. *Id.* at 395.

In *State v. Brewton*, 238 Or 590, 597-602, 395 P2d 874 (1964), this court applied *Jackson/Denno* and held that the defendant's convictions had to be vacated because the trial court failed to determine the voluntariness of the defendant's confession before submitting it to the jury. This court ordered a limited remand for the trial court to correct that procedural error, explaining:

As pointed out in *Jackson*, however, it is not essential that we remand the case for a new trial. We are allowed some latitude in the choice of the further proceedings. Due process will be satisfied if the trial court, after a full hearing, finds that [the defendant's] confessions were voluntary. * * *

We, therefore, reverse the judgment of conviction and remand this case to the trial court for further proceedings, which may be, at the election of the state, either (1) a hearing by the trial court to determine whether [the defendant's] confessions were voluntary, or (2) a new trial.

* * * * *

If the state elects to prove that the [defendant's] confessions received in the trial of this case were voluntary, the trial court shall hold a hearing and determine whether [the] confessions were voluntary. If the court finds that the confessions were voluntary, it shall make an appropriate finding and enter a new judgment of conviction based on said finding and the verdict heretofore returned by the jury. * * *

238 Or at 602-04. *Brewton* thus illustrates that a limited remand is appropriate to remedy a federal-constitutional procedural or analytical error involving the admission of evidence.

To summarize, nothing in the federal constitution precludes a limited remand to remedy the claimed error. If balancing on remand demonstrates that

the evidence was admissible, then the admission of the evidence did not violate due process, and the prior procedural or analytical balancing error will have been harmless beyond all doubt. To require a new trial in such circumstances would violate the Oregon Constitution, would waste judicial resources, and would not make sense. If a remand is required in this case, this court should modify the Court of Appeals' decision and order the limited-remand procedure described above.

CONCLUSION

In enacting OEC 404(4)(a), the Oregon legislature intended trial courts to engage in a limited, restricted application of OEC 403 to prevent the admission of other-acts evidence that would violate due process. But that due-process determination remains a due-process determination and is nothing more. The Court of Appeals was mistaken to equate that due-process balancing with full-scale, ordinary, discretionary OEC 403 balancing. The trial court correctly admitted the other-acts evidence under OEC 404(4). This court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

If a remand is necessary for the trial court to conduct balancing, this court should modify the Court of Appeals' decision and order a limited remand for

balancing, which would result in the reinstatement of defendant's convictions if the balancing establishes that the evidence was admissible.

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 Kristin A. Carveth, 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 10,142 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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