

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AARON SCOTT ALTABEF,
Defendant-Appellant.

Marion County Circuit Court
13C41985; A156547

On remand from the Oregon Supreme Court, *State v. Altabef*, 361 Or 885, 403 P3d 768 (2017).

Thomas M. Hart, Judge.

Submitted on remand October 11, 2017.

Jesse Wm. Barton filed the opening, reply, and first supplemental briefs for appellant. On the second supplemental brief was Mark J. Geiger.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Rolf C. Moan, Assistant Attorney General, filed the answering brief for respondent. On the supplemental briefs were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Rolf C. Moan, Assistant Attorney General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

DeVORE, J.

Reversed and remanded as to Counts 2 and 4; otherwise affirmed.

DeVORE, J.

This case comes to us on remand from the Supreme Court. *State v. Altabef*, 361 Or 885, 403 P3d 768 (2017). In our initial decision, we held that the trial court committed reversible error as to the counts on which defendant was convicted by admitting evidence of defendant’s previous conduct toward the victim without first balancing the probative value of that evidence against its risk of unfair prejudice under OEC 403, and we remanded for a new trial on those counts. *State v. Altabef*, 279 Or App 268, 379 P3d 755 (2016). We rejected the remainder of defendant’s assignments of error without written discussion. *Id.* at 269. After our decision, the Supreme Court decided *State v. Baughman*, 361 Or 386, 393 P3d 1132 (2017), *State v. Mazziotti*, 361 Or 370, 393 P3d 235 (2017), and *State v. Zavala*, 361 Or 377, 393 P3d 230 (2017), which addressed “various issues related to OEC 403 balancing, including the analysis of harmless error in that context and whether the correct remedy for such an error is a new trial or a more limited remand.” *State v. Holt*, 292 Or App 826, 828, ___ P3d ___ (2018). The Supreme Court vacated our decision and remanded for reconsideration in light of *Zavala*, *Mazziotti*, and *Baughman*. *Altabef*, 361 Or 885.

On remand, we again conclude that the trial court committed reversible error in failing to conduct OEC 403 balancing. Defendant concedes, and we agree, that the appropriate remedy is the type of limited remand described in *Baughman*. The state, however, contends that a remand for balancing is unnecessary because the trial court’s failure to have done so is harmless error. We reject that contention for the reasons that follow.

Defendant was charged with four sexual crimes for conduct against his niece, J. We summarized the relevant facts in our first opinion:

“J alleged that defendant sexually abused her three times between November 2012 and January 2013. The charges concern the latter two incidents. J said that the first incident happened at her grandparents’ house in Snohomish County, Washington, while she and her family visited over Thanksgiving. The second incident happened during the

car ride back home from her grandparents' house, while defendant shared the backseat with J and her younger sister. The third incident happened at her parents' house in Oregon while defendant babysat for J and her sister."

279 Or App at 269.

Before trial, defendant moved to exclude evidence of the first incident and evidence of any conduct during the car ride back from Washington that occurred outside of Oregon. Defendant argued that the evidence was irrelevant or relevant only to show propensity, and defendant requested that the court conduct OEC 403 balancing before admitting the evidence. The state argued that such evidence was relevant for nonpropensity reasons under OEC 404(3) "to explain the victim's disclosure, to place the various incidents in context (including the incident that occurred at the victim's residence), to explain the defendant's opportunity to commit the crime and accessibility [*sic*] to the victim, and to explain the defendant's predisposition toward the victim." *Id.* at 270. The trial court held that the evidence was relevant because "it is important to explain how this all came about" and admitted it without conducting OEC 403 balancing. *Id.* at 270 & n 3.

We held that the trial court erred in failing to balance the probative value of the evidence against its prejudicial effect before admitting the evidence. *Id.* at 273. Because we could not conclude that the error was harmless, we reversed and remanded for a new trial.¹ *Id.*

As noted above, the Supreme Court vacated and remanded this case to us for reconsideration in light of its decisions in *Baughman*, *Mazziotti*, and *Zavala*. In *Holt*, a case similar to this one that was remanded for the same reason, we recently summarized the holdings of those cases:

"In *Baughman*, the court held that OEC 404(4) requires trial courts to conduct balancing under OEC 403 rather than a 'narrower, "due process" standard for evaluating

¹ In keeping with our case law at the time, we applied federal harmless error analysis and held that the error was not harmless beyond a reasonable doubt. *Id.*; see *Holt*, 292 Or App at 832 (explaining that, before the Supreme Court decided *Baughman*, *Mazziotti*, and *Zavala*, we applied federal harmless error analysis to failures to balance and erroneous balancing under OEC 403).

the admissibility of evidence.’ 361 Or at 399. The court further determined that, in that case, the trial court erred in the manner in which it had conducted the required OEC 403 balancing and that the error was prejudicial. *Id.* at 407-08, 408 n 11 (concluding that the error was prejudicial after applying the state law harmless error standard rather than the federal harmless error standard that this court had applied). Finally, the court addressed the appropriate remedy for the type of OEC 403 balancing error at issue, concluding that a more limited remand is required, whereby the trial court will ‘determine, on a case-by-case basis, whether, after conducting a correct analysis under OEC 404 and OEC 403, other acts evidence should again be received and whether a new trial is required or appropriate.’ 361 Or at 410.

“In *Mazziotti*, the court similarly rejected the state’s argument that ‘traditional’ OEC 403 balancing was not required, and it held that the trial court in that case erred by failing to conduct the necessary OEC 403 balancing. 361 Or at 374-75. And, as it had in *Baughman*, the court explained that the appropriate remedy was a remand so that the trial court could decide, in the first instance, whether the error should result in a retrial. *Mazziotti*, 361 Or at 376.

“Both *Mazziotti* and *Baughman* involved preserved claims of error with regard to the trial court’s failure to conduct OEC 403 balancing. In the third case of the trilogy, *Zavala*, the question of preservation was in dispute. But rather than work through those preservation issues, which the court described as a ‘briar patch,’ it affirmed the trial court’s judgment—and reversed our decision—on the ground that any error was harmless. 361 Or at 384. In reaching that outcome, the court explained that the balancing error in *Zavala* did not involve improperly characterized *propensity* evidence, as had been the case in *Baughman*, but had been the failure to consider the probative value of the evidence for a *nonpropensity* purpose—the defendant’s sexual predisposition toward the victim—which is generally admissible unless the particular facts demonstrate a risk of prejudice that substantially outweighs its probative value. *Zavala*, 361 Or at 384. Because the defendant had not advanced ‘a meritorious argument that could persuade a trial court to exclude the challenged evidence,’ the court held that ‘the trial court’s failure to conduct balancing

under OEC 403 did not significantly affect its decision to admit that evidence' and, consequently, 'that there was little likelihood that the trial court's error affected its judgment of conviction.' *Id.* at 385."

292 Or App at 830-31 (emphasis in original).

In supplemental briefing on remand, the state contends that, in this case, as in *Zavala*, the trial court's erroneous failure to conduct OEC 403 balancing was harmless because, in the state's view, the trial court did, or could have, admitted the evidence under one or more of the nonpropensity theories urged at trial.

In *Zavala*, the trial court admitted the disputed evidence for a single nonpropensity reason: to show the defendant's sexual predisposition for the victim under *State v. McKay*, 309 Or 305, 787 P2d 479 (1990). 361 Or at 379. The defendant did not request OEC 403 balancing in the trial court and, consequently, never addressed the risk of unfair prejudice from the evidence. *Id.* at 379, 385. Again before this court and the Supreme Court, the only purpose for the evidence that the parties addressed was sexual predisposition under *McKay*, and again the defendant made no fact-specific argument about how the risk of unfair prejudice from the evidence outweighed its probative value under *McKay*. *Id.* at 385. In the absence of such an argument, the court had no ground on which to conclude that the trial court's failure to conduct OEC 403 balancing significantly affected its decision to admit the disputed evidence. *Id.*

We understand the court's holding in *Zavala* to have resulted from two related factors: the simplicity of the trial court's ruling—that the evidence was probative of the defendant's sexual predisposition for the victim under *McKay*—and the defendant's failure, before the trial court or on appeal, to identify any cogent reason that the trial court might conclude that the risk of unfair prejudice substantially outweighed that probative value. This case is not like *Zavala*. Here, defendant had several theories of relevance to address and made fact-specific arguments about the relative weight of the potential probative value of the evidence on those theories as compared to the risk of unfair prejudice.

Mazziotti shows that the mere fact that evidence may be relevant for a nonpropensity purpose does not mean that a trial court's failure to conduct balancing is harmless error. There, the defendant was charged with failure to perform the duties of a driver, reckless driving, and reckless endangerment, and the trial court admitted evidence of the defendant's prior acts, and resulting convictions, after the state argued that they were probative of "motive and knowledge" and the defendant's "criminal intent" and "recklessness." 361 Or at 372-73. The trial court declined the defendant's request to conduct OEC 403 balancing before admitting the evidence. *Id.* at 373. The Supreme Court held that OEC 403 balancing was required. *Id.* at 374. In the course of its analysis, the court noted that at least some of the "evidence proffered by the state undoubtedly was relevant for a nonpropensity purpose." *Id.* at 376. Nevertheless, the court reversed and remanded for the trial court to evaluate the purposes for which the proffered evidence was relevant and conduct balancing. *Id.* Thus, not every failure to conduct balancing before admitting nonpropensity evidence is harmless.

In this case, the trial court admitted the evidence for a nebulous combination of reasons, and defendant contended below and on appeal that the evidence should not be admitted for any of those reasons. Under those circumstances, we conclude that the failure to conduct balancing was not harmless. Consequently, we reverse and remand for the trial court to exercise its discretion to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Baughman*, 361 Or at 410-11 (describing scope of remand).

Reversed and remanded as to Counts 2 and 4; otherwise affirmed.