

**FILED: June 26, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

WENDELL URCEL TEITSWORTH,  
Defendant-Appellant.

Deschutes County Circuit Court  
MI090018

A145187

Edward L. Perkins, Judge.

Submitted on July 31, 2012.

Peter Gartlan, Chief Defender, and Jonah Morningstar, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Susan G. Howe, Senior Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Duncan, Judge, and Brewer, Judge pro tempore.

DUNCAN, J.

Affirmed.

1 DUNCAN, J.

2 In this criminal case, defendant was charged with one count of assault in  
3 the fourth degree constituting domestic violence, ORS 163.160, ORS 135.230(3) - (4),  
4 and one count of harassment constituting domestic violence, ORS 166.065(1), ORS  
5 135.230(3) - (4). The charges arose from an altercation between defendant and his then-  
6 girlfriend, the victim. Before trial, the state filed a motion seeking a ruling on the  
7 admissibility of evidence of prior altercations between defendant and the victim, during  
8 which, the victim claimed, defendant was the initial aggressor and injured her. Defendant  
9 objected, asserting that the evidence was inadmissible under OEC 404(3), which  
10 provides, in part, that "[e]vidence of other crimes, wrongs or acts is not admissible to  
11 prove the character of a person in order to show that the person acted in conformity  
12 therewith." The trial court ruled that the evidence was admissible to prove, *inter alia*,  
13 defendant's "intent" and the "matter of self-defense."

14 At the subsequent jury trial, the state presented evidence of the prior  
15 altercations. The jury found defendant guilty of fourth-degree assault, but not guilty of  
16 harassment. The trial court entered a judgment convicting defendant of fourth-degree  
17 assault and sentencing him to 24 months of probation.<sup>1</sup>

18 Defendant appeals the judgment, assigning error to the trial court's

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<sup>1</sup> Although the information charged defendant with fourth-degree assault constituting domestic violence, the jury found defendant guilty of fourth-degree assault. After the trial court issued the judgment, the state filed a motion asking the trial court to amend the judgment to reflect that defendant had been convicted of fourth-degree assault constituting domestic violence. The trial court denied the motion.

1 admission of evidence of the prior altercations. For the reasons explained below, we  
2 affirm.<sup>2</sup>

3           Whether evidence of uncharged misconduct is relevant for a noncharacter  
4 purpose is a question of law; accordingly, we review a trial court's conclusions regarding  
5 the relevance of such evidence for errors of law. *State v. Titus*, 328 Or 475, 481, 982 P2d  
6 1133 (1999). When doing so, we are bound by the court's findings of historical fact if  
7 there is constitutionally sufficient evidence in the record to support them. *State v. Ehly*,  
8 317 Or 66, 75, 854 P2d 421 (1993). If the court did not make findings on a particular  
9 issue, and there is evidence from which the facts could be decided more than one way, we  
10 presume that the court found the facts consistently with its ultimate conclusion. *Ball v.*  
11 *Gladden*, 250 Or 485, 487, 443 P2d 621 (1968). We state the facts in accordance with  
12 those standards.

13           Defendant and the victim were romantically involved and lived together  
14 intermittently from 2006 to 2008. On December 18, 2008, they had a physical  
15 altercation. The victim called the police and, when they arrived, she reported that  
16 defendant had punched her in the face several times, thrown her around the bedroom,  
17 and, when she was on the floor, kicked her in the face two or three times with his hiking  
18 boots. The victim also told the officers that defendant had put his hand over her mouth  
19 and that she had bitten his finger. The officers observed that the victim had scratches and

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<sup>2</sup> In two additional assignments of error, defendant asserts that the trial court erred in allowing the prosecutor to, in his view, vouch for the victim and disparage the defense. We reject those assignments without discussion.

1 a bruise on her face and was bleeding from the mouth.

2 Defendant told the officers that the victim had attacked him. He said that  
3 she had bitten him and that, in response, he had pushed her face away with his hand.  
4 Defendant told the police that the victim had scratched her own face in order to get him  
5 in trouble. The officers did not see any blood or skin under defendant's fingernails; they  
6 saw blood and what they thought might have been skin under the victim's fingernails.  
7 The officers arrested defendant.

8 As mentioned, defendant was charged with fourth-degree assault  
9 constituting domestic violence and harassment constituting domestic violence. "A person  
10 commits the crime of assault in the fourth degree if the person \* \* \* [i]ntentionally,  
11 knowingly or recklessly causes physical injury to another[.]" ORS 163.160(1), (1)(a). In  
12 this case, the state alleged that defendant recklessly assaulted the victim. For the  
13 purposes of the fourth-degree assault statute, "recklessly" is defined by ORS 161.085(9),  
14 which provides:

15 "Recklessly,' when used with respect to a result or to a circumstance  
16 described by a statute defining an offense, means that a person is aware of  
17 and consciously disregards a substantial and unjustifiable risk that the result  
18 will occur or that the circumstance exists. The risk must be of such nature  
19 and degree that disregard thereof constitutes a gross deviation from the  
20 standard of care that a reasonable person would observe in the situation."

21 Thus, to prove that a defendant has committed fourth-degree assault through reckless  
22 conduct, the state must prove that (1) the defendant engaged in conduct (2) when he was  
23 aware that the conduct created a substantial and unjustifiable risk of physically injuring  
24 another person, but consciously disregarded that risk, and, by doing so, grossly deviated

1 from the standard of care that a reasonable person would observe in the situation, and (3)  
2 the conduct caused physical injury to another person.

3 "Physical injury" is defined, for the purposes of the fourth-degree assault  
4 statute, as "impairment of physical condition or substantial pain." ORS 161.015(7). The  
5 term "impairment of physical condition" means "harm to the body that results in a  
6 reduction in one's ability to use the body or a bodily organ for less than a protracted  
7 period of time." *State v. Higgins*, 165 Or App 442, 446-67, 998 P2d 222 (2000). It  
8 includes, for example, a swollen, bloody lip. *See, e.g., State v. Cetto*, 66 Or App 337,  
9 340, 674 P2d 66, *rev den*, 296 Or 712 (1984) (child's swollen, bloody lip and facial  
10 bruises resulting from slapping constituted impairment of physical condition). The term  
11 "substantial pain" refers to the degree and duration of the pain suffered by the victim. It  
12 includes, for example, headache pain lasting approximately one hour. *State ex rel Juv.*  
13 *Dept. v. Greenwood*, 107 Or App 678, 682, 813 P2d 58 (1991); *see also State v. Poole*,  
14 175 Or App 258, 261, 28 P3d 643 (2001) (victim, who was kicked in the forearm by the  
15 defendant, and who felt sharp pain for one hour and then throbbing pain for 24 hours,  
16 suffered "substantial pain"); *State ex rel Juv. Dept. v. Salmon*, 83 Or App 238, 241-42,  
17 730 P2d 1285 (1986) (where victim experienced a combination of pain, swelling, and  
18 bruising as a result of being struck in the face with a plastic container, victim suffered  
19 "physical injury").

20 Prior to trial, the state filed a motion for a ruling on the admissibility of  
21 evidence of prior altercations between defendant and the victim during which, the victim

1 claimed, defendant had been the initial aggressor and had injured her. The state argued  
2 that the evidence was admissible (1) to prove the culpable mental state for the charged  
3 assault, *i.e.*, recklessness, and (2) to disprove defendant's self-defense claim.

4 With respect to the first purpose, the state told the trial court that evidence  
5 of the prior altercations--including one in 2007 in which, according to the victim,  
6 defendant punched her in the face, giving her two black eyes and a swollen lip--was  
7 relevant to prove that defendant knew that punching could cause physical injury.

8 Specifically, the state argued:

9 "The crime of Assault in the Fo[u]rth degree, as charged, requires  
10 the state to prove that the defendant recklessly caused physical injury. The  
11 defendant's prior act of punching the victim was also reckless. The victim  
12 is the same person. Both acts involve the defendant using his fists in a  
13 punching motion on the victim's face. They have the same physical  
14 elements. *The prior acts show that he was aware of the risk of causing her*  
15 *physical injury and ignored that risk.*"

16 (Emphasis added.) And, with respect to the second purpose, the state argued that the  
17 uncharged misconduct evidence was relevant to whether or not defendant "was the  
18 aggressor."

19 Defendant objected to the admission of the state's proffered evidence,  
20 arguing that it was not relevant to any fact at issue in the trial, but was instead improper  
21 propensity evidence. He also argued that, even if the evidence was relevant, its probative  
22 value was substantially outweighed by the risk it posed of unfairly prejudicing the jury  
23 against him.

24 The trial court ruled that the evidence was admissible to prove "intent," the

1 absence of accident, and to rebut the "matter of self-defense." The court also ruled that  
2 the evidence was admissible to prove defendant's "motive" and "plan."

3           The case proceeded to trial, and, as mentioned, a jury found defendant  
4 guilty of fourth-degree assault and not guilty of harassment. Defendant appeals,  
5 assigning error to the trial court's admission of the state's evidence of the prior  
6 altercations he had with the victim, including the one in which she suffered two black  
7 eyes and a swollen lip. He argues that the court committed reversible error by admitting  
8 the evidence under OEC 404(3), which governs the admissibility of uncharged  
9 misconduct evidence. In response, the state argues, as it did in the trial court, that the  
10 evidence was admissible to prove that (1) defendant recklessly assaulted the victim and  
11 (2) he did not do so in self-defense.<sup>3</sup>

12           OEC 404(3) provides:

13           "Evidence of other crimes, wrongs or acts is not admissible to prove  
14 the character of a person in order to show that the person acted in  
15 conformity therewith. It may, however, be admissible for other purposes,  
16 such as proof of motive, opportunity, intent, preparation, plan, knowledge,  
17 identity, or absence of mistake or accident."

18 Thus, in a criminal case, evidence of uncharged misconduct by the defendant is not  
19 admissible to prove that the defendant has a criminal character or a propensity to engage  
20 in criminal behavior. *State v. Pitt*, 352 Or 566, 576, 293 P3d 1002 (2012) (the  
21 admissibility of evidence of uncharged misconduct must be based on its relevance to a

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<sup>3</sup> The state does not argue that the evidence was admissible to prove "motive" or "plan," and, given our disposition, we need not determine whether the trial court's rulings regarding those theories of admissibility were correct.

1 fact at issue in the trial; such evidence cannot be admitted to prove a propensity to  
2 commit such conduct). In order for the state to secure the admission of evidence of  
3 uncharged misconduct by the defendant, the state must prove that the evidence is  
4 "relevant to some *contested* issue beyond propensity or bad character." *State v. Phillips*,  
5 217 Or App 93, 99, 174 P3d 1032 (2007), *rev den*, 345 Or 159 (2008) (emphasis in  
6 original).

7 When determining whether uncharged misconduct is relevant to prove a  
8 defendant's intent, courts should consider the following questions, set out by the Supreme  
9 Court in *State v. Johns*, 301 Or 535, 555-56, 725 P2d 312 (1986):

10 "(1) Does the present charged act require proof of intent?

11 "(2) Did the prior act require intent?

12 "(3) Was the victim in the prior act the same victim or in the same  
13 class as the victim in the present case?

14 "(4) Was the type of prior act the same or similar to the acts involved  
15 in the charged crime?

16 "(5) Were the physical elements of the prior act and the present act  
17 similar?

18 "(6) If these criteria are met, is the probative value of the prior act  
19 evidence substantially outweighed by the danger of unfair prejudice,  
20 confusion of issues or misleading the jury, undue delay or presentation of  
21 cumulative evidence?"<sup>4</sup>

22 As mentioned, on appeal, the state argues that the evidence of the prior

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<sup>4</sup> The 1997 enactment of OEC 404(4), which prohibits balancing the probative value of relevant uncharged misconduct evidence against its prejudicial effect in criminal cases, effectively eliminated the sixth factor of the *Johns* analysis. *State v. Dunn*, 160 Or App 422, 428, 981 P2d 809 (1999), *rev den*, 332 Or 632 (2001).



1   altercations between defendant and the victim was admissible for two nonpropensity  
2   purposes. First, the state argues that the evidence was admissible to prove that, during  
3   the altercation underlying the charged assault, defendant acted recklessly. The state's  
4   argument is, as it was in the trial court, that the prior altercations were relevant to prove  
5   that defendant knew that the charged conduct gave rise to a substantial and unjustifiable  
6   risk that the victim would be injured. Specifically, the state argues that "the fact that  
7   [defendant] had assaulted [the victim] on prior occasions made it more likely that he was  
8   aware of the risk his conduct would injure [the victim] on the date in question."

9               That argument is unavailing. Evidence of uncharged misconduct is  
10   admissible only to prove contested issues. *Phillips*, 217 Or App at 99; *State v. Sicks*, 33  
11   Or App 435, 438, 576 P2d 834 (1978) (generally, evidence of prior bad acts should be  
12   admitted to prove the required state of mind only when the defendant disputes whether he  
13   acted with that state of mind). Whether defendant was aware that the conduct for which  
14   the state prosecuted him--which included punching the victim in the face, throwing her  
15   around a bedroom, and kicking her in the face with his hiking boots--gave rise to a  
16   substantial and unjustifiable risk of physical injury was not a contested issue. Defendant  
17   did not claim that he did not know that such conduct could injure a person. Moreover,  
18   the charged conduct, if proven, would, by itself, "strongly indicate the required state of  
19   mind[.]" *Sicks*, 33 Or App at 438.

20              Here, if the state proved that defendant engaged in the conduct that the  
21   victim described to the police, which included punching and kicking the victim in the

1 face, it would have necessarily proved that defendant acted at least recklessly. There was  
2 no dispute that the charged acts in this case were the types of acts that would give rise to  
3 an obvious, substantial, and unjustifiable risk of physical injury, which, as described  
4 earlier, includes swollen, bloody lips and facial bruises. *Cetto*, 66 Or App at 340. Thus,  
5 evidence of the prior altercations was not admissible to prove that defendant acted at least  
6 recklessly because that was not a contested issue.<sup>5</sup>

7 Second, the state argues that the evidence of the prior altercations between  
8 defendant and the victim was admissible to disprove defendant's claim that he acted in  
9 self-defense. When a defendant raises the defense of self-defense, the state has the  
10 burden of disproving the defense beyond a reasonable doubt. ORS 161.055(1). Self-  
11 defense is defined, in pertinent part, as follows:

12 "[A] person is justified in using physical force upon another person  
13 for self-defense \* \* \* from what the person reasonably believes to be the

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<sup>5</sup> Indeed, defendant's intent was a conceded issue, at least in part. By asserting that he acted in self-defense, defendant conceded that he acted knowingly or intentionally. *State v. Boyce*, 120 Or App 299, 306, 852 P2d 276 (1993) ("To act in self-defense, a person must intentionally or at least knowingly engage in an act to prevent another from imminent use of physical force."). Because evidence that a defendant acted knowingly or intentionally is sufficient to establish that the defendant acted recklessly, defendant effectively conceded the culpable mental state for the charged assault. ORS 161.115(3) ("When recklessness suffices to establish a culpable mental state, it is also established if a person acts intentionally or knowingly."). Defendant did not dispute that he recklessly assaulted the victim; his defense was that the assault was justified.

The state points out that defendant did not admit to all of the conduct for which he was prosecuted and, therefore, the state contends, his self-defense claim did not eliminate the need for it to prove that the conduct he did not admit was reckless. But, again, the culpable mental state for the charged assault was recklessness, and the recklessness of the conduct for which defendant was prosecuted was not a contested issue because it would be established by proof of the conduct itself.

1 use or imminent use of unlawful physical force, and the person may use a  
2 degree of force which the person reasonably believes to be necessary for  
3 the purpose."

4 ORS 161.209. Notwithstanding ORS 161.209, a person is generally not justified in using  
5 physical force if the person is the initial aggressor. ORS 161.215(2). The state argues  
6 that "the fact that defendant repeatedly had assaulted the victim in the past made it more  
7 likely that he was the initial aggressor in the charged incident[.]" We accepted a similar  
8 argument in *State v. Yong*, 206 Or App 522, 542-43, 138 P3d 37, *rev den*, 342 Or 117  
9 (2006), where we held that evidence of prior misconduct by the defendant, who was  
10 charged with assaulting his girlfriend, was relevant to prove, "in opposition to defendant's  
11 defense, that defendant was the aggressor in the [charged] altercation."

12 In *Yong*, the victim initially told the police that the defendant, in a rage, had  
13 thrown her down, pinned her, and punched her, leaving bruises. She later recanted,  
14 saying that she had started an argument with the defendant and he had tried only to  
15 restrain her. Before trial, the state moved for a ruling on the admissibility of evidence  
16 that the defendant had been convicted of assault and menacing of the victim, as well as of  
17 assault of his former wife. The trial court ruled that the evidence was relevant to whether  
18 the defendant had acted intentionally in engaging in the charged conduct and ruled that it  
19 could be admitted.<sup>6</sup> *Id.* at 540. Following a jury trial during which the state presented

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<sup>6</sup> The trial court also ruled that the evidence was relevant to prove identity. On appeal, we held that that ruling was erroneous, citing *State v. Baughman*, 164 Or App 715, 995 P2d 551 (2000), *rev dismissed*, 333 Or 596 (2002), because identity was not a contested issue in the case. We explained, "[T]he issue was whether a crime had occurred, not whether the defendant, in contrast to some other person, had committed it."

1 evidence of the defendant's prior convictions, the defendant was convicted. The  
2 defendant appealed.

3           On appeal, the defendant challenged the admission of the evidence of his  
4 prior convictions, arguing that the evidence was not admissible to prove that he acted  
5 intentionally in committing the charged conduct because his defense was that he had not  
6 committed the conduct at all. In support of his argument, the defendant quoted *State v.*  
7 *Leach*, 169 Or App 530, 534-35, 9 P3d 755 (2000), *rev den*, 332 Or 632 (2001), in which  
8 we observed that

9           "there is a substantial and unresolved question as to whether 'prior  
10 bad acts' evidence can ever be admitted as being relevant to intent where, as  
11 here, the defense is that the charged crime never occurred. That is, this is  
12 not a case of allegedly 'innocent' or 'accidental' ambiguous conduct."

13           We rejected the defendant's argument that his intent was not at issue,  
14 explaining that it was undisputed that the defendant and the victim had been involved in  
15 an altercation, during which the victim had been injured, and that whether the defendant  
16 had been the initial aggressor was a contested issue:

17           "Both defendant and the victim acknowledged in their trial  
18 testimony that an altercation occurred between them on January 11 [the  
19 date of the charged crime]. It was also undisputed that the victim suffered  
20 physical injury during that incident. According to the victim, she was the  
21 aggressor, assaulting defendant by pushing him, trying to punch him in the  
22 chest and face, and kicking him 'hard' in the back. Defendant testified that  
23 he tried to restrain the victim but never struck her. But it was the state's  
24 theory that defendant had, in fact, been the aggressor, that he assaulted the  
25 victim as he had done in the past, and that the victim changed her story out  
26 of fear of retaliation."

27 *Yong*, 206 Or App at 542. Given the parties' theories, we held that the evidence of the  

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*Id.* at 540.

1 defendant's prior convictions was admissible under *State v. Johns*, 301 Or at 555-56, and  
2 *State v. Moen*, 309 Or 45, 786 P2d 111 (1990). *Yong*, 206 Or App at 541-43.

3           In *Johns*, the defendant was charged with killing his wife by shooting her in  
4 the head. He claimed that the shooting was accidental. To prove otherwise, the state  
5 introduced, over the defendant's objection, evidence that the defendant had attempted to  
6 kill his former wife six years earlier. On review, the Supreme Court rejected the  
7 defendant's argument that the evidence was inadmissible propensity evidence. The court  
8 held that the evidence was admissible to prove the defendant's intent because it tended to  
9 prove that, "when similarly agitated in a domestic setting defendant will act violently and  
10 intentionally." *Johns*, 301 Or at 551.

11           In *Moen*, 309 Or at 65-66, 69, the defendant was charged with killing his  
12 wife and mother-in-law, and the Supreme Court held that evidence that, three weeks  
13 earlier, he had pointed a shotgun at them and threatened to kill them was admissible to  
14 prove that he committed the charged killings, which he denied, and that he did so  
15 intentionally. The court observed that evidence of a defendant's prior hostile acts toward  
16 a victim "has special relevance to the issue of a hostile motive, which in turn is probative  
17 of intent. Evidence that shows a hostile relationship existed between a defendant and his  
18 victim tends to shed light on a defendant's *mens rea*." *Id.* at 68. Applying *Johns*, the  
19 court held that the evidence of the defendant's prior threats could be admitted to show  
20 "defendant's intentional reaction under similar circumstances." *Id.* at 69. The court also  
21 explained that "[t]he prior threat was relevant to prove that defendant later acted

1 consistent with that expressed intent." *Id.* The court summarized, "Evidence of the prior  
2 altercation [was] relevant to show that defendant would kill, and kill intentionally." *Id.*

3 Applying *Johns* and *Moen* in *Yong*--where, as described above, the  
4 defendant was charged with assaulting his girlfriend, who initially said that the defendant  
5 had attacked her, but later said that she was the initial aggressor--we concluded that the  
6 evidence of the defendant's prior convictions was admissible to disprove the defendant's  
7 defense:

8 "Here, as in *Johns* and *Moen*, the proffered evidence was admissible  
9 because it tended to prove that 'when similarly agitated in a domestic  
10 setting defendant will act violently and intentionally.' [*Moen*, 309 Or] at  
11 69. That fact was directly relevant to the state's theory, in opposition to  
12 defendant's defense, that defendant was the aggressor in the January 11  
13 altercation. As a consequence, the trial court did not err in admitting the  
14 challenged prior crimes evidence."

15 *Yong*, 206 Or App at 542-43.

16 In this case, as in *Yong*, there was no dispute that defendant and the victim  
17 had a physical altercation on the night of the charged incident, nor was there any dispute  
18 that, at a minimum, defendant pushed the victim in the face and that, when the police  
19 arrived, the victim's face was bruised and bleeding. Thus, while defendant admitted that  
20 he acted intentionally or knowingly with respect to some conduct, his specific intent--  
21 whether he did so in self-defense--was a contested issue. Accordingly, under *Yong*, 206  
22 Or App at 542, evidence of defendant's prior altercations with the victim was admissible  
23 to prove "the state's theory that defendant had, in fact, been the aggressor[.]"

24 If evidence of uncharged misconduct is introduced to show a defendant's

1 hostile motive toward the victim, "which in turn is probative of intent," *Moen*, 309 Or at  
2 68, the evidence must meet the *Johns* test for admitting evidence of uncharged  
3 misconduct to show intent. *Johns*, 301 Or at 555-56; *see also State v. Pyle*, 155 Or App  
4 74, 81-82, 963 P2d 721, *rev den*, 328 Or 115 (1998) (evidence of the defendant's prior  
5 acts of punching the victim was not relevant to prove that he intentionally shot the  
6 victim). Here, the charged act requires proof of intent; the prior act also required intent;  
7 the victim was the same in both acts; and both acts involved defendant striking the victim  
8 in the context of a domestic dispute. Therefore, we conclude that the trial court did not  
9 err in admitting the evidence of uncharged misconduct to rebut defendant's self-defense  
10 claim.

11 Affirmed.