

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

MERCEDES CELESTE ALVARADO,
Defendant-Appellant.

Marion County Circuit Court
14C46243; A159997

Dale Penn, Judge.

Argued and submitted July 25, 2017.

David O. Ferry, Deputy Public Defender, argued the cause for appellant. With him on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Shannon T. Reel, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Egan, Presiding Judge, and DeHoog, Judge, and James, Judge.

PER CURIAM

Reversed and remanded.

PER CURIAM

Defendant appeals from a judgment of conviction of manslaughter in the first degree, ORS 163.118. On appeal, she assigns error to the trial court's admission of a video depicting her and her boyfriend, Elliott, interacting with her two children, one of whom is the decedent. The video depicts Elliott prompting the children to use racial epithets and otherwise acting domineering. Defendant argues that the video is not relevant under OEC 401, or, alternatively, that the trial court erred in not conducting the balancing required under OEC 403, as required by *State v. Mayfield*, 302 Or 631, 733 P2d 438 (1987). We conclude that the video satisfies the minimal standard for relevance established by OEC 401. However, as explained below, we agree with defendant's second argument, that the trial court failed to adequately demonstrate that it admitted the video after consciously engaging in the OEC 403 balancing process required by *Mayfield*. Consequently, the court erred as a matter of law. We also conclude that the error was not harmless. Accordingly, we reverse and remand.

Here, the state concedes that both parties asked the trial court to conduct OEC 403 balancing. Despite that request, however, the trial court admitted the video with the following explanation:

“And I think as I have now heard the evidence to this point in the trial, I would agree with the arguments presented by the State that this Exhibit Number 111 would be relevant and would be appropriate on mental state issues of the defendant that the jury must decide in making a decision in this case.

“So I do agree that 111 is relevant, for all the reasons argued by the State, and particularly this issue of mental state of the defendant as it relates to the charges presently before the Court. So I will authorize the admission of 111.”

In *State v. Anderson*, 282 Or App 24, 26, 386 P3d 154, *rev allowed*, 361 Or 486 (2016), we reversed a trial court that had stated only “it's relevant” when it admitted evidence over an OEC 403 objection. There, we noted that “nothing about the statement ‘it's relevant’ implies an assessment of the quantum of probative value of the evidence, let

alone an assessment of the extent of potential prejudice and a balancing of the competing considerations.” *Id.* at 31-32. As we said, rather, “it implies that the court’s analysis never reached beyond the threshold question of ‘relevance.’” *Id.* at 32.

Here, the trial court’s rationale, as stated on the record, fails to show an assessment of the quantum of probative value of the evidence, or an assessment of prejudice, or a balancing of competing considerations. As in *Anderson*, the trial court’s explanation for admission of the video did not proceed beyond the threshold question of relevance.

Further, we cannot conclude that introduction of the video had “little likelihood” of affecting the verdict. [*State v. Davis*](#), 336 Or 19, 32, 77 P3d 1111 (2003). The state’s theory at trial was that defendant knew of the control and abuse Elliott perpetrated on the children, and effectively acquiesced to that abuse. In light of that theory, we cannot conclude that the video did not have a “possible influence *** on the verdict rendered.” *Id.*

Reversed and remanded.