

COMMENTS

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OEC 404(4): YOUR PAST WILL COME BACK TO HAUNT YOU

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I. INTRODUCTION

In Oregon, prior bad acts and propensity evidence is governed by Oregon Revised Statutes section 40.170 [hereinafter OEC 404].¹ Historically, the language of OEC 404 paralleled the language used in the Federal Evidence Code.² The similarities in the language of those evidentiary codes lent themselves to similar application of the statutes in practice. But in 1997, the Oregon Legislature added an additional subsection to OEC 404.³ That addition, OEC 404(4), hinges the admissibility of prior bad act evidence against criminal defendants

1. OR. REV. STAT. § 40.170 (2015).

2. Compare OR. REV. STAT. ANN. § 40.179 (1981), and FED. R. EVID. 404.

3. OEC 404(4).

solely on constitutional violations.⁴ As discussed below, Oregon courts avoided discussing in depth the application of OEC 404(4) for eighteen years until the recent decision in *State v. Williams*. The *Williams* opinion unraveled decades of developed safeguards limiting the admissibility of prejudicial bad acts evidence against criminal defendants. Thus, after the *Williams* opinion, the addition of OEC 404(4) caused a divergence from the federal court's application of admissibility of prior bad acts evidence by lowering the threshold for the admissibility of all prior bad act evidence in all criminal cases, instead of limiting the application to prior sexual misconduct in sexual assault cases like Federal Rules of Evidence (FRE) 413 and 414.

The following sections will first provide evidence that Oregon has historically based its evidentiary code on federal statutes and applications. Secondly, this paper will examine the history of Oregon's creation of OEC 404 and developed safeguards against frivolous admission of prior bad act evidence and the unraveling of those safeguards by *State v. Williams*. Third, this paper will discuss the aftermath of the *Williams* opinion, the questions that have been left unanswered about the application of OEC 404, and possible defendant responses to the paradigm shift. This paper will conclude by assessing whether the available safeguards to combat OEC 404(4) are adequate and examining whether Oregon overstepped its bound by enacting OEC 404(4). In sum, Oregon has deviated from its historical application of the admissibility of prior bad act evidence. This shift has increased the probability of wrongful convictions in Oregon, and OEC 404 should be repealed.

II. BACKGROUND, HISTORY, AND APPLICATION OF 404 PRIOR BAD ACTS EVIDENCE

A. *Application of Federal Rules of Evidence*

Although OEC 404(4) is unique to Oregon, Oregon's rule regarding propensity evidence otherwise mirrors the FRE on that subject. It is useful to begin with a brief discussion of how federal courts have interpreted the FRE regarding propensity evidence.

The Federal Rules of Evidence 404 governs the admission of prior bad act evidence in criminal trials at the federal level.

4. *Id.*

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Specifically:

Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character . . . [but t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.⁵

In construing that provision in *United States v. Wright*, the United States Supreme Court offered an example of the application of FRE 404(b). In *Wright*, the Court held that "evidence may not be used to prove a person's bad character or his propensity to commit crimes in conformity with that character, but may be used 'for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident.'"⁶

In *Wright*, two plain-clothed officers purchased four bags of crack cocaine from a man on the street.⁷ Police identified the defendant through photographs as the man who made the sale.⁸ Rather than make an arrest, the police waited six months and placed wiretaps on the defendant's phone.⁹ During a conversation with a woman, the defendant "bragged" about dealing drugs.¹⁰ During the phone conversation the defendant stated:

It's not as easy as everybody think it is, cause it it's the money is good, but it's a big hassle behind it because you got to set up, you got to get the stuff, you got to you got to cook it, you got to be it, and then you got to find somebody to sell it, and then you gotta keep up with what they come come short, and what they don't come short, and you gotta worry about them getting caught and this and that and the other, you gotta worry about if they gonna tell if they get

5. FED. R. EVID. 404(b).

6. *United States v. Wright*, 901 F.2d 68, 69 (1990).

7. *Id.* at 68.

8. *Id.*

9. *Id.*

10. *Id.*

caught.¹¹

That conversation was presented to the jury after the judge determined that the admission of these prior bad acts tended to show “intent.”¹²

The United States Supreme Court disagreed. The Court concluded that the evidence merely showed that the defendant had a higher propensity than the average person to be the suspect that sold crack to the undercover officers. Therefore, because the evidence only showed a general propensity, the Court determined the evidence was impermissible.¹³ To establish admissibility for purposes of intent the conversation would have to show “for example . . . that Wright was at that time selling drugs on streets near where the transactions occurred, or if he had said something that only a party to those transactions would know.”¹⁴

The admissibility of prior bad acts under FRE 404(b) is subject to balancing under FRE 403.¹⁵ The balancing test states that “the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.”¹⁶ “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”¹⁷ Put otherwise, “[a]lthough . . . ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.”¹⁸

To introduce prior bad act evidence under FRE 404(b), the state does not have to prove beyond a reasonable doubt that the act actually occurred.¹⁹ As stated in *Dowling v. United States*, “[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can

11. *Id.* at 69.

12. *Id.* at 68–69.

13. *Id.* at 69.

14. *Id.*

15. *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

16. FED. R. EVID. 403.

17. *Old Chief*, 519 U.S. at 180 (citing J. WEINSTEIN, M. BERGER, & J. McLAUGHLIN, WEINSTEIN’S EVIDENCE (1996)).

18. *Id.* at 181 (citing *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)).

19. *Dowling v. United States*, 493 U.S. 342, 348 (1990).

reasonably conclude that the act occurred and that the defendant was the actor.”²⁰ And notwithstanding OEC 404(4), Oregon has followed a very similar approach to this issue.

B. Application of the Oregon Evidentiary Code

The application of Oregon’s statute governing prior bad acts closely reflects that of the FRE in both language and application. The language of OEC 404(3) states:

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.²¹

Modern day interpretations of OEC 404(3) are deeply rooted in the opinion of *State v. Johns*. In *Johns*, the Oregon Supreme Court set out a multifactor test for the application of OEC 404.²² The basic holding of *Johns* stated that “an unremarkable single instance of prior conduct probably will not qualify [for admissibility], but a complex act requiring several steps, particularly premeditated, may well qualify.”²³

Johns presented a situation in which the defendant was charged with murdering his wife by shooting her in the head.²⁴ The State sought to admit evidence, through the testimony of the defendant’s ex-wife, that the defendant had threatened and assaulted a previous spouse with a gun in order to establish the defendant’s intent in the charged matter.²⁵ The trial court allowed the evidence of the defendant’s prior act to establish intent, but the court of appeals reversed, stating that the evidence was improperly admitted for purposes of OEC 404(3).²⁶ The Oregon Supreme Court eventually

20. *Id.*

21. OR. REV. STAT. § 40.170(3) (2015).

22. *State v. Johns*, 725 P.2d 312 (Or. 1986).

23. *Id.* at 324.

24. *Id.* at 313.

25. *Id.* at 315.

26. *Id.* at 315–16.

reversed the court of appeals' ruling and agreed with the trial court after walking through the following analysis.²⁷

Johns pointed to Oregon legislative history, intended to “aid courts in interpreting OEC 404(3),” to explain that when dealing with prior bad acts evidence “evidence of other crimes, wrongs or acts is not admissible to prove character for the purpose of suggesting that conduct on a particular occasion was in conformity therewith . . . [h]owever, such evidence may be offered for purposes that do not fall within the prohibition.”²⁸ Furthermore, “[t]he list of purposes set forth in subsection (3) for which evidence of other crimes, wrongs or acts may be admitted is not meant to be exclusive.”²⁹ The *Johns* court concluded that the legislative note demonstrates that Oregon courts must use an inclusionary rule as opposed to an exclusionary rule when interpreting OEC 404 prior bad acts evidence.³⁰ This means that “[t]he admissibility of evidence of other crimes must not be based upon the relationship of the evidence to one of the listed categories, rather it must be based on its relevancy to a fact at issue in the trial [except for] proving a propensity to commit certain acts.”³¹ Further, courts “are not required to admit evidence” and should only do so after “determin[ing] whether the danger of undue prejudice outweighs the probative value of the evidence” under OEC 403.³² The *Johns* court concluded that “OEC 404(3) forbids ‘prior crime’ evidence when the evidence is offered solely to prove (1) the character of a person, and (2) that the person acted conformity therewith. Both elements are required.”³³ The court, in turn, defined “character” as “disposition or propensity to commit certain crimes” and determined that “OEC 404(3) unquestionably forbids the admission of evidence solely to show propensity or that the defendant is a bad person.”³⁴

However, as the court explained, “the trial judge must not jump immediately into the listed categories or exceptions before

27. *Id.* at 327.

28. *Id.* at 316.

29. *Id.*

30. *Id.* at 317.

31. *Id.* at 320–21.

32. *Id.* at 316.

33. *Id.* at 320; *see also* State v. Pinnell, 311 P.2d 110, 115 n.11 (Or. 1991), (“OEC 404(3) does not create exceptions to the rule excluding character evidence to prove guilt; rather, it provides an avenue for admitting evidence that proves guilt without any inference to character.”).

34. *Johns*, 725 P.2d at 320.

determining the basic relevancy of the proffered evidence” as required by OEC 403.³⁵ OEC 403 reads “[a]lthough 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.”³⁶ In order to address this, based on the facts of *Johns*, the court developed the following factors to consider:

- (1) Does the present charged act require proof of intent?
- (2) Did the prior act require intent?
- (3) Was the victim in the prior act the same victim or in the same class as the victim in the present case?
- (4) Was the type of prior act the same or similar to the acts involved in the charged crime?
- (5) Were the physical elements of the prior act and the present act similar?³⁷

“If these criteria are met” the court must then apply an analysis based on OEC 403.³⁸ When a judge is weighing the probative value of evidence versus the prejudicial effect of prior bad acts evidence they must consider “(1) the need for the evidence, (2) the certainty that the other crime was committed and that defendant was the actor, (3) the strength or weakness of the evidence, and (4) its inflammatory effect on the jury.”³⁹

Based on the facts of *Johns* and the criteria above, the court determined that the probative value of the evidence outweighed the prejudicial effect because: (1) the only witness to the crime was the deceased; (2) the defendant did not dispute that he was the actor in the previous crime; (3) intent was the key issue in the case; (4) the defendant did not seriously injure his ex-wife; and (5) the defendant was apologetic after the crime was committed.⁴⁰ Based on the foregoing analysis, the supreme court agreed with the trial court’s

35. *Id.*

36. OR. REV. STAT. § 40.165 (2015).

37. *Johns*, 725 P.2d at 324–25.

38. *Id.* at 325.

39. *Id.* at 325–26 (citing *State v. Collins*, 698 P.2d 969, 971–72 (Or. Ct. App. 1985)).

40. *Id.* at 326.

ruling and reversed and reinstated the defendant's conviction.⁴¹ A defendant can request the foregoing analysis to be conducted prior to the admission of prior bad act evidence under what has been called a "*Johns* hearing."⁴²

The Oregon Supreme Court addressed the issue of prior bad acts evidence again in *State v. Johnson*.⁴³ In *Johnson*, the body of a young woman was found lying on the beach, and eventually, strangulation was identified as the cause of death.⁴⁴ Upon further investigation, police discovered high levels of morphine in the victim's system along with evidence of sexual contact.⁴⁵ The State sought to admit evidence, through testimony of thirty-two witnesses, that the defendant had a history of drugging and sexually abusing young girls while they were unconscious.⁴⁶ Specifically, the witnesses would provide:

- (1) testimony [from] various young women that defendant gave them alcohol, morphine, or other drugs that caused them to black out or become ill, some of whom further stated that defendant had sexually abused them while they were incapacitated by the drugs defendant had administered;
- (2) testimony of witness Franklin that a female friend had told him that defendant had drugged and raped her; [and] (3) testimony of witness Robinson about two interactions with defendant.⁴⁷

The defendant filed a motion in limine "directed primarily at limiting or excluding testimony about defendant's prior crimes or bad acts."⁴⁸ The trial court denied the motion, and the defendant appealed, assigning error "arguing that the testimony should have been excluded."⁴⁹

In the supreme court's analysis, it noted that *Johns* applied an inclusionary approach to OEC 404, which "means that[] while the

41. *Id.* at 327.

42. *State v. Brown*, 355 P.3d 216, 218 (Or. Ct. App. 2015).

43. *State v. Johnson*, 131 P.3d 173 (Or. 2006).

44. *Id.* at 175.

45. *Id.* at 176.

46. *Id.* at 184–85.

47. *Id.* at 185.

48. *Id.*

49. *Id.* at 184.

rule sets out a list of possible ‘exceptions’ to the general prohibition on prior bad act evidence might logically and lawfully be applied.”⁵⁰ The State argued that the testimony of the young girls who claimed to have also been drugged and sexually molested by the defendant was essential to proving that the defendant raped the victim before committing murder.⁵¹ When viewing the testimony in this regard, the State had “strong direct evidence that defendant had had sexual intercourse with [the victim] shortly before she died but had no way of proving directly that that defendant’s sexual contact with [the victim] was nonconsensual.”⁵² Further, “when combined with the toxicology report showing a significant level of opiates in [the victim’s] system, the testimony at issue would be powerful circumstantial evidence that defendant’s sexual contact with [the victim] occurred after he had drugged her, and that he took advantage of her incapacitated state.”⁵³

When addressing the probative value of evidence, as required by OEC 403, the Oregon Supreme Court applies several different factors before it permits admission of evidence to prove identity based on modus operandi or to prove intent for purposes of OEC 404(3).⁵⁴ When evidence is offered to prove identity based on modus operandi, “the trial court must find a very high degree of similarity between the charged and uncharged crimes, as well as methodology that is highly distinctive.”⁵⁵ By contrast, when evidence is offered to prove intent, “a high degree of similarity is helpful but is not essential, and . . . a distinctive methodology is entirely irrelevant.”⁵⁶ Specifically, the court explained that the “uncharged crimes evidence involve a method of incapacitation,” which meets the purpose the State “s[ought] to draw from it—that sexual contact between [the victim] and the defendant occurred while [the victim] was incapacitated by morphine the defendant had administered.”⁵⁷ Moreover, although the uncharged crime does not have to “closely replicate the crime that is charged (as there is when prior crime evidence is used to establish

50. *Id.* at 185 (citing *State v. Johns*, 735 P.2d 312, 320 (Or. 1986)).

51. *Id.*

52. *Id.*

53. *Id.* at 186.

54. *Id.*

55. *Id.*

56. *Id.* (citing *State v. Johns*, 735 P.2d 312, 324–25 (Or. 1986)).

57. *Id.*

identity), any similarity in the circumstances increases the probative value of the prior crime evidence and enhances the argument for admissibility under OEC 404(3).⁵⁸ Furthermore, “timing, repetition, similarity of both the act and the surrounding circumstances all are important considerations.”⁵⁹

Applying those concepts to the testimony in question, the supreme court determined that the trial court properly deemed the evidence admissible.⁶⁰ Witnesses testified that defendant drugged them (with an opiate substance) causing them to black out and sexually abused them in some way while they were incapacitated.⁶¹ According to the court, the testimony established that the “defendant had developed a method for obtaining sexual access to women without their consent.”⁶² Because the incapacitating drug discussed in the witness testimony was the same drug found in the victim’s system, the court determined that “the jury would be able to infer that the victim, like others, had not consented to the sexual contact with defendant that other evidence all but conclusively established had occurred.”⁶³ It also allowed the jury to determine that the defendant had administered the morphine to the victim in order to gain sexual access.⁶⁴ That “inference is strengthened by the multiplicity of similar incidents (suggesting a pattern), for example, the fact that the incidents occurred within the year preceding [the victim’s] murder, and the fact that the victims of those uncharged crimes all were teenage girls who moved in the same circles as [the victim].”⁶⁵ Based on the foregoing reasons, the court determined that the evidence “passe[d] the muster of OEC 404(3).”⁶⁶

Recently, the Oregon Supreme Court revisited *Johns* and *Johnson* in *State v. Leistiko*.⁶⁷ In *Leistiko*, the State charged the defendant with, “among other things, three counts of first-degree rape” each relating to a different victim.⁶⁸ During the course of

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 186–87.

62. *Id.* at 187.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *State v. Leistiko*, 282 P.3d 857 (Or. 2012).

68. *Id.* at 858.

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investigation, the State discovered a fourth victim who accused the defendant of raping her, but the State did not charge defendant with that allegation in his indictment.⁶⁹ The State nonetheless sought to allow the fourth victim to testify about the events that occurred with defendant.⁷⁰ The State's justification for admitting this evidence was "[t]o prove that each of the three victims had not consented to defendant's sexual advances."⁷¹ The trial court determined "the fourth woman's testimony was admissible, and the jury convicted defendant of three counts of first degree rape."⁷² The court of appeals, basing its analysis on *Johnson*, upheld the admission of the fourth woman's testimony.⁷³ The Oregon Supreme Court overruled the court of appeals' decision.⁷⁴

The first victim testified that the defendant responded to her "erotic services" advertisement on Craigslist and she proceeded to defendant's house to dance, for money, in a sexually explicit manner.⁷⁵ During her dance, defendant began to touch her in ways that made her uncomfortable, and upon her objection to these advances, defendant became violent.⁷⁶ The victim testified that the defendant tackled her to the floor, choked her until she began to "blackout" and only calmed down when she told defendant they could have intercourse as long as he used protection.⁷⁷ After intercourse she quickly left the residence.⁷⁸

The second victim testified that, while working as a prostitute at age fifteen, she proceeded to the defendant's residence after he responded to an "erotic services" post on Craigslist asking for a "two girl special."⁷⁹ The victim asked the defendant to wear protection and they proceeded to have intercourse.⁸⁰ The defendant then began to discuss having intercourse without protection, and upon her objection,

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 858–59.

74. *Id.* at 859.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

the defendant held the victim down and forced her to have unprotected intercourse.⁸¹

The third victim testified that the defendant responded to her “women seeking men” ad on Craigslist and scheduled a date to spend time together at defendant’s house.⁸² During this encounter the defendant unsuccessfully tried to kiss the victim.⁸³ Eventually, during a back massage, the defendant held the victim down and forcefully had intercourse with her.⁸⁴ The defendant then cooked cheeseburgers, and after dinner, the victim left the defendant’s residence.⁸⁵

The fourth victim was permitted to testify about conduct for which the defendant was never indicted.⁸⁶ The fourth victim testified that she works as an unlicensed masseuse advertising her services on Craigslist.⁸⁷ The defendant answered the fourth victim’s Craigslist ad and scheduled an appointment to come to her house.⁸⁸ During the massage, the defendant unsuccessfully attempted to pay for sexual services.⁸⁹ The defendant eventually became aggressive, pushed the fourth victim on the bed and forced her to have sexual intercourse.⁹⁰

The defendant conceded to engaging in sexual intercourse with the three women, but alleged that all sexual acts were consensual.⁹¹ The trial court allowed the fourth victim to testify in order “to prove that the [other] three victims had not consented to defendant’s advances.”⁹² The court of appeals upheld the trial court’s ruling relying on *Johnson* stating “evidence of a defendant’s uncharged misconduct can be probative regarding the issue of whether an alleged victim consented to sexual contact with the defendant.”⁹³ The court of appeals determined “the evidence in this case permitted the jury to find that defendant had established a plan for obtaining sexual access to women without their consent and that that evidence was relevant to

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 860.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Leistiko v. State*, 246 P.3d 82, 86 (Or. Ct. App. 2011), *aff’d in part, rev’d in part*, *State v. Leistiko*, 282 P.3d 857 (Or. 2012)).

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rebut defendant's claim that the three victims had consented to his sexual advances."⁹⁴ The State is prohibited from offering "the fourth woman's testimony to prove that defendant has a propensity to forcibly compel women to engage in sexual intercourse and that he acted in conformity with that propensity with the three victims . . . [but] OEC 404(3) does not prohibit the state from offering the fourth woman's testimony if it is relevant for some other legitimate purpose."⁹⁵

The "state argue[d] that the fourth woman's testimony was admissible to prove: (1) each victim's state of mind; (2) defendant's state of mind; or (3) a plan that defendant carried out with each of the three victims."⁹⁶ The State suggested that "the fourth woman's decision not to engage in sexual relations with defendant was relevant to prove that each of the three victims made the same decision."⁹⁷ However that "[t]he fact . . . that one woman consented (or refused to consent) to have sexual relations with defendant does not mean that another woman made the same choice."⁹⁸ In relation to the court of appeals' analysis, the Oregon Supreme Court distinguished this case from *Johnson*, stating that even though *Johnson* "permitted the jury to infer that the victim, like others, had not consented to the sexual contact with [the] defendant' . . . that statement cannot be divorced from the context in which it was made."⁹⁹ The evidence in *Johnson* demonstrated that the defendant had a "plan or method" used in order to gain sexual access to women.¹⁰⁰ That holding "does not stand for the proposition that, if the victims have the mental capacity to consent, one victim's decision not to consent to a defendant's sexual advances is relevant to prove that another victim made the same choice."¹⁰¹

In sum, the holding in *Leistikio* "explained that a trial court must ensure at least one of two conditions is satisfied before admitting evidence of other crimes or acts to prove the defendant's intent or

94. *Id.*

95. *Id.* at 862.

96. *Id.*

97. *Id.*

98. *Id.* (citing *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948) ("The fact that one woman was raped has no tendency to prove that another woman did not consent.")).

99. *Id.*

100. *Id.*

101. *Id.* at 862-63.

some other mental state: (1) the defendant has conceded the charged act that requires proof of a concomitant mental state, or (2) the jury is instructed not to consider the evidence of the required mental state unless it finds that the defendant committed the charged act.”¹⁰² The introduction of prior bad acts evidence puts a “burden [] ‘on the party offering the evidence to show that the proffered evidence is relevant and probative of something other than a disposition to do evil.’”¹⁰³ The *Leistiko* opinion eventually gave rise to a “*Leistiko* jury instruction” which requires the trial court to, upon the request to introduce a defendant’s prior bad act as evidence of the defendant’s mental state, instruct the jury to not consider that evidence until they have determined that the defendant committed the *actus reus* of the charged crime.¹⁰⁴

Soon after *Leistiko*, the Oregon Supreme Court once again added to the application of OEC 404(3) in *State v. Pitt*.¹⁰⁵ In *Pitt*, the defendant was charged with “two counts of first-degree unlawful sexual penetration and two counts of first-degree sexual abuse” involving alleged victim, A.¹⁰⁶ The alleged acts that resulted in defendant’s charges occurred in Clatsop County.¹⁰⁷

During an interview with a clinical psychologist, A disclosed that she, and another girl, R, were touched inappropriately by defendant.¹⁰⁸ The acts A described in the interview were allegedly committed in Lane County, and consequently, were not listed in defendant’s Clatsop County indictment.¹⁰⁹

The defendant filed a motion in limine to suppress the evidence of the prior allegations.¹¹⁰ The defendant argued “because his ‘defense is and has always been that this didn’t happen, that he didn’t do it, if it did happen it wasn’t him. And so the question of intent is not really at issue in this case.’”¹¹¹ The State responded by arguing the previous instances of sexual abuse “would bear upon the absence

102. *State v. Williams*, 308 P.3d 330, 334 (Or. Ct. App. 2013).

103. *Id.* (quoting *State v. Pratt*, 758 P.2d 350, 354 (Or. 1990)).

104. *State v. Brown*, 355 P.3d 216, 219 (Or. Ct. App. 2015).

105. *State v. Pitt*, 293 P.3d 1002 (Or. 2002).

106. *Id.* at 1004.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1003.

111. *Id.* at 1004.

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of mistake or accident, in addition to going to defendant's intent."¹¹² In making its decision, the trial court relied upon the *Johns* analysis and determined:

(1) the charges required the state to prove that defendant had acted with intent; (2) the Lane County incidents would have required intent as well; (3) A was the same victim and R was in the same class of victims; (4) defendant faced similar charges in Lane County for his conduct there; (5) the physical elements of the conduct were the same or very similar; and (6) the evidence was probative of defendant's knowledge but could confuse the jury.¹¹³

The trial court determined that because defendant asserted that he may bring the defense that someone else committed the crime "then [the] identity of who committed the crime is at issue."¹¹⁴ Consequently the State elicited testimony both from A and an expert that examined A, physically and psychologically, pertaining to the alleged acts that were not a part of this trial's indictment.¹¹⁵

The trial court offered the following limiting jury instructions in relation to the prior bad acts evidence:

First, as to whether defendant acted with knowledge as to the alleged criminal conduct in this case, or second, as to the identity of the person who committed the allegations in this case, i.e., whether the defendant or someone else committed the alleged criminal conduct. Specifically you are not to draw the inference that the evidence of the other conduct makes defendant guilty of the charges in this case.¹¹⁶

The Oregon Supreme Court clarified that OEC 404(3) provides a non-exhaustive list of "permissible purposes for which prior bad act evidence may be admitted at trial."¹¹⁷ The supreme court has avoided

112. *Id.*

113. *Id.* at 1004-05.

114. *Id.* at 1005.

115. *Id.*

116. *Id.*

117. *Id.* at 1007.

applying OEC 404(4) in cases involving prior bad acts evidence on appeal. Therefore, “OEC 404(3) ‘allows Oregon judges to resort to any theory of logical relevance that does not run afoul of the ‘propensity to commit crimes or other acts’ prohibition.’”¹¹⁸

The court of appeals only affirmed based on identity and found that the evidence was not permissible for purposes to prove absence of mistake or accident and intent.¹¹⁹ The supreme court agreed with the court of appeals that this evidence was not admitted under the “traditional identity exception” that states that “prior bad acts offered to prove identity by modus operandi requires ‘a very high degree of similarity between the charged and uncharged crimes’ as well as a distinctive methodology ‘so as to earmark the acts as the handiwork of the accused.’”¹²⁰ However, the Oregon Supreme Court disagreed with the court of appeals’ analysis in determining that A’s testimony could be “admitted to prove identity if it is relevant to bolster a witness’s identification” because OEC 404(3) is meant to be inclusive rather than exclusive as stated in *Johns*.¹²¹ The court determined that “[i]n our view, bolstering A’s identification of defendant with defendant’s prior uncharged conduct against A and R constituted an impermissible propensity purpose under these circumstances, because the reasoning relies on impermissible character inference about defendant.”¹²² In this case, “the force of the ‘bolstering’ evidence rests primarily on an inference that, on the occasion charged, defendant acted consistently with his character to sexually abuse A . . . [that] constitutes an impermissible propensity purpose that goes beyond proving that A could recognize and relay information about who had abused her.”¹²³ The court relied upon a federal application of prior bad act evidence to reach this conclusion.¹²⁴

When examining the permissibility for proving intent, the supreme court agreed with the defendant’s argument that “[i]n the absence of a stipulation by the defendant [that he committed the charged acts], unless the state first introduces evidence sufficient to allow the jury to find that the charged act occurred, a court cannot

118. *Id.* (quoting *State v. Johns*, 725 P.2d 312, 320 (Or. 1986)).

119. *Id.* at 1008.

120. *Id.* (quoting *State v. Johnson*, 832 P.2d 443, 446–47 (Or. 1992)).

121. *Id.*

122. *Id.* (citing CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 22 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5246 (1978)).

123. *Id.* at 1008.

124. *Id.* at 1008–09.

properly admit the uncharged misconduct evidence as relevant to prove intent.”¹²⁵ Since this was determined during a motion in limine hearing, before the trial had even began, the State could not have met the burden stated above, and for this reason, the court deemed this to be an impermissible reason for admitting the evidence.¹²⁶

The court noted that this error was not harmless because “[t]he court’s evidentiary ruling permitted the jury to consider the uncharged misconduct evidence before it decided whether the defendant had committed the charged acts.”¹²⁷ Because the issue of this case was “whether the charged abuse occurred” the introduction of this evidence “created a risk that the jury would use the uncharged misconduct evidence for an impermissible propensity purpose.”¹²⁸

As the foregoing authorities demonstrate, on a basic application level, the Oregon courts have applied a very similar analysis to that of the federal courts.

III. OEC 404(4): THE ELEPHANT IN THE ROOM

During the Oregon 1997 legislative session, a proposal to add a fourth subsection of OEC 404, labeled OEC 404(4), was passed.¹²⁹ The addition of this subsection deviated from the federal application of prior bad acts evidence for the first time.¹³⁰ This additional piece states:

In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by . . . [ORE 406-12] and, to the extent required by the United States Constitution or the Oregon Constitution, [ORE 403, t]he rules of evidence relating to privilege and hearsay[, t]he Oregon Constitution[,] and [t]he United States Constitution.¹³¹

This bill was met with criticism from several forward-thinking

125. *Id.* at 1009.

126. *Id.* at 1010.

127. *Id.* at 1011.

128. *Id.*

129. S.B. 936, 69th Leg. Assemb., Reg. Sess. (Or. 1997).

130. See FED. R. EVID. 404(b).

131. OR. REV. STAT. § 40.170(4) (2015).

individuals who feared this broad subsection would allow the state to more freely present a defendant's prior bad acts to a jury. This criticism can be seen through testimony during the consideration of the bill containing the amendments. Michael Phillips, a representative of the Oregon State Bar, testified in front of the Judiciary Subcommittee stating:

The specific amendment to Rule 404 radically changes Oregon law and reverses a principle that has existed in Anglo-American law since 1695. That principle is that the state may not punish a person for his or her character, but will punish for his or her acts. This rule makes it more likely the accused will be found guilty for who they are. The bill makes Oregon stand alone in having a practice that Justice Cardozo described as "peril to the innocent."¹³²

The foregoing text demonstrates that representatives of the Oregon State Bar were skeptical about the addition to OEC 404 because the state would more easily be able to present evidence of a defendant's prior bad actions. Courts initially followed similar logic by stating that OEC 404(4) does not subject prior bad act evidence to the OEC 403 balancing test "except as required by [the] state or federal constitution."¹³³ More specifically, "[i]n criminal cases, OEC 404(4) precludes a trial court from excluding relevant evidence of a defendant's other crimes, wrongs, or acts under OEC 403, except as required by the state or federal constitutions."¹³⁴ Therefore, these earlier interpretations suggested that OEC 404(4) lowered the bar for the admission of prior bad act evidence to one question: Is the evidence relevant? Thus, for the time being, Michael Phillips's concerns, along with the Oregon Bar Association, were completely correct. OEC 404(4) had supplanted OEC 403 and allowed the state to present prior bad acts to a jury without the court deciding whether the

132. *Public Hearing on S.B. 936A Before the Subcomm. on Criminal Law*, 69th Leg. Assemb. (Or. 1997) (statement of Michael Phillips, on behalf of the Oregon State Bar).

133. *State v. Wyant*, 175 P.3d 988, 991 (Or. Ct. App. 2007) (citing *State v. Phillips*, 174 P.3d 1032, 1034 (Or. Ct. App. 2007)).

134. *State v. February*, 292 P.3d 604, 610 (Or. Ct. App. 2012); *see also State v. Phillips*, 174 P.3d 1032, 1034–35 (Or. Ct. App. 2007); *State v. Leach*, 9 P.3d 755, 760 (Or. Ct. App. 2000) (holding that as long as evidence is relevant, such as to show intent or identity, the evidence is admissible under OEC 404(4) without being subject to a OEC 403 balancing test unless the state or federal constitution requires the balancing).

probative value of the evidence exceeds the prejudicial effect it will have on the defendant. The Oregon Supreme Court and Oregon Court of Appeals did not delve deeper into the interpretation of OEC 404(4) for eighteen years, but the evolution of OEC 404(4) was not over.

A. *Enter State v. Williams*

Oregon courts failed to specifically address 404(4)'s application until the recent Supreme Court decision of *State v. Williams*.¹³⁵ In *Williams*, defendant was charged with two acts of Sex Abuse in the First Degree involving a five-year-old child.¹³⁶ At trial, defendant disputed these charges and claimed that he never inappropriately touched the alleged victim.¹³⁷ The State sought to introduce into evidence, two pairs of children's underwear that defendant's landlord had found in his residence after defendant had vacated the property.¹³⁸ The State had defendant's landlord testify to the fact that "one pair of underwear was [found] between the mattress and box spring on defendant's bed and another pair was in a duffel bag."¹³⁹ Defendant explained that he did not know that the underwear was in his prior residence, but offered the explanation that a friend had spent the weekend with him and the underwear could have possibly been left behind.¹⁴⁰

"Defendant objected to the admission of the underwear evidence" asserting that the "evidence was unfairly prejudicial and inadmissible under OEC 403," because (1) "the evidence did not establish that the underwear was in his possession; and (2) "the underwear was irrelevant to any material issue and that, even if relevant, the evidence was offered only to suggest that defendant had 'a problem with little girls'—i.e., that he was a pedophile—and that he acted in conformity with that character in touching the victim in this case."¹⁴¹ The State argued that the evidence was admissible under 404(3) to show "that the defendant had touched the victim with a sexual purpose rather than accidentally" and was not unfairly

135. *State v. Williams*, 346 P.3d 455 (Or. 2015).

136. *Id.* at 456.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 456–57.

141. *Id.* at 457.

prejudicial.¹⁴² The trial court admitted the evidence under OEC 404(3), and defendant was convicted of both counts of first-degree sexual abuse.¹⁴³

The trial court's ruling was reversed on appeal.¹⁴⁴ The court of appeals opined "that OEC 403 and OEC 404(3) apply [only to] evidence that is logically relevant under OEC 401, and that the underwear evidence was not relevant to a 'contested issue in the case.'" ¹⁴⁵ The court of appeals determined that the evidence was not relevant to a "contested issue in the case" because defendant had not argued that "he had touched the victim as alleged, [but] he did so without criminal intent" and that "if defendant had performed the charged acts, then those acts 'strongly indicate a sexual purpose'" in and of themselves.¹⁴⁶

The Oregon Supreme Court allowed the State's petition for review based on the argument at that they "need not decide whether the underwear evidence was admissible under OEC 404(3) to demonstrate a defendant's sexual purpose," but rather that, "in criminal cases, OEC 404(4) supersedes OEC 404(3) and makes relevant 'other acts' evidence admissible for *all* purposes."¹⁴⁷ In other words, the State argued that, since OEC 404(4) supersedes OEC 404(3) in criminal cases, "relevant 'other acts' evidence is now admissible for all purposes unless, after conducting a 'due process balancing' under OEC 403, the court determines that the federal Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the exclusion of that evidence."¹⁴⁸ Furthermore, the State argued that "OEC 404(3) is not an exception to the admissibility of evidence under 404(4) and, in addition, because the two rules conflict, OEC 404(3) must give way."¹⁴⁹ Defendant rebutted the State's argument by stating that OEC 404(4) intends to say

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 458.

149. *Id.* at 461 (citing *Carlson v. Myers*, 599 P.2d 31 (Or. 1998) ("Ordinarily, if the legislature enacts a statutory requirement that conflicts with another earlier-enacted statutory requirement, and the conflict is irreconcilable, the earlier statute must yield to the later statute."); *see also*, OR. REV. STAT. § 174.020(2) ("When a general and particular provision are inconsistent . . . a particular intent controls a general intent that is inconsistent with the particular intent.")).

evidence is not relevant unless “it is relevant for a *permissible purpose* and that OEC 404(3) sets out [the specific] permissible purposes.”¹⁵⁰

The supreme court agreed with the State’s argument and opined that, when the state seeks to enter a defendant’s prior bad acts into evidence, the trial court is to determine the admissibility of that evidence by examining (1) the logical relevance under OEC 401 and (2) the weighing of the probative value versus the prejudicial effect of the evidence under OEC 403 “to the extent required by the United States [and Oregon] Constitution[s].”¹⁵¹ The court concluded by stating “that OEC 404(4) supersedes OEC 404(3) in a criminal case except to the extent required by the state or federal constitution. In a prosecution of child sexual abuse, the federal Constitution requires that a trial court determine whether the risk of unfair prejudice posed by the evidence outweighs its probative value under OEC 403.”¹⁵² The legislative history behind OEC 404(4) led the court to believe that the constitutional limitations placed upon OEC 404(4) were in reference to the United States Supreme Court’s ultimate determination of “whether evidence proffered under FRE 413 and FRE 414 [would be] subject to balancing under FRE 403.”¹⁵³ Furthermore, even the court admitted that this ruling caused a massive shift in the law by stating:

OEC 404(4) nevertheless effects a significant change in the law. Before the legislature enacted OEC 404(4), “other acts” evidence offered to prove a defendant’s character and propensity to act accordingly was categorically inadmissible

150. *Id.*

151. *Id.* at 463, 467.

152. *Id.* at 467.

153. *Id.* at 463 (“As noted, the Oregon Legislative Assembly adopted OEC 404(4) in 1997, just three years after Congress had adopted FRE 413 and 414. At that time, questions about whether evidence proffered under FRE 413 and 414 was subject to balancing under FRE 403 and whether those rules violated the Due Process Clause were pending in lower federal courts. The Oregon Legislative Assembly recognized the unsettled state of the law by expressly making OEC 404(4) subject to OEC 403 ‘to the extent require by the United States Constitution. In so providing, the legislature deferred the courts to determine whether the federal constitution requires the application of OEC 403. Because the United States Supreme Court is the final arbiter of federal constitutional requirements, we must endeavor to determine how that Court would decide the question that the parties present: Whether the Due Process Clause requires the application of OEC 403.”).

under OEC 404(3). That is no longer the rule. Now, in a prosecution for child sexual abuse, the admission of “other acts” evidence to prove character and propensity under OEC 404(4) depends on whether the risk of unfair prejudice outweighs the probative value of the evidence under OEC 403. That determination must be made on a case-by-case basis.¹⁵⁴

B. The Aftermath of Williams: How Can Defense Attorneys Mitigate the Introduction of Prior Bad Act Evidence?

The *Williams* opinion’s interpretation of OEC 404(4) has ultimately left some questions unanswered about the application of the vague statute such as: are *Johns* hearings still valid; did *Williams* overrule *Leistiko* jury instructions; is *Williams* applicable to cases other than child sex-abuse cases; and should courts still use the “traditional” OEC 403 balancing test, or some new “due process specific” balancing test when determining the probative value versus the prejudicial effect of prior bad act evidence?

The most in-depth examination of the *Williams* opinion came out of the court of appeals’ case *State v. Brown*.¹⁵⁵ One of the main issues in *Brown* was whether or not courts are to apply a “traditional” balancing test under OEC 403 or a “narrower ‘due process balancing’” test under OEC 403.¹⁵⁶ *Brown* pointed to the language of the *Williams* opinion and suggested that a spectrum exists where, on one end,

“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. At the other end of the spectrum . . . when “other acts” evidence “goes only to character and there are no permissible inferences the jury may draw from it,” it is more likely that the evidence will be excluded. Such evidence generally will have little or no cognizable probative value, and the risk that the jury may conclude improperly that the

154. *Id.* at 465.

155. *State v. Brown*, 355 P.3d 216 (Or. Ct. App. 2015).

156. *Id.* at 220.

defendant had acted in accordance with past acts on the occasion of the charged crime will be substantial.¹⁵⁷

However, *Brown*, like every other case that has followed *Williams*, did not need to decide whether courts should conduct a “traditional” balancing test, or a narrower “due process” balancing test under OEC 403, although the argument has been raised several times.¹⁵⁸

The *Williams* court largely based its analysis of OEC 404(4) on the United States Supreme Court’s interpretation of FRE 413’s and 414’s constitutional limits regarding FRE 403 balancing.¹⁵⁹ Therefore, a logical start to discussing the future of Oregon’s interpretation of OEC 403 balancing under OEC 404(4) is an examination of the federal court’s application of FRE 403 in regards to evidence submitted under FRE 413 and 414.

FRE 413 states in part that “[i]n a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant. . . . This rule does not limit the admission or consideration of evidence under any other rule.”¹⁶⁰ Similarly, FRE 414 states “[i]n 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. . . . This rule does not limit the admission or consideration of evidence under any other rule.”¹⁶¹

Courts applying FRE 403 balancing tests to FRE 413 and 414, have allowed the admission of defendant’s prior acts of sexual abuse, for propensity purposes, by diminishing the prejudicial effect, or bolstering the probative value, of the evidence through means of: (1)

157. *Id.* (quoting *State v. Williams*, 346 P.3d 455, 465 (Or. 2015)).

158. *Id.* at 220–21 (explaining that the court did not need to decide which balancing test should be used because the “traditional” balancing test was met based on the facts of the case); *see also* *State v. Brumbach*, 359 P.3d 490, 496 (Or. Ct. App. 2015) (concluding that only a narrower “due process” balancing test was required and that the trial court erred because it did not use a balancing test).

159. *State v. Williams*, 346 P.3d 455, 459–61, 463, 465 (Or. 2015).

160. FED. R. EVID. 413(a), (c).

161. FED. R. EVID. 414(a), (c).

reminding the jury of the government's burden of proof;¹⁶² (2) limiting testimony to witnesses who were involved in similar crimes only;¹⁶³ and (3) ensuring that the prior acts were closely related in time.¹⁶⁴ Federal courts have also frequently examined "the necessity of the evidence beyond the testimonies already offered at trial."¹⁶⁵ Thus, courts applying the federal rules do not apply the propensity based "spectrum" approach hinted at in the *Williams* opinion, but rather, look at other factors that may mitigate the propensity prejudice or help bolster the probative value of the prior bad act evidence. However, despite the fact that the *Johns* analysis was rooted in the rubric of OEC 404(3), "[a] trial court may consider[, under a OEC 403 analysis,] the proponent's need for the proffered evidence, how likely it was that the defendant committed the 'other act' at issue, the relative strength or weakness of the evidence as a whole, and the similarity between the other act and the offenses at issue" when determining the probative value of the evidence.¹⁶⁶ In sum, if courts looked to the *Johns* factors when determining the probative value of evidence during an OEC 403 analysis, they would conform to the practices of the federal interpretations of FRE 403 in a similar context.

In *State v. Horner*, defendant argued "that his *Leistiko* 'arguments, and the law on which they are based, [were] not altered by the *Williams* decision.'"¹⁶⁷ Defendant was indicted for identity theft based on the fact that identifications of two individuals were

162. *United States v. Jones*, 748 F.3d 64, 70–71 (1st Cir. 2014) (holding that defendant's prior state conviction for aggravated sexual assault and endangering the welfare of a child was admissible in prosecution for traveling across state lines to engage in a sex act with a minor).

163. *United States v. Crow Eagle*, 705 F.3d 325, 328 (8th Cir. 2013) (holding that the court diminished prejudicial effect by limiting the testimony of defendant's prior sexual abuse of family members to witnesses that were actually children at the time of the abuse and concluding that "testimony from adult victims was barred due to dissimilarity from the charges [in the present case]").

164. *United States v. Hawpetoss*, 478 F.3d 820, 825 (7th Cir. 2007) (quoting *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (considering the *LeMay* factors and holding that the "(1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial" were sufficient to conclude that the prejudicial effect of the prior bad acts evidence was outweighed by the probative value).

165. *LeMay*, 260 F.3d at 1028.

166. *State v. Brown*, 355 P.3d 216, 221 (Or. Ct. App. 2015).

167. *State v. Horner*, 356 P.3d 111, 117 (Or. Ct. App. 2015).

found in a stolen vehicle that defendant had allegedly been driving.¹⁶⁸ The State sought to admit defendant's nine prior convictions for identity theft and defendant objected.¹⁶⁹ Defendant, on appeal, argued that "[a]lthough *Leistiko* was primarily focused on OEC 404(3), and *Williams* held that OEC 404(4) abrogated OEC 404(3), both rules require that the proponent of evidence first establish its relevance."¹⁷⁰ Defendant further argued that "[u]ntil the jury first determined that defendant *knew* the items were in the vehicle evidence bearing only on secondary questions regarding what defendant intended to do with the items were *not yet relevant*[,]” and therefore required a *Leistiko* jury instruction.¹⁷¹

The State countered by stating that “defendant incorrectly characterizes the *Leistiko* rule as one strictly of relevancy, rather than of admissibility” and that “*Leistiko* was concerned with OEC 404(3), [and] OEC 404(3) ‘does not bear on the relevancy determination of specific evidence,’ it simply identifies a type of evidence that—although relevant—is inadmissible based on a specific application of 403.”¹⁷² The court determined that “the error defendant claimed under *Leistiko* remains the same after *Williams*. The trial court erred by admitting defendant's prior identity theft convictions without instructing the jury that it must first find that defendant possessed the identifications of others before considering whether he had the intent to deceive or defraud.”¹⁷³ This provides an affirmative “yes” answer to the burning question of whether *Leistiko* jury instructions were still valid after *Williams*.¹⁷⁴

A motion for a limiting instruction may be warranted when prior bad act evidence is admitted against a defendant under OEC 404(4). The basis of the argument for a jury instruction would be rooted in OEC sections 105, 401, and 403. Oregon's Evidence Code limits the admissibility of evidence by stating “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon

168. *Id.* at 113–14.

169. *Id.* at 114.

170. *Id.* at 117.

171. *Id.*

172. *Id.* at 118.

173. *Id.*

174. *State v. Brown*, 355 P.3d 216, 222 (Or. Ct. App. 2015) (explaining that it did not need to address the continued validity of *Leistiko* after the *Williams* opinion).

request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”¹⁷⁵ Furthermore, “Oregon Rule of Evidence 105 is identical to Rule 105 of the Federal Rules of Evidence. It permits the admission of evidence for a limited purpose and the instruction of the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in deciding whether to exclude evidence for unfair prejudice under Rule 403.”¹⁷⁶ Further, OEC 401 deals with:

[A] variety of relevancy problems [because of] the ingenuity of counsel in using circumstantial evidence as means of proof. An enormous number of cases fall into no set pattern, and this section is . . . a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the applications of the present rule as limited by the exclusionary principles of Rule 403.¹⁷⁷

The interplay of these sections of the evidence code, especially when coupled with the State’s argument in *Horner*, creates an ability to move for a limiting instruction to the jury (i.e., that the jury should only consider the evidence for the reason it was admitted in the first place, its relevancy under OEC 401, and not general propensity of the defendant’s character).

C. Will These Mitigating Attempts “Fix” the Prejudice?

There is a mass of social science research that suggests juries use a defendant’s prior convictions to determine the defendant’s guilt in a present case. Social scientists examined real juries and “found that juries convict on the basis of earlier convictions.”¹⁷⁸ The study showed that “[d]efendants with records were more likely to be convicted than defendants with no records.”¹⁷⁹ In experimental design

175. OR. R. EVID. 105 cmt. from 1981 Conference Committee.

176. *Id.*

177. OR. R. EVID. 401 cmt. from 1981 Conference Committee.

178. Margaret Platt Jendrek & Martin F. Kaplan, *Social Science Evidence and the Discrepancy in the Federal Rules of Evidence on Character Testimony*, 11 LAW & PSYCHOL. REV. 39, 47 (1987).

179. *Id.*

and mock trials “group decisions [were] examined and these [studies] also [led] to the conclusion that juries are more likely to convict if the defendant’s prior record is provided.”¹⁸⁰ This research also demonstrated that “juries are more likely to convict, especially if the prior convictions are for charges resembling the current charge.”¹⁸¹

This concept was revisited by research scientists in order to examine whether the higher conviction rates were attributable to unlawful considerations of the prior conviction evidence and whether the risk of prejudice to a defendant was outweighed by the benefit to the prosecution.¹⁸² Subjects were presented with written descriptions of hypothetical cases designed to ensure the ambiguity of guilt or innocence.¹⁸³ The case descriptions contained “various facts of the case, the testimony of the defendant and several other witnesses, and instructions as to the elements which would be necessary in order to find the defendant beyond a reasonable doubt.”¹⁸⁴ Groups were then presented with one of the following four prior conviction scenarios: “[1] no mention of the defendant’s prior record, [(2)] previous conviction for the same crime, [(3)] previous conviction for a dissimilar crime . . . , [or (4)] previous conviction for perjury.”¹⁸⁵ In cases that included prior conviction evidence, subjects were given judicial instructions “that they were not to consider the evidence of the defendant’s prior record as indicating that the defendant has criminal tendencies or dispositions[,] but to use this evidence solely to assess the believability of his testimony.”¹⁸⁶

The social scientists opined that, if the subjects were correctly using the prior bad act evidence to determine the credibility of the defendant’s testimony, “the prior conviction would have done the most to vitiate the defendant’s credibility.”¹⁸⁷ The subject’s determination of the reliability of the defendant’s testimony did not vary across the four prior conviction scenarios, however, “conviction

180. *Id.* at 49.

181. *Id.*

182. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 *LAW & HUM. BEHAV.* 1, 37 (1985).

183. *Id.* at 40.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 43.

rates *did* vary as a function of the existence and type of record.”¹⁸⁸ Defendants with no prior conviction received the lowest rate of conviction and defendant’s that had a prior conviction for a crime similar to the crime alleged against them received the highest rate of guilty verdicts.¹⁸⁹ Based on those results, “it appears that the mock jurors used the prior conviction evidence to help them judge the likelihood that the defendant committed the crime charged.”¹⁹⁰ Further, “subjects were willing to state that the prior conviction evidence increased the likelihood of the defendant’s guilt and was the reason they found him guilty, even though they had been instructed not to use the information for that purpose.”¹⁹¹

This subject has been examined in the context of evidence of prior acquittals.¹⁹² Subjects were given altered trial transcripts concerning the bank robbery tried in *Dowling*.¹⁹³ The altered transcripts contained one of the following scenarios: (1) no evidence of defendant’s prior conviction, (2) evidence that defendant had been previously tried, and acquitted, of a home invasion, and (3) evidence that defendant had a prior conviction for home invasion.¹⁹⁴ Half of the subjects who were given records containing prior conviction or acquittal evidence were also given the following limiting instruction:

You are to use the evidence of prior conviction (or acquittal) only to the extent it helps in determining the identity of the person who committed the bank robbery in question. If the testimony does not fall into the aforementioned category, it may be disregarded. Mr. Dowling was found guilty (or not guilty) of the crime of robbery that occurred at the residence of Vena Henry.¹⁹⁵

The results showed that subjects who received evidence of prior acquittal and subjects that received no prior bad act evidence came to

188. *Id.*

189. *Id.*

190. *Id.* at 44.

191. *Id.*

192. Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 1, 67 (1995).

193. *Id.* at 71.

194. *Id.*

195. *Id.*

similar determinations about the defendant's guilt.¹⁹⁶ Subjects who were presented with evidence of the defendant's prior convictions were significantly more likely to return a guilty verdict against the defendant.¹⁹⁷ The defendant was rated as not reliable and highly dangerous by participants that received records containing prior conviction evidence.¹⁹⁸ The researchers found "that limiting instructions had little effect on jurors' use of this evidence [because v]erdicts from mock jurors with instructions about the restricted use of this information were not different from verdicts of jurors without such instruction."¹⁹⁹

All of the foregoing experimental conclusions conform in opinion. If such research is in fact accurate, then juries may be using prior bad act evidence impermissibly to determine that a defendant has a general propensity to commit crime, and therefore, is guilty. Furthermore, the use of limiting instructions may have little to no mitigating effect for a majority of juries. This would undermine OEC 403 protections against "unfair prejudice" and everything it intended to protect. The purpose of OEC 403 was to ensure that evidence is both relevant and to "determine whether the evidence might unfairly prejudice the defendant."²⁰⁰ The Oregon Supreme Court has

previously held, "unfair prejudice" . . . means an undue tendency to suggest a decision on an improper basis. . . . [It] describes a situation in which the preferences of the trier of fact are affected by reasons essentially unrelated to the persuasive power of the evidence to establish a fact of consequence.²⁰¹

"The rule, as applied to criminal trials, recognizes the long-standing principle 'that a defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged.'"²⁰² "In the context of OEC

196. *Id.* at 76.

197. *Id.*

198. *Id.*

199. *Id.*

200. *State v. Lawson*, 291 P.3d 673, 694 (Or. 2012).

201. *Id.* at 695 (citing *State v. Lyons*, 924 P.2d 802, 816 (Or. 1996)).

202. *State v. Pitt*, 293 P.3d 1002, 1008 (Or. 2002).

403, ‘unfair prejudice’ does not mean that the ‘evidence is harmful to the opponent’s case—a central reason for offering evidence.’ Rather, it means an undue tendency to suggest a decision on an improper basis, commonly, although not always, an emotional one.”²⁰³ The foregoing social science research suggests that juries will use prior bad act evidence to decide cases purely on an emotional basis, which wholly undermines the purpose of OEC 403.

D. Are Due Process Rights Being Protected?

It is important to note that this article is not the first to examine the “loosening” of admissibility of propensity evidence. Scholars have examined this topic both in other state and federal jurisdictions. As Aviva Orenstein noted while examining the possible due process rights violations when admitting evidence under FRE 413 and 414, “it is beyond the capacity of even the most open-minded juror to hear propensity evidence without being overly influenced by it.”²⁰⁴ Further, it is established that the Supreme Court has consistently opined that FRE 413 and 414 do not violate the Due Process Clause.²⁰⁵ Courts have determined that due process rights are not violated by FRE 413 and 414 because Rule 403 acts “as a guardian of fairness, a defender against prejudice, and [is] the obvious retort to any due process objection.”²⁰⁶

Courts have routinely pointed to Congress’ intent to “loosen to a substantial degree the restrictions of prior law on the admissibility of [prior bad act] evidence” in sex abuse cases.²⁰⁷ Specifically, the accepted argument is that Congress, by drafting FRE 413 and 414, has determined that evidence of prior sexual assaults is “uniquely probative” in sexual abuse cases.²⁰⁸ Orenstein pointed out that any arguments alleging that the introduction of prior bad act evidence under the less strict standards of FRE 413 and 414 is unconstitutional will be unsuccessful. Orenstein proposed two ways in which courts could reduce the risk unfairly admitting evidence under FRE 413 and 414: (1) require prosecutors to prove that the prior bad acts actually

203. *State v. Lyons*, 924 P.2d 802, 816 (Or. 1996) (citing *State v. Hampton*, 855 P.2d 621, 626 n.15 (Or. 1993) and *State v. Pinnell*, 806 P.2d 110, 116 n.12 (Or. 1991)).

204. Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1517 (2005).

205. *Id.* at 1515–17.

206. *Id.* at 1518.

207. *Id.* at 1520 (quoting *United States v. LeCompte*, 131 F.3d 767, 768 (8th Cir. 1997)).

208. *Id.* at 1541.

occurred by a more stringent burden of proof, or (2) engage in a “fact specific” analysis to consider the admissibility of the prior bad act evidence.²⁰⁹ Orenstein’s suggested analysis is similar to Oregon’s pre-*Williams* analysis outlined above.

Both Iowa and Missouri’s Supreme Courts have determined their own evidentiary sections mimicking FRE 413 and 414 unconstitutional in violation of the Due Process Clause of their respective states.²¹⁰ For example, both Iowa and Missouri found that their statutes concerning the introduction of prior bad act evidence violated the due process rights of their state constitutions.²¹¹ The Oregon Supreme Court briefly discussed the constitutionality of OEC 404(4) in regards to the Due Process Clause, but as the following section will illustrate, the question of whether OEC 404(4) is constitutionally valid as interpreted by the *Williams* opinion is unanswered.

E. Did Oregon Go Too Far?

An argument can be made that Oregon is continuing to mimic the FRE because OEC 404(4) is intended to codify FRE 413 and 414. However, this is simply untrue. The *Williams* opinion stated in passing that FRE 413 and 414 were determined to supersede FRE 404(b), but the court expressed “that historical background is helpful, but it does not resolve the question before us: Whether OEC 404(4) is subject to OEC 404(3) or OEC 403.”²¹² The Court in *Williams* went on to say “we conclude that the legislature indented OEC 404(4) to supersede OEC 404(3) in criminal cases, except, of course, as otherwise provided by the state or federal constitutions.”²¹³

The foregoing section highlighted that federal courts have determined that FRE 413 and 414 do not violate the Due Process

209. *Id.* at 1544.

210. Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 AM. CRIM. L. REV. 321, 330 (2015).

211. *Id.* at 330–33 (citing *State v. Ellison*, 239 S.W.3d 603 (Mo. 2007) (holding that a statute mimicking FRE 413 and 414 violated Missouri’s Due Process Clause because it allowed for evidence to be admitted for crimes other than the acts charged in the indictment) and *State v. Cox*, 781 N.W.2d 757 (Mo. 2010) (holding that a statute that mimicked FRE 413 and 414 to govern the admissibility of evidence of similar sexual abuse offenses violated the state’s Due Process Clause)).

212. *State v. Williams*, 346 P.3d 455, 461 (Or. 2015).

213. *Id.* at 462.

Clause because evidence of prior sexual misconduct is “uniquely probative”²¹⁴ in sexual assault cases. *Williams* was indeed a sex abuse case, the *Williams* opinion, however, did not limit the lower admissibility standards to just prior sexual misconduct, but instead made all prior bad act evidence against all criminal charges admissible to prove a defendant’s propensity to engage in criminal acts as long as that evidence is relevant.²¹⁵ Oregon has gone too far because the “uniquely probative” argument does not carry the same weight when the category is broadened to encompass “all criminal cases.” In other words, there can be no probative value “unique” to all prior misconducts and all criminal charges.

However, as quoted above by *Brown* discussing the spectrum approach to prior bad act evidence admissibility under OEC 403, the *Williams* court carefully addressed the due process issue by stating:

At one end of the spectrum, ‘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. At the other end of the spectrum, as the state recognizes, when ‘other acts’ evidence ‘goes only to character and there are no permissible inferences the jury may draw from it,’ it is more likely that the evidence will be excluded.²¹⁶

Thus, at least the Oregon Supreme Court, if forced to deal with this issue again for crimes other than sex abuse, will likely conclude that OEC 403 balancing and the Due Process Clause of the United States Constitution protect defendant’s due process rights in this context. However, the *Williams* opinion also mentioned that “[i]f this were a case in which defendant had been charged with crimes other than child sexual abuse, we might be persuaded that due process incorporates that historical practice and therefore not only requires the application of OEC 403, but also precludes the admission of ‘other acts’ evidence to prove propensity.”²¹⁷ This provides some hope that

214. See Orenstein, *supra* note 204, at 1541.

215. *Williams*, 346 P.3d at 462.

216. *Id.* at 465.

217. *Id.* at 464.

the Oregon Supreme Court, if faced with prior bad act evidence in a non-sex-abuse case, may limit the application of OEC 404(4). However, this question remains unanswered.

Although unconfirmed, it seems possible that Oregon has overstepped the bounds of FRE 413 and 414. OEC 404(4) and the *Williams* opinion would have a much more difficult time passing constitutional muster due to the lack of “uniquely probative” evidence pointed out by federal courts. It is also possible that the Oregon Supreme Court may limit the ability to admit propensity evidence under OEC 404(4) in non-sex abuse cases. Therefore, criminal defense attorneys should properly object, and adequately preserve for appeal, due process violations upon the admission of prior bad act evidence under OEC 404(4) when their clients are on trial for criminal offenses other than sex-abuse offenses. Proper preservation and appeal may force the hand of the Oregon Supreme Court to readdress this issue in a way that conforms to FRE 413 and 414 as well as the rest of the Federal Rules of Evidence.

IV. CONCLUSION

Oregon’s codification of the Oregon Evidentiary Code, including the section on prior bad acts evidence, mirrored the Federal Rules of Evidence. This is demonstrated through the adoption of similar language in Oregon’s statutory provisions, Oregon’s actual application of OEC 404(3), and Oregon’s reliance on the federal courts history when determining its own application of prior bad acts evidence. However, when it adopted, over the objections of the Oregon Criminal Defense Lawyers Association and the Oregon State Bar, a new subsection of OEC 404 that allowed the state to introduce prior bad acts evidence against a defendant more easily, Oregon departed from its alignment with the FRE.

After eighteen years, the Oregon Supreme Court held in *State v. Williams* that this new subsection, OEC 404(4), supersedes OEC 404(3) and allows the prosecution to introduce prior bad acts evidence against a defendant as long as (1) it is logically relevant under OEC 401, which is not a high hurdle to overcome, and (2) the evidence is admissible after conducting a balancing test under OEC 403. This holding caused a large shift in the law of prior bad acts evidence in Oregon and, as a result, has unraveled the safeguards put in place over decades of Oregon Supreme Court holdings and left some questions

about the application of the statute unanswered such as: (1) how has the *Williams* holding affected earlier holdings about prior bad acts evidence; (2) what courses of action may a defendant make in rebutting the state's attempt to admit prior bad act evidence against them at trial; and (3) what level of inquiry is required by trial courts in examining the admissibility of prior bad act evidence under OEC 403, the traditional 403 analysis, or something narrower strictly under the Due Process Clause?

Despite the uncertainty of the application, this new subsection of OEC 404 not only unfairly singles out criminal defendants and allows the state to more easily present prior bad acts to juries in criminal cases, but it also has the potential to increase the risk of unlawful convictions. To state that Oregon continued to conform with the FRE by passing OEC 404(4) is unfounded. FRE 413 and FRE 414 lowered the bar for prior sexual misconduct in sexual assault cases, similar to the purpose of OEC 404(4), but Oregon's OEC 404(4) departed from the FRE by lowering the bar for the admissibility of prior bad act evidence for *all* criminal cases. Oregon may have impeded on the due process of criminal defendants by lowering the admissibility threshold for all prior bad acts in all criminal cases. In order to ensure fair trials, and to avoid undermining OEC 403 and the prior application of OEC 404(3), Oregon should repeal the addendum made to OEC 404 and remain consistent with the federal court's application by passing statutes directly in line with FRE 413 and 414. This behavior can be, and should be, encouraged through criminal defense attorneys adequately preserving due process violations through objection at the trial court level.