IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JEFFREY BRIAN JOHNSON,
Defendant-Appellant.

Washington County Circuit Court
C120228CR; A156737

Thomas W. Kohl, Judge.

Argued and submitted April 26, 2016.

Mary M. Reese, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Peenesh H. Shah, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Affirmed.

ARMSTRONG, P. J.

Defendant appeals a judgment of conviction for intentional murder with a firearm, ORS 163.115, ORS 161.610, raising two assignments of error.[1] First, defendant challenges the trial court's exclusion of expert testimony about defendant's personality traits, which defendant sought to introduce to support his defense of extreme emotional disturbance (EED), ORS 163.135. We reject defendant's first assignment of error because we conclude that he failed to preserve it. Second, defendant assigns error under OEC 403 to the trial court's decision to admit autopsy photographs in conjunction with testimony by a medical examiner about the autopsy. Defendant contends that the trial court erred by failing to create a record that reflected that the court had engaged in the balancing process required under OEC 403 and *State v. Mayfield*, 302 Or 631, 733 P2d 438 (1987), before deciding to admit the autopsy photographs as evidence. He further contends that the trial court abused its discretion under OEC 403 by admitting the autopsy photographs because their probative value was substantially outweighed by the danger of unfair prejudice to defendant. We conclude that the record demonstrates that the trial court engaged in the required OEC 403 balancing and that the trial court did not err by admitting the photographs. Accordingly, we affirm.

The relevant facts are undisputed. Defendant killed the victim, Johnson,[2] in the course of a custody dispute over R, who is the son of defendant's daughter, M, and Johnson. Before R was born, Johnson and M had lived with defendant. However, Johnson moved from defendant's home after R's birth and had relatively little involvement with R over the next two years.

In early 2011, when R was roughly two years old, Johnson initiated court proceedings to secure parenting time with R. That action led to an increasingly contentious relationship between Johnson and M. A few months after

[1] Defendant also was convicted of unlawful use of a weapon with a firearm, ORS 166.220, ORS 161.610, which the trial court merged into the murder conviction.

[2] Defendant and the victim share a last name but are not related to each other.

Johnson had initiated the court proceeding, he was convicted of telephonic harassment of M. Johnson obtained court-ordered parenting time with R in September 2011. In the beginning of October 2011, Johnson and M had a disagreement about R that escalated into Johnson pushing M, which defendant and R witnessed. A few days later, M obtained a court restraining order against Johnson under the Family Abuse Prevention Act (FAPA), ORS 107.700 to 107.735. When the court issued the restraining order, it also ordered that Johnson could continue to have parenting time with R but that defendant would arrange that time so that M would not have to have any contact with Johnson. As a result of having to coordinate Johnson's parenting time, defendant and Johnson exchanged email and text messages with each other.

Over the next couple of months, defendant became increasingly emotional and fearful about Johnson's involvement in R's life. Defendant told Johnson through texts that Johnson was harming R, and he offered Johnson money to abandon Johnson's parental rights. During that time, Johnson obtained dismissal of M's FAPA restraining order, which led defendant to believe that the court did not appreciate the seriousness of the situation, and that defendant had to intervene to protect his family. In November 2011, defendant bought a handgun. At the end of December 2011, Johnson and M had a disagreement during Johnson's scheduled time with R, which resulted in a shoving match between Johnson and M and a call to the police. However, no charges were filed from that incident. That event caused defendant even more concern because he believed that Johnson was a threat to his family and that the courts would not protect them from Johnson.

After that incident, defendant and Johnson continued to exchange text messages, and defendant continued to express his belief that Johnson was a bad influence on R and to offer Johnson money to walk away from parenting R. Johnson refused to withdraw from R's life and, eventually, told defendant to stop contacting him.

Defendant bought a new car on January 23, 2012. Three days later, Johnson and his step-brother drove from

their home to a nearby grocery store. In his newly purchased, unlicensed car, defendant followed Johnson into the store's parking lot. As Johnson and his step-brother were walking to the store's entrance, defendant ran up behind Johnson and fired six bullets at Johnson, killing him.

At trial, defendant did not contest that he had killed Johnson. Rather, he sought to prove the affirmative defense of extreme emotional disturbance (EED), ORS 163.135.[3] EED is an affirmative defense to intentional murder, ORS 163.115(1)(a), that, if proven, reduces a homicide from murder to first-degree manslaughter. *See* ORS 163.135(1). An EED defense has three components: "(1) Did the defendant commit the homicide under the influence of an extreme emotional disturbance? (2) Was the disturbance the result of the defendant's own intentional, knowing, reckless, or criminally negligent act? (3) Was there a reasonable explanation for the disturbance?" *State v. Counts*, 311 Or 616, 623, 816 P2d 1157 (1991) (footnote omitted). Under *State v. Ott*, 297 Or 375, 686 P2d 1001 (1984), and *State v. Wille*, 317 Or 487, 858 P2d 128 (1993), a defendant is limited in the evidence that the defendant can introduce to prove the EED defense. Those cases draw a distinction between evidence of *personal* characteristics—like "age, sex, race, nationality, physical stature, and mental and physical handicaps"—which is relevant to the defense—and evidence of *personality* characteristics or traits, which is not. *Ott*, 297 Or at 396, 396 n 20; *Wille*, 317 Or at 499.

In support of his EED defense, defendant sought to have his expert testify at trial about four of defendant's characteristics: "(1) That defendant has no history of violence and is a pacifist; (2) that defendant avoids conflict and

[3] ORS 163.135(1) provides,

"It is an affirmative defense to murder for purposes of ORS 163.115 (1)(a) that the homicide was committed under the influence of extreme emotional disturbance if the disturbance is not the result of the person's own intentional, knowing, reckless or criminally negligent act and if there is a reasonable explanation for the disturbance. The reasonableness of the explanation for the disturbance must be determined from the standpoint of an ordinary person in the actor's situation under the circumstances that the actor reasonably believed them to be. Extreme emotional disturbance does not constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

values compromise; (3) that defendant's core values include protecting his family; and (4) that defendant does not share his feelings with others." Defendant recognized that *Ott* and *Wille* foreclosed introducing evidence of personality traits. In a motion *in limine* seeking admission of his expert's testimony, defendant conceded that "neither the defense expert nor the state expert on EED may testify about the defendant's 'personality traits,'" and that, under *Ott* and *Wille*, "expert testimony about defendant's personality traits is irrelevant to an EED claim and therefore inadmissible." Defendant contended, however, that the four characteristics that he sought to introduce were admissible *personal* characteristics and not inadmissible *personality* traits. Defendant noted that the Supreme Court in *Ott* had listed admissible personal characteristics, like age, sex, and race. Defendant then argued that the *Ott* list was not exhaustive and that the evidence that he sought to introduce was of the same type as that listed in *Ott* and, thus, relevant.

Defendant's expert testified at a pretrial hearing about the distinction between personal characteristics and personality traits. Defendant also argued that the proffered evidence about his character was necessary for a jury to understand what had happened with him—that is, the evidence was necessary to provide context for defendant's relationship with Johnson, M, and R, and the stress that defendant was under leading up to the homicide. He argued,

> "We're simply asking the Court not to artificially constrain us so that [defendant's expert] cannot give any meaningful opinion because he wouldn't be able to describe the human being [whom] he's evaluated and how those factors, those characteristics play out in this equation of how [defendant] subjectively saw this situation and what it meant to the man who is the pacifist, the man who is the conciliator one—ten days after he gets this court hearing, for example, to go buy a gun for the first time in his life. Not to mention what happens later.
>
> "We need to understand that history, those characteristics of the man to have a fair and honest picture for the fact-finders in this case.
>
> "* * * * *

> "But in this case, the issue is with respect to the nonviolence and the compromising, these qualities, these characteristics of this man are absolutely essential to this jury understanding how in the world you go from A to B in a short period of time. How does a person lose control? What is that emotional roller coaster that person is put on and why is it peculiar to this person that that can happen. That that person can snap. That person can break. How do you understand EED if you don't know the context in which the actions arise?"

Ultimately, the trial court refused to allow defendant's expert to testify about the four characteristics that defendant had identified, because it concluded that the list of personal characteristics in *Ott* was exhaustive and, hence, that the evidence that defendant sought to admit was not admissible under *Ott*. However, the trial court did permit defendant's expert to testify about the events leading up to the homicide, including the stress, fear, and emotions under which defendant was suffering.

On appeal, defendant assigns error to the trial court's exclusion of his expert's testimony about the four characteristics of defendant's personality that defendant sought to have admitted. However, defendant's argument has changed on appeal. Defendant has effectively abandoned his trial argument and concedes that the type of evidence that he sought to introduce at trial was evidence of his *personality traits* and was "clearly outside the scope of the personal characteristics deemed relevant to [the third prong of the EED defense] by *Ott* and *Wille*." Defendant now contends, however, that *Ott* and *Wille* foreclose evidence of personality traits only with respect to the third prong of the EED defense. He argues that, although the evidence that he sought to admit is inadmissible with respect to the third prong, it *is* relevant and admissible on the first prong of the EED defense, *viz.*, did defendant commit the act under the influence of an extreme emotional disturbance? The state responds that defendant's argument on appeal is not preserved. We agree.

Normally, we will not consider an unpreserved issue on appeal. *See, e.g.*, *State v. Tyler*, 213 Or App 109, 112, 159 P3d 1218, *rev den*, 343 Or 467 (2007). "To preserve an issue,

a party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted." *Id.* at 112-13 (internal quotation marks omitted). There are "distinctions between raising an *issue* at trial, identifying a *source* for a claimed position, and making a particular *argument*. The first ordinarily is essential, the second less so, the third least." *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) (citation omitted; emphasis in original).

As set out above, defendant did not preserve the legal issue that he now raises on appeal. Defendant now concedes that the legal premise for his trial argument—that evidence of his four characteristics was admissible because those characteristics were more akin to personal characteristics than personality traits—was incorrect under *Ott* and *Wille*. Instead, defendant raises an entirely different argument on appeal. He contends that the evidence that he sought to admit about his personality traits is not foreclosed by *Ott* and *Wille* because the evidence is relevant to the first prong of the EED defense, *viz.*, whether he committed the homicide under the influence of an extreme emotional disturbance. Defendant did not raise that argument below and, in fact, stated to the trial court, without exception, that *Ott* and *Wille* foreclosed the admission of evidence of personality traits with respect to the EED defense.

Defendant nonetheless contends that he preserved his argument on appeal because he argued to the trial court that evidence about his personality traits was relevant to enable the jury to understand the subjective nature of his actions, which he contends is evidence that is inherently and necessarily related to the first prong of the EED defense. We disagree with defendant's preservation argument. Defendant is correct that the first prong of the EED defense is purely subjective; however, the third prong also has a subjective component. *See Counts*, 311 Or at 623 (the first prong of the EED defense is "purely subjective"); *Ott*, 297 Or at 394 (the third prong of the EED defense is a blend of an objective test that "tak[es] into account the actor's situation," which is a subjective component). Because two prongs of the EED

defense have subjective components, an argument that evidence of personality is admissible to enable the jury to understand the defendant's subjective actions does not adequately raise the legal issue that defendant now seeks to advance on appeal on the admissibility of evidence under the first prong of the EED defense. In sum, the arguments made by defendant in the trial court and those raised on appeal implicate materially different legal issues. Accordingly, defendant did not preserve his argument, and, hence, we do not consider his first assignment of error.

We turn to defendant's second assignment of error, in which he contends that the trial court erred by admitting autopsy photographs. At trial, the state called a medical examiner to testify about Johnson's death, wounds, and autopsy. The state sought to admit 17 autopsy photographs that the medical examiner intended to use in his testimony to show the entrance and exit points of the six gunshot wounds that Johnson had suffered. One "internal" photograph showed the internal damage that a bullet had caused to Johnson's shoulder, including where the bullet had ultimately lodged inside his shoulder. The other sixteen photographs were external photographs of the wounds.

Defendant objected under OEC 403 to the admission of the autopsy photographs, arguing that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. Defendant offered to stipulate to whatever facts the state sought to establish through the medical examiner's testimony, including the number, location, and trajectory of the wounds, that the bullets had caused internal damage sufficient to cause Johnson's death, how far away Johnson was from the gun that had fired the bullets, and Johnson's time of death. Defendant argued that, because he was not contesting that he had caused Johnson's death and had proposed to stipulate to the facts that the state sought to prove with the photographs, the photographs had minimal probative value. Defendant also argued that the photographs were unfairly prejudicial to him because they were graphic and would be displayed to the jury for a considerable period of time. In an offer of proof, the medical examiner testified about the nature of the photographs and

his need to use them to demonstrate entry and exit wounds for the jury to understand his testimony.

The trial court especially focused its discussion at the hearing on the one internal photograph, asking whether the expert could testify without using that photograph. The state responded that the expert could do that if the "court's inclined to spare these jurors of the one interior photograph." The court ruled that the internal photograph would not be admitted, but the other photographs would be admitted because the court could not "force the state to stipulate to what [defendant] want[s it] to ***. I'm not going to force the state to do that."

OEC 403 provides that, "[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." In *Mayfield*, the Supreme Court described "an approved method of analysis that should guide trial courts in their decision-making under OEC 403." *State v. Borck*, 230 Or App 619, 637, 216 P3d 915, *modified*, 232 Or App 266, 221 P3d 749 (2009), *rev den*, 348 Or 291 (2010) (internal quotation marks omitted). *Mayfield* sets out four steps for a trial court to consider when ruling on an OEC 403 objection:

> "First, the trial judge should assess the proponent's need for the uncharged misconduct evidence. In other words, the judge should analyze the quantum of probative value of the evidence and consider the weight or strength of the evidence. In the second step the trial judge must determine how prejudicial the evidence is, to what extent the evidence may distract the jury from the central question whether the defendant committed the charged crime. The third step is the judicial process of balancing the prosecution's need for the evidence against the countervailing prejudicial danger of unfair prejudice, and the fourth step is for the judge to make his or her ruling to admit all the proponent's evidence, to exclude all the proponent's evidence or to admit only part of the evidence."

302 Or at 645. "*Mayfield* is a matter of substance, not form or litany." *State v. Brown*, 272 Or App 424, 433, 355 P3d 216, *rev den*, 358 Or 145 (2015). Even if a trial court does not

expressly follow the *Mayfield* analysis, the court does not err if "the totality of the attendant circumstances indicate that the court did engage in the conscious process [that *Mayfield* requires] of balancing the costs of the evidence against its benefits." *Borck*, 230 Or App at 638 (internal quotation marks omitted).

Defendant first contends that the record is insufficient to determine whether the trial court engaged in the four-step balancing process that *Mayfield* specifies.[4] We disagree. The court here engaged in the requisite balancing. First, as required by *Mayfield*, the court analyzed the probative value of the photographs. In considering that question, the court asked whether the medical examiner would be able to testify about the wounds without the interior photograph. Also, the trial court stated that it could not force the state to stipulate to facts. Inherent in those comments is the court's determination that the 16 external photographs had probative value, and that a stipulation would not have the same probative value as the photographs. Next, as required by *Mayfield*, the trial court analyzed the danger of unfair prejudice. As noted, the court focused on the one internal photograph and asked the medical examiner about that photograph. The court determined that the probative value of the internal photograph was substantially outweighed by the danger of unfair prejudice, which is what the third *Mayfield* requirement demands. The questions that court asked about the internal photograph, and its decision to exclude it, indicate that the court also engaged in the requisite balancing for the 16 external photographs when it decided to admit those photographs and determined that the danger of unfair prejudice from them did not outweigh their probative value. Thus, we conclude that the trial court engaged in the balancing process required under *Mayfield*.

Next, defendant contends that the trial court abused its discretion by admitting the photographs that it did. The

[4] The state argues that making an OEC 403 objection is not sufficient to preserve the *Mayfield* argument that defendant now makes, because defendant did not ask the trial court to make a more detailed record. We have rejected that argument in other cases. *See, e.g.*, *State v. Anderson*, 282 Or App 24, 28 n 3, 386 P3d 154 (2016), *rev allowed*, 361 Or 486 (2017). For the reasons stated in *Anderson*, we conclude that defendant preserved the argument that he now makes.

state responds, and we agree, that the trial court did not err because the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice to defendant. Simply because the photographs are graphic does not necessarily mean that their admission created a danger of unfair prejudice. *See State v. Sparks*, 336 Or 298, 312, 83 P3d 304, *cert den*, 543 US 893 (2004) ("[P]hotographs of a victim's body that are relevant are not unfairly prejudicial solely because they are graphic."); *State v. Barone*, 328 Or 68, 88, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000) ("Although the photographs in question were graphic, they could not be said to be remarkable in the context of a murder trial."). Similarly, even though defendant offered to stipulate to any facts that the state might use the photographs to establish, a stipulation does not have the effect of causing the evidence to have no probative value. *See, e.g.*, *Sparks*, 336 Or at 311-12 (stipulations about photographs are "not of equal evidentiary significance" as showing the photographs to the jury and "could not replace the demonstrative value of the photographic evidence"). We conclude that the trial court did not abuse its discretion by admitting the autopsy photographs of the wounds caused by defendant.

In sum, we conclude that defendant did not preserve his first assignment of error regarding the scope of expert testimony about the EED defense. Second, as the record demonstrates, the trial court did not abuse its discretion by admitting the autopsy photographs.

Affirmed.