

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Petitioner on Review,

v.

RUSSELL ALLEN BAUGHMAN,

Defendant-Appellant,
Respondent on Review.

Clatsop County Circuit
Court No. 111306

CA A152531

SC S064086

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 Clatsop County
Honorable CINDEE S. MATYAS, Judge

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

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
ERIC R. JOHANSEN #822919
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
eric.r.johansen@opds.state.or.us

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
DOUG M. PETRINA #963943
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: doug.petrina@doj.state.or.us

Attorneys for Respondent on Review

Attorneys for Petitioner on Review

TABLE OF CONTENTS

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW	1
HISTORICAL AND PROCEDURAL FACTS.....	2
A. Defendant’s crimes.....	2
B. The trial court admitted “other acts” evidence involving the victim and involving the daughter of defendant’s prior girlfriend.....	4
C. The Court of Appeals reversed defendant’s convictions and remanded for a new trial.	9
SUMMARY OF ARGUMENT	11
ARGUMENT	14
A. The trial court correctly admitted the other-acts evidence under OEC 404(4), because its admission did not violate due process.....	14
1. OEC 404(4)(a) limits the application of OEC 403 to due-process balancing.....	16
2. The admission of the other-acts evidence involving the victim did not render the trial fundamentally unfair.....	23
3. The admission of the other-acts evidence involving did not render the trial fundamentally unfair.....	31
B. If a remand is necessary, it should be a limited remand for balancing and not necessarily for a new trial.....	36
1. The Oregon Constitution would mandate a limited remand.....	37
2. The federal constitution would not preclude a limited remand.....	41
CONCLUSION.....	47
EXERPT OF RECORD	

TABLE OF AUTHORITIES

Cases Cited

<i>Batson v. Kentucky</i> , 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986)	44
<i>Bernal v. People</i> , 44 P3d 184 (Colo 2002)	44
<i>Chapman v. California</i> , 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967)	37
<i>Coleman v. Alabama</i> , 399 US 1, 90 S Ct 1999, 26 L Ed 2d 387 (1970)	44
<i>Dowling v. United States</i> , 493 US 342, 110 S Ct 668, 107 L Ed 2d 708 (1990)	17, 19, 27
<i>Estelle v. McGuire</i> , 502 US 62, 112 S Ct 475, 116 L Ed 2d 385 (1991)	19, 27
<i>Gilbert v. California</i> , 388 US 263, 87 S Ct 1951, 18 L Ed 2d 1178 (1967)	44
<i>Jackson v. Denno</i> , 378 US 368, 84 S Ct 1774, 12 L Ed 2d 908 (1964)	45, 46
<i>Lisenba v. California</i> , 314 US 219, 62 S Ct 280, 86 L Ed 166 (1941)	27, 36
<i>Marshall v. Lonberger</i> , 459 US 422, 103 S Ct 843, 74 L Ed 2d 646 (1983)	17
<i>Martinez v. Cui</i> , 608 F3d 54 (1st Cir 2010)	16
<i>Mejia v. Garcia</i> , 534 F3d 1036 (9th Cir 2008)	32
<i>People v. Falsetta</i> , 21 Cal 4th 903, 89 Cal Rptr 2d 847, 986 P2d 182 (1999)	32
<i>People v. Johnson</i> , 38 Cal 4th 1096, 45 Cal Rptr 3d 1, 136 P3d 804 (2006)	44
<i>Spencer v. Texas</i> , 385 US 554, 87 S Ct 648, 17 L Ed 2d 606 (1967)	27

<i>State v. Affeld</i> , 307 Or 125, 764 P2d 220 (1988).....	38
<i>State v. Babson</i> , 355 Or 383, 326 P3d 559 (2014).....	40
<i>State v. Baughman</i> , 276 Or App 754, 369 P3d 423 (2016)	4, 9, 24, 29, 31
<i>State v. Berg</i> , 223 Or App 387, 196 P3d 547 (2008), <i>adh'd to as modified</i> , 228 Or App 754, <i>rev den</i> , 346 Or 361 (2009)	20, 24, 29
<i>State v. Brewton</i> , 238 Or 590, 395 P2d 874 (1964).....	46
<i>State v. Brumbach</i> , 273 Or App 552, 359 P3d 490 (2015), <i>rev den</i> , 359 Or 525 (2016)	10
<i>State v. Cartwright</i> , 336 Or 408, 85 P3d 305 (2004).....	41
<i>State v. Cox</i> , 781 NW 2d 757 (Iowa 2010).....	30
<i>State v. Hall</i> , 108 Or App 12, 814 P2d 172, <i>rev den</i> , 312 Or 151 (1991)	25
<i>State v. Hampton</i> , 317 Or 251, 855 P2d 621 (1993).....	27
<i>State v. Johns</i> , 301 Or 535, 725 P2d 312 (1986).....	5, 10
<i>State v. Johnson</i> , 221 Or App 394, 190 P3d 455, <i>rev den</i> , 345 Or 418 (2008)	23
<i>State v. Jones</i> , 246 Or App 412, 266 P3d 151 (2011), <i>vac'd and remanded on other grounds</i> , 353 Or 208 (2013)	22
<i>State v. Kristich</i> , 226 Or 240, 359 P2d 1106 (1961).....	25, 29

<i>State v. Leistiko</i> , 352 Or 172, 282 P3d 857 (2012).....	8
<i>State v. Lewis</i> , 352 Or 626, 290 P3d 288 (2012).....	15
<i>State v. McKay</i> , 309 Or 305, 787 P2d 479 (1990).....	26
<i>State v. Mills</i> , 354 Or 350, 312 P3d 515 (2013).....	40
<i>State v. Moore/Coen</i> , 349 Or 371, 245 P3d 101 (2010).....	17, 21, 22, 27
<i>State v. O'Donnell</i> , 36 Or 222, 61 P 892 (1900).....	29
<i>State v. Pace</i> , 187 Or 498, 212 P2d 755 (1949).....	27
<i>State v. Panduro</i> , 224 Or App 180, 197 P3d 1111 (2008).....	25
<i>State v. Parker</i> , 317 Or 225, 855 P2d 636 (1993).....	37
<i>State v. Paulson</i> , 313 Or 346, 833 P2d 1278 (1992).....	40
<i>State v. Pitt</i> , 352 Or 566, 293 P3d 1002 (2012).....	31
<i>State v. Probst</i> , 339 Or 612, 124 P3d 1237 (2005).....	40
<i>State v. Smith</i> , 190 Or App 576, 80 P3d 145 (2003), rev'd on other grounds, 339 Or 515 (2005)	38, 39, 43
<i>State v. Titus</i> , 328 Or 475, 982 P2d 1133 (1999).....	19
<i>State v. Van Hooser</i> , 266 Or 19, 511 P2d 359 (1973).....	38
<i>State v. Walton</i> , 311 Or 223, 809 P2d 81 (1991).....	37
<i>State v. Williams</i> , 357 Or 1, 346 P3d 455 (2015).....	1, 9-11, 14-16, 18, 20, 28, 29, 33, 36, 42

<i>State v. Wyant</i> , 217 Or App 199, 175 P3d 988 (2007), rev den, 344 Or 558 (2008)	20
<i>State v. Zavala</i> , 276 Or App 612, 368 P3d 831 (2016)	10, 40, 42, 43
<i>State v. Zybach</i> , 308 Or 96, 775 P2d 318 (1989)	25
<i>United States v. Comito</i> , 177 F3d 1166 (9th Cir 1999)	23
<i>United States v. Enjady</i> , 134 F3d 1427 (10th Cir 1998)	28
<i>United States v. Gregory</i> , 730 F2d 692 (11th Cir 1984)	45
<i>United States v. LeMay</i> , 260 F3d 1018 (9th Cir 2001)	32, 33, 34, 35, 36
<i>United States v. Lovasco</i> , 431 US 783, 97 S Ct 2044, 52 L Ed 2d 752 (1977)	18
<i>United States v. Rogers</i> , 587 F3d 816 (7th Cir 2009)	33
<i>United States v. Turner</i> , 936 F2d 221 (6th Cir 1991)	44
<i>United States v. Wade</i> , 388 US 218, 87 S Ct 1926, 18 L Ed 2d 1149 (1967)	44
<i>Wood v. Georgia</i> , 450 US 261, 101 S Ct 1097, 67 L Ed 2d 220 (1981)	44

Constitutional and Statutory Provisions

FRE 403	16, 33
FRE 413	35
FRE 413-15.....	16
FRE 414	35
OEC 401.....	15
OEC 403.....	1, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 22, 23, 47
OEC 404(3).....	1, 9, 14, 24, 26, 27, 30
OEC 404(4).....	1, 13, 14, 17, 20, 23, 30, 31, 47
OEC 404(4)(a)	1, 9, 11, 13, 16, 17, 21, 22, 23, 36, 42, 43, 47
Or Const Article VII (Amended), § 3	13, 37, 39
US Const Amend XIV	11

Other Authorities

Basyle J Tchividjian, <i>Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions</i> , 39 Am J Crim L 327 (2012)	33
Edward J. Imwinkelried, 1 <i>Uncharged Misconduct Evidence</i> (2014).....	18

**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

Defendant was charged in Clatsop County with unlawful sexual penetration, sexual abuse, rape, and sodomy in a 12-count indictment. (ER-1 to ER-3, Indictment). The victim was the daughter of defendant's girlfriend. The victim, her mother, and defendant lived together.

The victim was 16 years old at the time of trial. (Tr 362). She testified that, from the ages of 12 to 14 when they were living in Clatsop County, defendant sexually abused her "pretty much * * * every day" in her room by performing oral sex on her, forcing her to perform oral sex on him, touching her breasts, making her give him a "hand job," and putting his finger in her vagina. (Tr 368, 378-79). Defendant also forced sexual intercourse on her several times a week. (Tr 377-78, 380). The abuse began when they were living in Umatilla County when the victim was six or seven years old. (Tr 369). Defendant would force the victim to touch his penis and give him a "hand job," and defendant would touch her breasts and vagina and put his finger inside her vagina. (Tr 369-70). Defendant told the victim that if she ever told anyone about the abuse he would hurt her, and he was physically abusive to her. (Tr 371, 374, 382).

Defendant would tell the victim that “[her] boobs were bigger and [her] vagina was tighter than [her mother’s].” (Tr 384).

In December 2010, defendant and the victim’s mother ended their relationship. (Tr 443). In January 2011, the victim moved back to Umatilla County, and in April 2011, the victim told an ex-boyfriend about the abuse, which ultimately led to the abuse being reported to the police, and the charges in Clatsop County. (Tr 238, 244-47, 380-81).

At trial, defendant asserted that the victim fabricated the allegations. Defendant’s theory of the case was that the victim was angry at him, because he had ended the relationship with her mother, because the victim had a close relationship with defendant and wanted to be adopted by him, and because, when defendant’s relationship with the victim’s mother ended, the victim and her mother’s relationship deteriorated and the victim was forced to live with a physically abusive grandparent in Umatilla County. (*See* Tr 231-36, containing defendant’s opening statement; Tr 1120-1122, 1140-43, containing defendant’s closing argument). The defense painted the victim as an untruthful, troubled child, and it stressed that she had multiple opportunities dating back to 2002 to report the claimed abuse but did not until April 2011, and that there was no physical evidence to corroborate the abuse or other corroboration. (*See* Tr 231-36, containing defendant’s opening statement; Tr 1122-30, 1133-34, 1142-43, containing defendant’s closing argument).

B. The trial court admitted “other acts” evidence involving the victim and involving the daughter of defendant’s prior girlfriend.

Before trial, the state sought a ruling on the admissibility of other-acts evidence that defendant engaged in similar acts of sexual abuse with —the daughter of defendant’s previous girlfriend—to prove defendant’s motive, intent, and plan to sexually abuse the victim. (ER-4 to ER-14, Motion).

At a pretrial hearing, the state presented testimony from the victim and The Court of Appeals summarized the victim’s testimony as follows:

According to [the victim], who was 16 years old at the time of the hearing, defendant had been in a relationship with her mother and had moved in with the family when [the victim] was approximately five years old. Defendant’s relationship with [the victim’s] mother lasted for more than nine years, and he was “like a dad” to the [the victim]. Defendant and [the victim’s] mother also had two children together. Defendant began sexually abusing [the victim] when she was about seven years old, when the family lived in Umatilla County. [The victim] testified that defendant began by touching her body, and then escalated his abuse to putting his fingers into her vagina and making her touch his penis. When [the victim] was in seventh or eighth grade, the family moved to Clatsop County. After the move, defendant continued to abuse [the victim]; she testified that defendant began having sexual intercourse with her soon after the move. In addition, [the victim] testified that defendant compared her with her mother, telling her that she had a better body and a better “vagina and boobs” than her mother. [The victim] explained that defendant instructed her not to tell other people about his conduct and, according to [the victim], defendant threatened to hurt her if she told.

State v. Baughman, 276 Or App 754, 758, 369 P3d 423 (2016). And the Court of Appeals summarized A’s testimony about the abuse—which occurred in Umatilla County—as follows:

who was 21 years old at the time of the hearing, testified that defendant was in a relationship with her mother for approximately nine years, and that he moved into their family home when was about two years old. Defendant and mother had a child together who was born when was three years old. Defendant began sexually abusing when she was about 10 years old and in the fifth grade. According to defendant would insert his fingers into her vagina, kiss her, put his mouth on her vagina, and touch her breasts; he also showed her pornographic videos, made her touch his penis and, on one occasion, had intercourse with her. Defendant also compared looks to her mother's, telling her that her "boobs were bigger than [her] mom's." Defendant and mother eventually ended their relationship, and A testified that defendant last abused her when she was 13 or 14 years old.

Id. at 758-59.

The trial court issued an opinion letter and order, ruling that the other-acts evidence involving was admissible. (ER-15, Order; ER-16 to ER-22, Opinion Letter). The court admitted the evidence to prove intent under the analysis set forth in *State v. Johns*, 301 Or 535, 725 P2d 312 (1986), and also admitted the evidence to bolster the victim's credibility and to prove defendant's identity. (ER-16 to ER-21, Opinion Letter). The court concluded that the evidence was admissible under ordinary OEC 403 balancing, stressing the need for the evidence ("[i]n sex cases, there is often no physical evidence or witnesses") and the strength of the evidence ("direct testimony of [the prior victim" offered for proving identity and intent). (ER-20, Opinion Letter). The court explained that the evidence was being offered for "non-propensity

purposes” and could be “presented without undue confusion, distraction or unreasonable delay.” (ER-20 to ER-21, Opinion Letter).

The state subsequently sought a ruling on the admissibility of evidence of defendant’s sexual abuse of the victim in Umatilla County and of the threats that he made to her there “not to tell anyone about his sexual molestation of [her].” (ER-24, State’s Second Motion). In its written motion, the state argued that that testimony would “allow the jury to see a clear, cohesive picture of how defendant perpetuated the abuse for which he has been indicted in Clatsop County.” (*Id.*).

At the hearing on the motion, the prosecutor expanded on that rationale. She emphasized that the defense had been planning on “questioning [the victim] about why she didn’t earlier disclose sex abuse when it was occurring in Umatilla [County]” despite an opportunity to do so. (Tr 181). Defense counsel stated that she would refrain from that questioning if the other-acts evidence was not admitted. (*Id.*). The prosecutor then explained:

I don’t think it’ll make sense to a jury that they moved to Clatsop County to Hammond, [and] all of a sudden [defendant] starts actually having sexual intercourse [with the victim]. It didn’t start with sexual intercourse. It started with him exposing himself, having [the victim] touch him, and it built up.

And I don’t plan to spend a lot of time on those areas, and I don’t want to confuse the jury into thinking that those are things they can consider. But I think it would be very confusing to a jury and hard for them to understand how all of a sudden when she’s 11 he started having sex with her. * * *

(Tr 181-82).

The trial court explained that it had assumed that that evidence would be presented because it was essential context, and the court deemed it admissible during the following exchange:

[Trial court]: * * * I just assumed that evidence would be coming in as a way to explain to the jury the path leading up to the crimes charged in Clatsop County. So I'd be inclined to allow it.

[Defense counsel]: I mean, I'd just have a standing objection to that testimony, especially without going through the type of hearing required for the admissibility of prior bad acts.

[Trial court]: Well, I think it's relevant, and it falls within the same – I think the same rationale I set forth in my memo.

(Tr 182).

At trial, the state presented the other-acts evidence involving the victim and A. Before testified, the trial court gave the following limiting instruction:

You have heard or you may be hearing evidence from and about []. You may use that evidence for what you deem it is worth on the issue of [defendant]'s intent. You may not consider such evidence for the purpose of concluding that because [defendant] may have sexually assaulted [] he is guilty of sexually assaulting [the victim].

Evidence 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Tr 689).

During a break in testimony, defendant moved to exclude the other-acts evidence in light of this court's decision in *State v. Leistiko*, 352 Or 172, 282 P3d 857 (2012), which was decided that day, arguing that the evidence was inadmissible, because he denied that the act had occurred at all. (Tr 710-12). The trial court denied the motion, stressing its earlier *Johns* analysis involving the other-acts evidence involving (Tr 713). Defense counsel sought clarification about whether the trial court also was ruling with regard to the other-acts evidence involving the victim, and the trial court stated that that evidence was admissible, and the other-acts evidence involving was admissible. (Tr 713-14).

At the close of the evidence, the trial court repeated the limiting instruction that it had given for the other-acts evidence involving (Tr 1152). The court did not give a limiting instruction for the other-acts evidence involving the victim.

The jury acquitted defendant on four of the twelve charges (the rape charges and one of the sodomy charges) and found him guilty of the eight remaining charges (the unlawful-sexual-penetration and sexual-abuse charges and the remaining sodomy charges). (ER-26 to ER-28, Verdict). At

sentencing, the trial court imposed an aggregate prison sentence of 450 months. (TCF, Judgment).

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 *Williams* decision—which was after defendant filed his opening brief—defendant filed a supplemental brief asserting that, under *Williams*, the trial court was required to conduct ordinary OEC 403 balancing and failed to properly do so.

The state responded that due-process balancing is narrower than ordinary balancing, and that the admission of the evidence did not violate due process. The state also argued that the trial court properly conducted ordinary OEC 403 balancing.

The Court of Appeals reversed defendant’s convictions. *Baughman*, 276 Or App at 767-72. The court rejected the state’s argument that due-process balancing under OEC 404(4)(a) is narrower than ordinary balancing. The court previously had interpreted *Williams* to mandate ordinary, discretionary balancing under OEC 404(4)(a), and the court adhered to that view. *Id.*¹ 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

Footnote continued...

court held that the trial court’s balancing determination was analytically flawed. The Court of Appeals concluded that the other-acts evidence was admissible to prove defendant’s intent under a nonpropensity doctrine-of-chances theory under the *State v. Johns* analysis; but the court also concluded that the identity and bolstering-the-credibility-of-the-victim theories rested on character inferences and thus amounted to the use of the evidence as propensity. *Id.* at 767-71. Because the trial court failed to recognize that some of the theories were based on propensity, that court “did not correctly consider the quantum of probative value of the evidence” under OEC 403, and the court’s balancing determination was defective and erroneous. *Id.* at 772.

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 balancing establishes that the evidence was admissible. For a preserved claim,

(...continued)

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.

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. *Baughman*, 276 Or App at 772.

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.

SUMMARY OF ARGUMENT

The Court of Appeals should have limited its review under OEC 404(4)(a) to whether the admission of the other-acts evidence violated due process, rather than reviewing whether the trial court properly conducted 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 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 admission of the other-acts evidence of defendant’s sexual abuse of the victim and threats to her in Umatilla County did not violate due process. Defendant began sexually abusing the victim in Umatilla County and those crimes continued and escalated when they moved to Clatsop County. The Umatilla County evidence was relevant and admissible as essential context for defendant’s Clatsop County crimes. The evidence had a tendency to prove the

relationship between defendant and the victim, to explain the victim's behavior (including her delayed reporting), and to prove defendant's sexual predisposition for the victim. That contextual evidence has always been admissible in child-sexual-abuse cases in this state and remains so under the broader rule of admission authorized under OEC 404(4). The evidence was not propensity evidence but, regardless, its admission did not render defendant's trial fundamentally unfair.

The admission of the evidence of defendant's sexual abuse of did not violate due process either. That evidence was relevant and admissible as propensity evidence to bolster the victim's credibility and thus to prove that defendant committed the charged crimes. The evidence was highly probative given its similarity to the abuse alleged by the victim, given the frequency of the other acts, and given the state's need for the evidence. That probative value was not so outweighed by the evidence's unfair prejudicial effect that its admission rendered 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 balancing error is not, itself, a constitutional violation and because, in all events, a prior balancing 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)² and governs the admission of evidence of a criminal defendant’s “other crimes, wrongs or acts.”

² 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

Footnote continued...

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.

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). The state had to prove that defendant committed the charged sex crimes involving the victim in Clatsop County. The evidence of defendant’s acts of sexual abuse in Umatilla County involving the victim and involving —and his threats to the victim if she reported the abuse—had at least a tendency to prove that defendant engaged in the charged conduct and did so with the requisite intent. 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?

(...continued)

purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

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 17.³

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

³ 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 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.

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*, 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 in this case performed ordinary OEC 403 balancing, but because OEC 404(4)(a) limits the application of OEC 403 to the question whether the admission of the evidence violated due process, this court should limit its review accordingly. And even if the trial court had not conducted any balancing, this court could make the due-process 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 conduct balancing, or a balancing error, 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 other-acts evidence involving the victim did not render the trial fundamentally unfair.

Applying that understanding, the trial court correctly admitted the other-acts evidence under OEC 404(4), because its admission did not violate due process. The state begins with the evidence that, before moving to Clatsop

County, defendant sexually abused the victim in Umatilla County and threatened to harm her if she reported the abuse. The trial court admitted that evidence because it was context for the charged sex crimes involving the victim in Clatsop County. (Tr 182).⁴ The probative value of the evidence was not so outweighed by any prejudicial effect as to render the trial fundamentally unfair.

The evidence of defendant's other acts of sexual abuse of the victim and of his threats to her was highly-relevant context that bolstered the victim's credibility and was circumstantial evidence of defendant's guilt. It was admissible for the nonpropensity purpose of providing context for the charged

⁴ The Court of Appeals concluded that the trial court admitted the other-acts evidence involving the victim and the other-acts evidence involving for identical reasons. *Baughman*, 276 Or App at 767 n 9. The state disagrees. The prosecutor offered, and the court admitted, the other-acts evidence involving the victim, because it was relevant context, and the court did not include that evidence in the limiting instruction for the evidence involving The court's "same rationale" comment likely was referring to the balancing determination but in no event does the comment establish that the court immediately changed its mind and no longer admitted the evidence as context.

But even if the trial court admitted the evidence for the "identical" reasons, it is appropriate to resort to the "essential context" reasoning to determine whether a due-process violation occurred. *Cf. State v. Turnidge*, 359 Or 364, 434-42 & n 43, 374 P3d 853 (2016) (relying on non-*Johns* analysis to affirm a trial court's *Johns*-based OEC 404(3) ruling); *Berg*, 223 Or App at 398 (similar). This is not an issue of ordinary, discretionary balancing under OEC 403. Instead, the issue is whether the admission of the evidence, *as a matter of law*, rendered the trial fundamentally unfair. Regardless of any lack of clarity in the trial court's ruling or of the court's actual precise reasoning, the key point is that other-acts evidence involving the same victim is admissible as essential context to bolster the victim's credibility and to prove conduct, intent, and identity. The admission of this evidence did not violate due process.

crimes by demonstrating the nature of the relationship between defendant and the victim and to explain the victim's behavior, including her delayed reporting. *See State v. Kristich*, 226 Or 240, 241-47, 359 P2d 1106 (1961) (evidence admissible to prove nature of the relationship and to explain the victim's behavior); *State v. Zybach*, 308 Or 96, 100-01, 775 P2d 318 (1989) (delayed reporting); *State v. Panduro*, 224 Or App 180, 185-92, 197 P3d 1111 (2008) (delayed reporting and context); *State v. Hall*, 108 Or App 12, 17, 814 P2d 172, *rev den*, 312 Or 151 (1991) (“[a] victim's relationship to the accused is relevant to explain her conduct”).

This court has correctly characterized such evidence as “part and parcel of the crime[s] actually charged.” *Kristich*, 226 Or at 245. In child-sexual-abuse cases, it often would be “an unnatural and * * * unbelievable story” to describe “only” an isolated incident of sexual abuse “without [the requisite] background” to explain the victim's behavior. *Id.* Rather, the prosecution is entitled to prove “the true relation[ship]” between the parties to “complete the story of the crime on trial by proving its immediate context” and to prove “the existence of a larger continuing plan [or] scheme” both of which are pertinent for other-acts evidence involving a defendant's ongoing abuse of the same child victim. *Id.* at 246 (internal quotation marks omitted).

Relatedly, the evidence of defendant's sexual abuse of the victim in Umatilla County was important context to prove that defendant had a sexual

predisposition for this particular victim. In *State v. McKay*, 309 Or 305, 307, 787 P2d 479 (1990), the defendant challenged the admission of evidence of sexual contacts between the defendant and the victim that began when the victim was 10 years old and ended when she was 13 years old to prove a sexual-abuse offense that occurred when she was 15 years old. After quoting the rule against propensity in OEC 404(3) and noting its open-ended nature, this court explained:

Simply stated, the proffered evidence here was admissible to demonstrate the sexual predisposition this defendant had for this particular victim, that is, to show the sexual inclination of defendant towards the victim, not that he had a character trait or propensity to engage in sexual misconduct generally.

In *State v. Pace*, 187 Or App 507, 507, 212 P2d 755 (1949), a prosecution for statutory rape, this court held that evidence of other similar criminal acts with the same child is admissible to show the specific sexual predisposition of the defendant towards that child. *State v. Kristich*, 226 Or 240, 242, 359 P2d 1106 (1961), stated that “[t]his court has repeatedly held that in crimes involving illicit sexual acts evidence of other similar acts between the same persons is admissible,” citing *State v. Howard*, 214 Or 611, 331 P2d 1116 (1958); *State v. Risen*, 192 Or 557, 235 P2d 764 (1951); and *State v. Ewing*, 174 Or 487, 149 P2d 765 (1944). *See also* Imwinkelried, *Uncharged Misconduct Evidence* §4.14 (1984). *The adoption of OEC 404(3) did not change the effect of the above cases.*

309 Or at 308 (emphasis added).

The *McKay* court correctly recognized that other-acts evidence that demonstrates that a defendant has a sexual predisposition for the victim is admissible for a nonpropensity purpose under OEC 404(3). The evidence is a

form of particularized motive evidence and, as such, was admissible in this case to prove defendant's identity, conduct, and intent. *See State v. Hampton*, 317 Or 251, 257 n 12, 855 P2d 621 (1993) (evidence of motive is admissible to infer conduct, mental state, and identity); *State v. Pace*, 187 Or 498, 507, 212 P2d 755 (1949) (evidence of the defendant's sexual predisposition for the particular victim is admissible to prove "the lustful disposition of the defendant and the probability of his having committed the particular act charged in the indictment").

Against that backdrop, the admission of the other-acts evidence involving the victim to provide essential context for the charged crimes did not meaningfully implicate—much less violate—due process. 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 comports 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 evidence of defendant’s sexual abuse of the victim in Umatilla County and of his threats to harm her if she reported the abuse was admissible for the nonpropensity purpose of providing essential context for the Clatsop County charges (by showing the nature of their relationship, by explaining the victim’s behavior, including her delayed reporting, and by proving defendant’s sexual predisposition for the victim). Beyond that, the evidence was admissible for the nonpropensity purpose of

proving defendant's intent under a doctrine-of-chances theory. *See Baughman*, 276 Or App at 769-71 (so holding). It follows that the trial court did not violate due process by admitting the other-acts evidence involving the victim. The admission of that evidence for nonpropensity purposes did not render defendant's trial fundamentally unfair. *See Berg*, 223 Or App at 398-99 (the admission of other-acts evidence involving the same victim to explain delayed reporting and to prove the defendant's sexual predisposition for the victim did not violate due process).

Furthermore—and regardless of whether the state's theories crossed the line into propensity-based theories—no due process violation occurred. *Williams* establishes that propensity evidence is sometimes admissible and longstanding Oregon caselaw establishes that this type of contextual evidence is valid. *See State v. O'Donnell*, 36 Or 222, 226, 61 P 892 (1900) (when a defendant is “charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties is admissible to prove an inclination to commit the act for which the accused is put upon his trial”); *Kristich*, 226 Or at 242 (“[t]his court has repeatedly held that in crimes involving illicit sexual acts[,] evidence of similar acts between the same persons is admissible”).

The dominant fact is that the other-acts evidence of defendant's sexual abuse of the victim was extraordinarily probative, because it was particularized

evidence of defendant's motive and provided necessary context to understand the dynamics of the relationship between defendant and the victim, and to understand the victim's behavior. The evidence that defendant threatened the victim if she disclosed the abuse obviously was highly probative context as well. The state's need to present relevant context evidence in child-sexual-abuse cases is high because, as here, these cases often reduce to credibility contests between a defendant and a child victim. Without this evidence, the jury would have had been presented with a highly misleading picture of what transpired. Defendant's abuse of the victim began in Umatilla County and continued into Clatsop County where the abuse escalated. The state was entitled to present the first part of that "story," which was the abuse and threats that occurred in Umatilla County.

Weighed against its compelling probative value, nothing about the nature of the challenged evidence rendered its admission fundamentally unfair. This type of evidence was admissible long before the adoption of the Oregon Evidence Code, it was admissible under OEC 404(3), and it remains admissible under the broader rule of admission authorized under OEC 404(4). Indeed, even those jurisdictions that take the narrowest of views of the admissibility of other-acts evidence involving *different* victims recognize that evidence involving the *same* victim is extremely probative as essential context and admissible. *See State v. Cox*, 781 NW 2d 757, 761-69 (Iowa 2010) (applying

state due process clause to invalidate Iowa propensity evidentiary rule as applied to different-victim evidence but emphasizing that same-victim evidence remains admissible, because it is so probative to prove the nature of relationship and the defendant's feelings towards the victim, and because the evidence is necessary for a full presentation of the case). The admission of the other-acts evidence involving the victim did not violate due process.

3. The admission of the other-acts evidence involving did not render the trial fundamentally unfair.

The trial court also correctly admitted the other-acts evidence involving under OEC 404(4). The court admitted that evidence to bolster the credibility of the victim's allegations of sexual abuse, which amounted to admitting the evidence to prove defendant's conduct, intent, and identity. The evidence was admitted as propensity evidence, because the relevancy of the evidence for proving defendant's conduct and identity hinged on inferences about his character. *See State v. Pitt*, 352 Or 566, 577, 293 P3d 1002 (2012) (use of evidence to corroborate the victim's allegations is propensity evidence if the relevancy hinges on an inference about the defendant's character).⁵

⁵ The other-acts evidence involving was relevant to prove defendant's intent under a nonpropensity "doctrine of chances" theory. (ER-20, Opinion Letter); *Baughman*, 276 Or App at 769-71 (so holding). The admission of the evidence for that purpose did not violate due process. As discussed above, due-process principles are not violated by the use of other-acts evidence for a nonpropensity purpose to prove an element of a crime.

Accordingly, the state focuses its analysis on whether the admission of the other-acts evidence involving [redacted] as propensity to bolster the victim's credibility—and thus to corroborate her testimony that defendant sexually abused her—violated due process. The answer is that it did not: the probative value of the evidence to bolster the victim's credibility was not so outweighed by its prejudicial effect as to render defendant's trial fundamentally unfair.

At the outset, it bears emphasis that, although it was propensity evidence, the evidence that defendant sexually abused A was relevant to bolster the credibility of the victim's allegations that defendant sexually abused her. The “admission of propensity evidence * * * to lend credibility to a sex victim's allegations * * * [is] indisputably relevant to the crimes charged.” *Mejia v. Garcia*, 534 F3d 1036, 1046 (9th Cir 2008). “[E]vidence of a defendant's other sex offenses constitutes relevant circumstantial evidence that he committed the charged sex offenses.” *People v. Falsetta*, 21 Cal 4th 903, 920, 89 Cal Rptr 2d 847, 986 P2d 182 (1999).

More to the point, the evidence of defendant's sexual abuse of [redacted] was highly probative to bolster the credibility of the victim's allegations that defendant sexually abused her. Defendant's sexual abuse of [redacted] was similar to the sexual abuse alleged by the victim. *See United States v. LeMay*, 260 F3d 1018, 1028 (9th Cir 2001) (identifying “the similarity of the prior acts to the

acts charged” as a consideration).⁶ and the victim were in the same class—both were similar-aged daughters of defendant’s girlfriends when the abuse occurred—and the physical elements of the acts were similar—both involved repeated digital penetration, oral sodomy, and other sexual contact under similar circumstances. In addition, defendant made explicit comments to both and the victim about how their sexual body parts were superior to their mothers’ sexual body parts.

The probative value of the evidence that defendant sexually abused was bolstered by the number of times that it occurred. *Id.* (identifying “the frequency of the prior acts” as a consideration). In her testimony, described a large number of incidents and acts of sexual abuse that occurred over a period of time. (Tr 8-15, 18-19, 23). For example, testified that defendant put his

⁶ *Williams* noted that cases like *LeMay* may be helpful in determining whether the unfair prejudice outweighs the probative value of the evidence. 357 Or at 20. *LeMay*, however, involved application of Federal Rule of Evidence (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. Therefore, the state loosely draws on the *LeMay* ordinary-balancing factors as an aid in its due process analysis. *But see also* Basyle J Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 Am J Crim L 327 (2012) (surveying approaches, criticizing over emphasis on similarity, and proposing test based on characteristics and behavioral patterns identified by research); *United States v. Rogers*, 587 F3d 816, 823 (7th Cir 2009) (deeming “lists * * * unhelpful” and rejecting *LeMay*’s approach).

mouth on her vagina “[a] lot,” and she described “[a]t least 10 or 12” occasions in which defendant would put his finger in her vagina under particular circumstances. (Tr 10, 14-15).

In addition, remoteness considerations did not undermine the probative value of the evidence. *See LeMay*, 260 F3d at 1029 (“[t]he lapse of twelve years does not render the decision to admit relevant evidence of similar prior acts an abuse of discretion”). Defendant’s sexual abuse of ended around 2003 or 2004, (Tr 18): defendant began sexually abusing the victim around that time in Umatilla County (Tr 362, 369), and he was charged with sexually abusing her in Clatsop County beginning in 2007. (ER-1, Indictment).

The probative value of the evidence was enhanced by the state’s need for the evidence. *See LeMay*, 260 F3d at 1029 (identifying whether other-acts evidence was “necessary [for government] to prove the case” as a consideration). The trial court correctly found that the state’s need for the evidence weighed in favor of admission. (ER-20, Opinion Letter). This was a child-sexual-abuse case that turned on the credibility of the victim, because there was no physical evidence or witnesses to the crime, and because the defense vigorously attacked the victim’s credibility. The state’s need for the evidence was substantial. *See LeMay*, 260 F3d at 1028-29 (evidence “necessary” because it “was relevant to bolster the credibility of the victims after [the defendant] suggested they could be fabricating the accusations” and to

“counter[] [the defendant’s] claim that there was no evidence corroborating the testimony of [the victims of the charged conduct]”).

Weighed against its probative value, nothing about the nature of the challenged evidence rendered its admission fundamentally unfair. The evidence may have been inflammatory but that is not dispositive, given the strong probative value of the evidence, and the state’s need for the evidence. *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”).

In *LeMay*, the Ninth Circuit affirmed a federal trial court’s ruling applying FRE 414⁷ in a child-molestation case and admitting other-acts evidence that, eight years before the charged crimes, the defendant sexually abused two other victims. 260 F3d at 1022-23, 1031. The trial court admitted the evidence to bolster the credibility of the victims of the charged offenses, which the Ninth Circuit recognized amounted to admitting the evidence to prove propensity. *Id.* at 1023, 1028. But the Ninth Circuit held that the trial

⁷ FRE 414 provides, in part:

In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

FRE 413 sets forth the same rule for sexual-assault cases.

court did not abuse its discretion by admitting the evidence, because it was highly probative on the issue of the victims' credibility given the similarity of the acts, and because it was important to the government's case given the absence of corroborating evidence. *Id.* at 1028-30.

The evidence at issue here was highly probative and not unfairly prejudicial for similar reasons. The *LeMay* court's ordinary-balancing Rule 403 analysis confirms that the admission of the other-acts evidence involving to bolster the victim's credibility was not so unfairly prejudicial as to violate due process. *See Williams*, 357 Or at 19 n 17 (evidence that is admissible under Rule 403 would necessarily be admissible under due-process balancing test).

To summarize, the trial court correctly admitted the other-acts evidence involving the victim and the other-acts evidence involving because the admission of that evidence did not render the trial fundamentally unfair. The admission of the evidence 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.⁸

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, 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.*

⁸ 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.

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,⁹ 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).

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

⁹ 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.

failure to properly 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.¹⁰

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.

¹⁰ 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 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,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Doug M. Petrina

DOUG M. PETRINA #963943
Senior Assistant Attorney General
doug.petrina@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

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 Eric R. Johansen, attorneys for respondent on review, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the 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 11,812 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Doug M. Petrina

DOUG M. PETRINA #963943
Senior Assistant Attorney General
doug.petrina@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon