IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
*Plaintiff-Respondent,*
*v.*
WAYNE DOUGLAS ROBERTS,
*Defendant-Appellant.*

Multnomah County Circuit Court
14CR31903; A159647

Edward J. Jones, Judge.

Argued and submitted June 29, 2017.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. With her on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

David B. Thompson, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Garrett, Presiding Judge, and Lagesen, Judge, and Edmonds, Senior Judge.

GARRETT, P. J.

Reversed and remanded.

Edmonds, S. J., dissenting.

**GARRETT, P. J.**

Defendant appeals a judgment of conviction for assault in the first degree, ORS 163.185. On appeal, defendant raises four assignments of error. We reject the third and fourth assignments without discussion. In his first assignment of error, defendant argues that the trial court erred in denying his motion to suppress incriminating statements made during a police interview after, according to defendant, he invoked his constitutional right to counsel. In his second assignment of error, defendant argues that the trial court should have granted his motion *in limine* to exclude evidence that he used a racial epithet to describe a black person. For the reasons explained below, we reject defendant's first assignment of error because we conclude that he never invoked his right to counsel. With respect to his second assignment, we conclude that the trial court erred, that the error was not harmless, and that a new trial is necessary. Accordingly, we reverse and remand for a new trial.

Police officers arrested defendant as a potential suspect in a stabbing at a Portland MAX Station. Detectives Hogan and Crate interviewed defendant at the police station early in the morning. Defendant was asleep when they entered the room. After brief introductions, Hogan read defendant his *Miranda* rights, and then asked if defendant had any questions about them. Defendant responded that he was intoxicated, homeless, and did not know what time it was, where he was, or how he had gotten there. Hogan told defendant the time and explained where he was, and began re-reading his *Miranda* rights. The following exchange ensued:

> "DETECTIVE HOGAN: Okay. You have the right to talk to a lawyer and have him present when you're being questioned. If you want to have a lawyer, you can have a lawyer present, okay?
>
> "[DEFENDANT]: *Do I need one?*
>
> "DETECTIVE HOGAN: I can't make that decision for you.
>
> "DETECTIVE CRATE: We're just going to be talking to you about stuff that happened tonight, okay, but we need

> to make sure you understand your rights first before going through them. So once you understand those, we'll explain everything that's going on, okay?
>
> "[DEFENDANT]: Okay.
>
> "DETECTIVE HOGAN: If you cannot afford to hire a lawyer, one will be appointed to represent you at no expense."

(Emphasis added.) Neither defendant nor the detectives further discussed defendant's right to an attorney. A few moments later, the detectives told defendant that they were investigating a fight at a MAX Station, and asked:

> "DETECTIVE CRATE: Mr. Roberts, you know that Tri-Met and everything has excellent video on its platforms, right?
>
> "[DEFENDANT]: I have no idea about that, but I was on that platform and this dude punched me in the face, so I punched him and I walked away.
>
> "DETECTIVE HOGAN: Okay.
>
> "[DEFENDANT]: *They was probably doing some nigger shit*[1] *there*. This dude hit me."

(Emphases added.) The detectives later asked about what defendant meant when he said either "nigger shit" or "nigger chick," and learned that defendant was referring to a black woman who witnessed the fight at the MAX Station. The police never discovered her identity, and she had no further significance in the case. After that exchange, defendant made several incriminating statements.

Defendant moved to suppress all statements from the interview, arguing that the police failed to obtain a valid *Miranda* waiver of his right to remain silent. Defendant's written motion did not make any argument concerning the right to counsel. During arguments on the motion, the court watched a video of the interview and asked the state if defendant's question "Do I need one?" was at least an equivocal invocation of the right to counsel. An extended discussion followed, primarily between the court and state, about what

[1] It is unclear from the record whether defendant actually said "shit" or "chick."

constitutes an equivocal invocation. Both parties cited case law. As the state points out on appeal, however, defendant's counsel never argued that the question "Do I need one?" constituted an equivocal invocation, and never asserted that the trial court did or would err by ruling otherwise. The trial court ultimately determined that defendant had made no invocation, and, even if he had made an equivocal invocation, the police properly clarified his intent before proceeding.

Next, defendant moved *in limine* to exclude all references in the police interview to the racial epithet, asserting that his use of the word had nothing to do with the case and would cause him unfair prejudice. The court denied the motion, stating:

> "THE COURT: The bottom line is, you know, if we start sanitizing everybody's statements—
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> "[DEFENSE COUNSEL]: Well, it's just the one.
>
> "THE COURT: —where does that end, you know. So, no, I'm not going to ask the State or anybody else to clean up poor word choices that either he or the officers made. You know, it's a path that would lead to nothing but disaster. So, denied."

At trial, defendant relied on a self-defense theory. The state played a portion of the police interview video in which defendant used the racial slur once and the detectives quoted it twice more to clarify what defendant was talking about. The state used the interview video to attack defendant's credibility by highlighting inconsistencies between his interview statements and other contrary evidence. The state also presented one eyewitness of the fight and played a video of Tri-Met security camera footage depicting the stabbing itself; both parties argued extensively over whether the witness testimony and footage proved or disproved defendant's self-defense theory. The jury found defendant guilty by a 10-2 verdict.

On appeal, defendant first argues that the trial court should have granted his motion to suppress on the ground that his question near the beginning of the police interview—"Do I need one?"—was an equivocal invocation

of his right to counsel, which the police failed to adequately clarify.[2] The state responds that defendant's argument is not preserved, and, in all events, fails on the merits because defendant's question did not constitute an invocation of any rights.

Second, defendant contends that the trial court erred in denying his motion *in limine* under OEC 403 to exclude evidence of defendant's use of the racial epithet, arguing that the evidence was highly prejudicial and devoid of probative value. The state responds that any error in admitting the evidence was harmless, but that, if it was not harmless, then a limited remand is appropriate under *State v. Baughman*, 361 Or 386, 393 P3d 1132 (2017).[3]

We begin with the invocation issue. We review for legal error whether defendant's question was an invocation of his right to counsel under Article I, section 12, of the Oregon Constitution, and defer to the trial court's findings of facts if they are supported by the evidence in the record. *State v. Sanelle*, 287 Or App 611, 613, 404 P3d 992 (2017), *rev den*, 362 Or 482 (2018). We limit our analysis to the record developed at the motion hearing. *State v. Pitt*, 352 Or 566, 575, 293 P3d 1002 (2012).

At the outset, we consider the state's argument that defendant failed to preserve this issue. The state's position, as we understand it, is a narrow one. Conceding that the trial court raised the equivocal invocation issue *sua sponte*, and further conceding that the issue was extensively discussed, briefed, and ruled on, the state points to the fact that *defendant* never took an explicit position on that issue below, but focused instead on the distinct issue of the right to remain silent. Put more succinctly, the state argues that defendant never put the trial court on notice that defendant

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[2] Defendant's right-to-counsel argument is made under Article I, section 12, of the Oregon Constitution. Defendant makes no argument under the United States Constitution.

[3] We reject the state's contention that defendant failed to preserve his OEC 403 argument because his objection below primarily focused on relevance and spoke little of prejudice. While arguing that the evidence in question had "nothing to do with this case," defendant never explicitly narrowed his objection to relevance alone, and further argued that the evidence was "extremely prejudicial." We conclude that defendant adequately preserved his OEC 403 argument.

believed that it would be error for the court to rule the way that it did, and that defendant may not make that argument for the first time on appeal.

The purposes of the preservation requirement are to (1) apprise the trial court of a party's position such that it can consider and rule on it, (2) ensure fairness to the opposing party by avoiding surprise and allowing that party to address all issues raised, and (3) foster full development of the record. *Peeples v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008) (adding that the "touchstone" of the pragmatic basis for preservation is procedural fairness to the parties and the court).

The record reflects that the invocation issue was extensively discussed, although defendant did little to advance that discussion. As we understand the state's argument, the state does not dispute that the trial court had the opportunity to—and did—"consider and rule" on the invocation issue; nor does the state contend that the state did not have an adequate opportunity to argue the issue or that the record would have developed differently if defendant had been a more active participant in the dialogue.

The state's argument is limited to the fact that defendant did not expressly assert "error" by the trial court. In our view, that argument is foreclosed by our cases that have deemed issues preserved, despite a party's own failure to raise them in the trial court, in circumstances where the issues were nonetheless raised and argued and the purposes of the preservation requirement appear to have been served. For example, in *State v. Smith*, 252 Or App 707, 712, 288 P3d 974 (2012), *rev den*, 353 Or 429 (2013), we held that the defendant's argument on appeal was preserved, even though it had not been made below, where "the trial court raised the issue *sua sponte*—in effect recharacterizing the issue and defendant's argument in order to address the theft by receiving charge more specifically—and the state responded at length before the trial court specifically *ruled* on that issue." *Id.* at 712 (emphasis in original). We specifically reasoned that "there is no indication that development of the record was impaired because the court, rather than defendant, raised the issue." *Id.* at 711-15. *See also State v. Spears*,

223 Or App 675, 680-81, 196 P3d 1037 (2008) (concluding that defendant's argument on appeal was preserved where the trial court raised the issue *sua sponte* after defendant moved for judgment of acquittal); *State ex rel Juv. Dept. v. Tyree*, 177 Or App 187, 190, 33 P3d 729 (2001) ("In determining whether an assignment of error is preserved, the most significant question is whether the trial court had a realistic opportunity to make the right decision.").

The foregoing cases stand for the proposition that a party's failure to assert error or object below is not dispositive of the preservation analysis, at least in circumstances where the issue was clearly raised and ruled upon, where the opposing party had an opportunity to be heard on the issue, and where there is no reason to believe that the record before the trial court would have developed materially differently if the appellant had been more vocal. Those circumstances exist here, and the state has not argued that the cases cited above are distinguishable or were incorrectly decided. Accordingly, we conclude that the invocation-of-counsel issue was preserved for our review, and we proceed to the merits.

The issue is whether, as defendant argues, the circumstances of the police interview would have led a reasonable officer to understand that defendant meant to invoke his right to counsel under Article I, section 12, when he asked the detectives whether he needed a lawyer. Although he acknowledges that his purported invocation—"Do I need one?"—was framed as a question instead of an assertion, defendant argues that that fact is not dispositive.

The right to have an attorney present during a custodial police interrogation is derived from a person's right against self-incrimination under Article I, section 12. *State v. Scott*, 343 Or 195, 200, 166 P3d 528 (2007). A suspect invokes the right to counsel by making a statement or request that a reasonable officer would understand as an invocation. *Sanelle*, 287 Or App at 624; *State v. Alarcon*, 259 Or App 462, 466, 314 P3d 364 (2013), *rev den*, 354 Or 838 (2014). We review whether defendant invoked his rights by considering his statement "in the context of the totality of circumstances existing at the time of and preceding their

utterance" to determine whether a reasonable officer would understand that defendant was invoking his rights. *State v. Nichols*, 361 Or 101, 108-09, 390 P3d 1001 (2017) (quoting *State v. Avila-Nava*, 356 Or 600, 613, 341 P3d 714 (2014)).

Invocations of one's Article I, section 12, rights may take one of two forms: unequivocal or equivocal. *State v. Schrepfer*, 288 Or App 429, 436, 406 P3d 1098 (2017). An invocation is unequivocal when the suspect expresses a clear intent to invoke his or her rights. *See Nichols*, 361 Or at 110 (noting that unequivocal invocations typically involve a statement of "the desired action or view relating to the right in question (won't answer questions, don't want to talk, need a lawyer)"); *State v. Brooke*, 276 Or App 885, 892, 369 P3d 1205 (2016) ("[A] mere reference to an attorney does not necessarily constitute an unequivocal invocation of the right to counsel; however, where a suspect expresses a clear desire to speak with an attorney, that suspect has invoked that right."). If a suspect in police custody unequivocally invokes the right to an attorney, the interrogation must immediately cease. *State v. Boyd*, 360 Or 302, 313, 380 P3d 941 (2016); *State v. Meade*, 327 Or 335, 339, 963 P2d 656 (1998).

An invocation is equivocal, in contrast, when the suspect's statement or request is subject to more than one reasonable interpretation, one of which is that he or she is invoking the right to counsel. *See Avila-Nava*, 356 Or at 609 (providing that, when a defendant's invocation is "ambiguous or equivocal," the police must clarify "what the person meant"); *State v. Dahlen*, 209 Or App 110, 118, 146 P3d 359, *modified on recons*, 210 Or App 362, 149 P3d 1234 (2006) (observing that the phrase "will I have an opportunity to call an attorney" was ambiguous because it "may express a present desire to do something, or it may simply be intended to explore one's options" (referencing *State v. Charboneau*, 323 Or 38, 913 P2d 308 (1996)); *see also Meade*, 327 Or at 348 n 10 (Durham, J., dissenting) (observing that the case law surrounding invocations of the right to counsel tends to use "ambiguous" and "equivocal" interchangeably, both meaning that the listener could reasonably interpret two or more meanings from a single statement) (quoting Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259, 299

n 203 (1993))). If a suspect's request for an attorney is equivocal, it places additional obligations on police before they may continue the interrogation. Specifically, they must ask neutral, follow-up questions to clarify the suspect's intent. *Avila-Nava*, 356 Or at 609 (citing *Charboneau*, 323 Or at 54); *Meade*, 327 Or at 339. Any question not reasonably designed to clarify the equivocal nature of the statement is impermissible. *Schrepfer*, 288 Or App at 436.

Here, defendant does not contend that he unequivocally invoked his rights. Therefore, we consider whether his question "Do I need one?" was an equivocal invocation by examining the totality of the circumstances to determine whether a reasonable officer in Hogan's and Crate's position would have understood *at least one* plausible meaning of that question to be that defendant *was invoking* the right to counsel. If so, the request required clarification.

We conclude that defendant's question was not an equivocal invocation because it is not reasonably susceptible to an interpretation that defendant *was invoking* his right to counsel. Rather, the only reasonable interpretation of defendant's question is that he had not yet formed any intent to invoke his right, and was seeking additional information that the detectives were not required to provide. *See Dahlen*, 209 Or App at 118 (suggesting that a defendant's question that is only "intended to explore one's options" reflects insufficient intent to invoke the right to counsel); *U.S. v. Ogbuehi*, 18 F3d 807, 814 (9th Cir 1994) (concluding that the defendant's question, "Do I need a lawyer?" did "not rise to the level of an 'equivocal request,'" but was instead merely a request for advice).

Defendant cites other cases in which a suspect was determined to have made an invocation of the right to counsel by putting questions to the police. In each of those cases, however, the question was susceptible to a plausible interpretation that the defendant was, in fact, expressing a present desire to invoke his or her rights. *See, e.g.*, *Brooke*, 276 Or App at 894 (holding that the question "Can I call my mom? She's a lawyer" was an unequivocal request for an attorney, in part because it expressed "a present desire to do the thing asked about" (quoting *Dahlen*, 209 Or App at 118)); *Alarcon*,

259 Or App at 468 (holding that the defendant's question about "when she could call a lawyer" was at least an equivocal request for counsel, in part because it expressed "a present desire" to do the thing asked about (quoting *Dahlen*, 209 Or App at 118)); *Dahlen*, 209 Or App at 118 (holding that the question "When can I call an attorney?" was an unequivocal request for counsel, in part because the phrasing "when can I" "expresses a present desire to do the thing asked about," like the phrase from *Charboneau*, 323 Or at 55, "[w]ill I have an opportunity to call an attorney tonight?"). *Cf., e.g.*, *State v. Montez*, 309 Or 564, 572, 789 P2d 1352 (1990) (concluding that the phrase "I think I need a lawyer" was, at most, an equivocal invocation of the right to counsel); *State v. Gable*, 127 Or App 320, 332, 873 P2d 351 (1994) (holding that a warning to invoke the right to counsel at a later point if the police continued to accuse him of murder did not constitute even an equivocal invocation of the right to counsel).[4]

Here, in contrast, there is no reasonable interpretation of defendant's question in which defendant was expressing a "present desire" to invoke his right to counsel. We therefore agree with the trial court that defendant's question did not amount to even an equivocal invocation of the right to counsel, and we affirm on the first assignment of error.

We turn to defendant's second assignment of error. Defendant argues that the trial court should have excluded, under OEC 403, portions of the police interview video containing defendant's use of a racial epithet. The state does not make a merits argument that the court properly admitted the evidence under OEC 403, but instead argues that the trial court's failure to develop a record of its balancing analysis necessitates a limited remand under *Baughman* to allow the trial court an opportunity to develop that record. 361 Or at 410-11 (holding that, when the trial court fails

[4] Defendant argues that, because he was intoxicated and disoriented at the time, the officers should have understood his question as simply an inarticulate or nonassertive invocation of his rights. We are unconvinced that, even given defendant's condition at the time, a reasonable officer would have understood the question "do I need a lawyer?" to actually mean "I want a lawyer." *Cf. Dahlen*, 209 Or App at 118 ("A reasonable officer would interpret defendant's words consistently with their ordinary meanings and would not understand the defendant to say something he did not actually say.").

to make an appropriate analysis under OEC 404 and OEC 403, the proper remedy is to allow the trial court to correctly conduct that analysis). Alternatively, the state posits that any error in admitting the evidence was harmless.

We agree with the state that the trial court failed to make a record of its OEC 403 balancing analysis. Under OEC 403, trial courts must determine whether the probative value of the evidence to which a party objects 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." A trial court "errs as a matter of law if it fails to conduct OEC 403 balancing when requested to do so or if it fails to make a record that reflects that the court has conducted the requested OEC 403 balancing." *State v. Garcia-Rocio*, 286 Or App 136, 142, 399 P3d 1009 (2017).[5]

Here, the trial court's only record of its reasoning for admitting the evidence was the following:

> "The bottom line is, you know, if we start sanitizing everybody's statements— *** where does that end[?] *** You know, it's a path that would lead to nothing but disaster."

We are unable to discern from that record whether the trial court consciously conducted OEC 403 balancing, and, if it did, how it weighed the evidence's probative value against the danger of unfair prejudice. The court accordingly erred in failing to make a record of its OEC 403 balancing.

Although, in these situations, we typically remand to the trial court for the limited purpose of allowing it to develop the necessary record, *Baughman*, 361 Or at 410, we need not do so here. Limited remands are necessary when the reviewing court is "not in a position to know whether the

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[5] Although a trial court need not expressly follow them, a trial court's record must establish that it considered the four matters prescribed in *State v. Mayfield*, 302 Or 631, 645, 733 P2d 438 (1987):

> "(1) assess the proponent's need for the proffered evidence; (2) determine how prejudicial the evidence is; (3) balance the proponent's need for the evidence against the danger of unfair prejudice; and (4) make a ruling to admit all, part, or none of the proffered evidence."

*State v. Borck*, 230 Or App 619, 636, 216 P3d 915, *adh'd to as modified on recons*, 232 Or App 266, 221 P3d 749 (2009), *rev den*, 348 Or 291 (2010) (internal quotation marks omitted).

trial court will exclude or admit" the evidence at issue when reconsidering the parties' new arguments on remand. *Id.* But where a trial court has no option other than to exclude the evidence, *Baughman*'s rule is inapplicable. This court has foregone limited remands in OEC 403 balancing cases that present no discretionary options for the trial court, and in which exclusion of the evidence in question is required. *See, e.g.*, *State v. Parker*, 285 Or App 777, 784-87, 398 P3d 437 (2017) (reversing the trial court's admission of evidence that was devoid of probative value and was unfairly prejudicial to defendant, and remanding for a new trial, notwithstanding the lack of a record regarding the trial court's OEC 403 balancing rationale).

Even though trial courts generally have discretion in making balancing decisions under OEC 403, *State v. Shaw*, 338 Or 586, 614-15, 113 P3d 898 (2005), they have no discretion where a question presents only one legally permissible outcome. *See State v. Rogers*, 330 Or 282, 312, 4 P3d 1261 (2000) ("If there is only one legally correct outcome, then 'discretion' is an inapplicable concept."). And here, as we explain below, there is no legally permissible outcome but exclusion.

For one, the evidence here is utterly devoid of any probative value, and the state does not argue otherwise. *Compare State v. Lipka*, 289 Or App 829, 833, ___ P3d ___ (2018) ("Defendant's use of the racial slur was indicative of his state of mind and would permit an inference of his attitude toward law enforcement as a whole, which suggested a motive for his actions."). Defendant's slur referred, in passing, to someone whom the police never identified, and who was not relevant to the issues in the case. Both defendant and the victim were white, and the state did not rely on a race-based theory in its case at trial.

Second, we have already recognized that the potential for unfair prejudice arising from this type of evidence is "manifest," *Bray v. American Property Management Corp.*, 164 Or App 134, 144, 988 P2d 933 (1999), and the word's inflammatory quality invites jurors to convict defendant for reasons unrelated to the evidence. *See State v. Lyons*, 324 Or 256, 280, 924 P2d 802 (1996) (defining "unfair prejudice"

to mean "an undue tendency to suggest a decision on an improper basis, commonly, although not always, an emotional one"). Although that does not mean that it would be an abuse of discretion to admit evidence of racial epithets in all circumstances, *see, e.g.*, *Lipka*, 289 Or App at 835, 835 n 5 (acknowledging *Bray* but nevertheless concluding that the trial court did not abuse its discretion in admitting evidence of a racial epithet), we are persuaded that it is true here, on this record. *Cf. Bray*, 164 Or App at 143-44 (trial court did not abuse its discretion in excluding evidence of racial slurs where the potential for undue prejudice was "manifest" and the "probative value of *** [the] racial epithets was insubstantial").

Third, both at trial and on appeal, the state has made no merits argument that the trial court *could*, in the exercise of its sound discretion, conclude that the danger of unfair prejudice did not "substantially outweigh" the probative value of the evidence. In the absence of any such argument, we are persuaded that the interests of judicial efficiency would not be served by a *Baughman* remand. Instead, we conclude, under these circumstances, that OEC 403 required exclusion of the evidence.[6] *See Lipka*, 289 Or App at 834 ("[T]here may be circumstances *** in which the danger of unfair prejudice outweighs the probative value derived from evidence of the use of a slur ***."); *Parker*, 285 Or App at 786-87 ("Where a defendant has objected to the admission of a prejudicial piece of evidence and offered a nonprejudicial evidentiary equivalent, the Supreme Court has stated that in such circumstances 'the prejudicial effect of the evidence would outweigh its probative value and it is not admissible.'" (quoting *State v. Zimmerlee*, 261 Or 49, 54, 492 P2d 795 (1972))).

Finally, the trial court's error was not harmless. Error is harmless when there is "little likelihood that the error affected the verdict." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). Erroneously admitted evidence is more

[6] A *Baughman* remand may well be the appropriate disposition in other cases involving evidence such as this. Our conclusion here is heavily based on the undisputed lack of *any* probative value to the evidence, and the fact that the state has identified no permissible basis on which the trial court could decide on remand to admit the evidence.

likely to affect the verdict where it is qualitatively different than the rest of the admitted evidence. *State v. Maiden*, 222 Or App 9, 13, 191 P3d 803 (2008), *rev den*, 345 Or 618 (2009).

The racial epithet that defendant used is highly offensive and inflammatory. *See Lipka*, 289 Or App at 834; *see also Swinton v. Potomac Corp.*, 270 F3d 794, 817 (9th Cir 2001) ("'["Nigger" is] perhaps the most offensive and inflammatory racial slur in English ***.'" (quoting *Merriam-Webster's Collegiate Dictionary* 784 (10th ed 1993))). The introduction of such evidence, in a case where it lacks any probative value, presents the risk that the jury would be tempted to deliver a verdict on the improper ground that defendant is a racist who deserves punishment.[7]

Furthermore, this case presented a significant question as to whether defendant acted in self-defense. The security camera footage introduced by the state shows that the victim approached defendant at least once and physically struck him before the stabbing. Only one of the state's witnesses saw the stabbing, and he did not testify as to whether defendant's actions appeared unjustified. This is not a case, therefore, in which we can readily conclude that the erroneous admission of evidence was harmless because the other evidence of defendant's guilt was "overwhelming." *See State v. Stewart*, 270 Or App 333, 340, 347 P3d 1060, *rev den*, 357 Or 743 (2015) ("[W]e have considered the significance of challenged evidence in light of the presence or absence of other 'overwhelming evidence' of a defendant's guilt."); *see, e.g.*, *State v. Villanueva-Villanueva*, 262 Or App 530, 535, 325 P3d 783 (2014) (concluding that erroneously admitted hearsay evidence was not harmless because "there was no overwhelming evidence of guilt for defendant's convictions").

The dissent would conclude that the error was harmless because the security camera footage and eyewitness testimony provided "unrebutted evidence of what occurred,"

[7] Our recent decision in *Lipka* is not inconsistent with our reasoning here. *Lipka* held that, under the circumstances of that case, OEC 403 did not require exclusion of evidence that the defendant used the word "nigger," because the prejudicial effect of that evidence did not substantially outweigh its probative value. 289 Or App at 834. *Lipka* thus did not address the question of whether the *erroneous* admission of that racial epithet may be harmless. *Id.* at 835.

and thus was more probative evidence than the police interview. 291 Or App ___ (Edmonds, J., dissenting). However, that evidence could support more than one interpretation regarding the justification of defendant's actions. For example, the security camera footage depicts the victim striking defendant first while defendant was sitting down. What the dissent describes as the victim's "defensive posture" could also be characterized as an offensive fighting stance; further, the victim attempts to strike defendant multiple times during the six-second altercation. Although the jury convicted defendant, the verdict was not unanimous. Accordingly, we decline to speculate about how the jury weighed and relied on all of the evidence, and we cannot agree with the dissent that the admission of defendant's inflammatory epithet had little likelihood of affecting the verdict.

Reversed and remanded.

**EDMONDS, S. J.,** dissenting,

I agree with the reasoning and the conclusions of the majority with regard to the first and third assignments of error. However, I disagree with its analysis regarding the second assignment of error because ultimately, any error is harmless. Consequently, I would affirm defendant's conviction rather than reverse.

In his second assignment of error, defendant asserts that the trial court erred under OEC 403 when it refused to redact a racial epithet expressed by defendant to the police during a video interview about what occurred during his contact with the victim at the scene of the crime.[1] On appeal, defendant argues that the trial court erred by failing to balance the probative value of the evidence against its unfair prejudicial effect as required by the rule.

At the pretrial hearing, defense counsel asked the trial court to redact defendant's use of the "N word chick" from the statements that he made in the video interview:

[1] OEC 403 provides, "Although 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."

> "[DEFENSE COUNSEL]: *** [Defendant] said, 'I have no idea about that, but I was on the platform and this dude punched me in the face, so I punched him and walked away.' The detective says, 'Okay.' And then [defendant] says *** 'There was this fucking, there was some nigger chick there. This dude hit me.'
>
> "The—I'm objecting—I'm asking the court to exclude the statement regarding the N word chick as—it's a—it's—first of all, it's not really—it doesn't have anything to do with the case. When you see the video there will be a—there's another woman that no one has ever been able to track down who's sitting there at the time. But I don't think it is—certainly the admission of it, because it has nothing to do with this case, there's no evidence there was any kind of racial bias on anybody's part, I find the—just the admission of the word itself as extremely prejudicial."

In response to defendant's argument, the trial court ruled,

> "The bottom line is, you know, if we start sanitizing everybody's statements—
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> "*****
>
> "—where does that end, you know. So, no, I'm not going ask the State or anybody else to clean up poor word choices that either he or the officers made. You know, it's a path that would lead to nothing but disaster. So, denied."[2]

The trial court did not deny defendant's motion pursuant to OEC 403, nor did it rule under OEC 401 on the ground of relevance.[3] Rather, it ruled that the law did not

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[2] Defendant did not expressly ask the trial court to decide defendant's motion under OEC 403, nor did he ask the court to perform the weighing process of probative value against unfair prejudice contemplated by the rule. Indeed, he told the court that the "N" word had "nothing to do with this case, *** there's no evidence *** [of] any kind of racial bias on anybody's part." For purposes of this opinion, however, I assume that defendant's assignment of error was adequately preserved under ORAP 5.45 and that the OEC 403 balancing process is applicable, even when the disputed evidence to be weighed against unfair prejudice has no probative value. *But see State v. Carrillo*, 108 Or App 442, 445-46, 816 P2d 654, *rev den*, 312 Or 527 (1991) (holding that an objection on the grounds of hearsay and relevance does not preserve a claim of error made under OEC 403).

[3] OEC 402 provides, in part, that, "[e]vidence which is not relevant is not admissible." OEC 401 provides that "'[r]elevant evidence' means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

require it to sanitize a witness's "poor choice of words." In the trial court's view, a ruling to the contrary would result in a "disaster" for trial judges—the task of "sanitizing" all witness testimony, whether the testimony is for the prosecution or the defense. I understand the nature of the court's ruling to be based on policy reasons of judicial economy and parity of treatment of witnesses; reasons that are, in the abstract, within the realm of the inherent discretionary authority of a court to govern the conduct of a trial over which it presides.[4] In general, the inherent authority of a judge presiding over a trial includes the authority to make rulings that promote parity of treatment of the parties and judicial economy. Because the exercise of inherent authority of a presiding judge to make rulings is discretionary in nature, the issue under the second assignment, when properly framed, is whether the trial court exceeded its inherent authority when it refused to redact defendant's racial epithet.

The court's discretionary authority is not unfettered. Although the exercise of inherent authority for judicial economy and parity purposes embraces the notion that there may exist more than one legally permissible choice, a court may still exceed the boundaries of its discretion if it exercises its discretion in a manner that rises to the level of a denial of fundamental fairness or of the rights guaranteed to a criminal defendant, including the right to a fair trial. In this case, the trial court's ruling had the effect of admitting evidence that had no probative value in violation of OEC 402. But the admission of inadmissible evidence does not in

[4] The trial court's reasoning is based on the need for pragmatism. Defendant's motion to redact was made during a pretrial hearing, and the argument he made to the trial court appears to assert that the use of the "N" word is inherently prejudicial. The trial court could well have understood defendant's argument similarly. On review, we have no record before us upon which to make the kind of ruling by judicial fiat that defendant appears to argue for. To the contrary, the trial court could have reasonably believed that among some segments of our society, the "N" word is used commonly as a descriptive term without discriminatory meaning or intention. Moreover, I am aware of no rule or law that requires a trial court to sanitize a witness's own words from evidence that is part of the operative facts of the case to make the declarant look better before a jury. Nonetheless, defendant is entitled to judicial review to determine whether the admission of nonrelevant evidence under the circumstances of this case caused him prejudice as he urges on appeal.

itself warrant reversal of defendant's conviction. Therefore, the question becomes whether the trial court's ruling constituted harmless error.

Defendant argues on appeal that the admission of the "N" word was "highly inflammatory." According to defendant,

> "[a]dmission of the challenged evidence invited the jury to focus on defendant's racial views, which were not a material issue. There was a substantial risk that the jury would use defendant's choice of words to conclude that he was generally a bad person, which could lead to two improper conclusions: (1) defendant acted in conformity with his general bad character during the charged acts, or (2) he was a bad person who needed to be punished regardless of his guilt of the charged offenses."

In resolving the question framed by defendant's argument, some well-recognized legal rules apply. For example, evidentiary error is not presumed to be prejudicial merely because inadmissible evidence is admitted. OEC 103(1).[5] It is defendant's responsibility on appeal to demonstrate that the error was not harmless. *State v. Lotches*, 331 Or 455, 487, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001) (holding that the defendant failed to show that any error was likely to have affected the verdict when there was no reasonable inference that an excluded audio tape mattered to the defendant's self-defense theory). Also, Article VII (Amended), section 3, of the Oregon Constitution requires appellate courts to affirm, notwithstanding evidentiary error, if there is little likelihood that the error affected the verdict. *State v. Davis,* 336 Or 19, 32, 77 P3d 1111 (2003).

In light of the above rules, I turn to the facts in this case. First, the disputed evidence itself constitutes an isolated reference in a videotape in which defendant explained his version of the events leading up to him being charged. The videotape that was played to the jury was redacted for other reasons, and what was apparently submitted to

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[5] OEC 103(1) provides, in part, that, "[e]vidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected ***."

the jury is reflected by a 12-page transcript.[6] Defendant's use of the "N" word appears on only page 4 of the transcript. Moreover, defendant and the victim are not African Americans, and no one contended at trial that race played a role in their conflict. The unidentified bystander described by defendant in his statements to the police was apparently an African American, although at one point in the statements, defendant says "I don't know if she was black or white, but she acted black." Later, he said, "I think she was black." Regardless, not only was the bystander not involved in the conflict, but she also was not a witness at trial.

During the trial, the state called seven witnesses, including five law enforcement officers, one medical expert, and one eyewitness to the assault, Ruiz. The victim did not testify. Ruiz, the only witness who was present when the assault occurred, testified that he saw defendant and another person in a shoving match. According to Ruiz, the following occurred:

> "[RUIZ]: No. I just looked back, and that's when I see the person stabbing the other person and saying, 'You don't punch me in my face you mother'—you know. I seen the person was stabbing the other one and saying 'You don't punch me in my face you motherfucker.' Sorry.
>
> "[THE COURT]: It's all right. We've heard it all here.
>
> "[RUIZ]: Yeah, I know."

Later in his testimony, Ruiz explained that the person who had been stabbed had nothing in his hand at any point in time during the conflict.

On cross-examination, Ruiz was not asked about his observations regarding whether the victim had anything in his hand during the time that the victim argued with defendant. Rather, the tenor of counsel's questions on cross-examination appears to concede that defendant had stabbed

[6] The state contends that, "[a]lthough it is clear that part of the video of the detectives' interview of defendant was played for the jury at trial, the record does not disclose whether the jury actually heard defendant's [N word] reference." The majority opinion does not address the state's argument. For purposes of this opinion, I assume that the jury heard defendant's statement. However, if defendant's conviction is to be reversed under the second assignment, then it is essential to that disposition that the record demonstrate that the jury heard the statement.

the victim, but sought to leave room for a self-defense theory based on what Ruiz did not see. At the close of the cross-examination of Ruiz, the trial court afforded an opportunity to the jury to ask questions, apparently through the jury submitting them in writing to the court. Thereafter, according to the transcript, the court asked Ruiz, among other things, whether there was a third person involved in the fight between defendant and the victim, whether the witness overheard what was said during the argument, and whether the witness "[saw] what the lady who was there did after the stabbing." Ruiz responded that there had been a third person there but "then that person left" before the fight. He said that he did not overhear any part of the argument, and as to the lady at the scene, "She just walk (*sic*) away."

After the state rested its case-in-chief, the defense rested without calling any witnesses. Neither party emphasized or referenced the use of the "N" word during its closing arguments. In his closing argument, defense counsel told the jury that "it's all on video," referring to the surveillance video of the scene where the fight occurred.

> "So [defendant] had to make a decision. This guy just punched me in the face, so should I wait to see what he's going to do next *** Should I do that, or should I do something to protect myself, and that's what he chose to do."

The state countered in its rebuttal argument that defendant could not have had a reasonable belief after the victim hit him that he was entitled to use deadly force to defend himself.[7]

I conclude based on the above facts from the record that there is little likelihood that defendant's use of the "N" word affected the jury's verdict. The only contested issue in the case was self-defense, and the most probative evidence on that issue came from Ruiz and the surveillance tape, and not from the evidence of the police interview video. The eyewitness testimony of Ruiz and the contents of the surveillance videotape of the actual assault itself provide unrebutted evidence of what occurred, despite defendant's claim

[7] According to the surveillance video, the victim struck defendant, the victim backed away with his hands in a defensive posture, defendant then retrieved a knife from his waist band, re-initiated contact with the victim, and stabbed him.

to the police during the interview that he only punched the victim. Finally, the objected-to word is completely isolated from the evidence that was determinative of the case. Taking into consideration the entire record, there is little likelihood that the failure of the court to redact defendant's use of the "N" word in his statements to the police affected the jury's rejection of his argument that he acted in self- defense.

In the absence of evidence in the record that supports counsel's argument that the court's ruling "invited the jury to focus on defendant's racial views," defendant is left with a *per se* prejudice argument. According to that argument, a trial court's failure to redact the "N" word from testimony will always cause prejudice and will always constitute reversible error in any trial in which the "N" word occurs. But that argument necessarily fails because, as a matter of law, prejudicial evidentiary error is never presumed. OEC 103(1).

For these reasons, I would hold that there is little likelihood that the failure of the trial court to redact defendant's use of the "N" word affected the jury's verdict. Therefore, I dissent.