IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

CLARENCE ELWOOD MORROW,
Defendant-Appellant.

Deschutes County Circuit Court
16CR64864; A163970

Walter Randolph Miller, Jr., Judge.

Submitted July 30, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Eric Johansen, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Patrick M. Ebbett, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

AOYAGI, J.

Judgment of conviction for fourth-degree assault and harassment reversed and remanded; otherwise affirmed.

Hadlock, P. J., dissenting.

AOYAGI, J.

Defendant was convicted of felony fourth-degree assault, ORS 163.160(3), and harassment, ORS 166.065(3), in connection with an alleged incident between defendant and his girlfriend T; he was acquitted of other charges. On appeal of the judgment of conviction, defendant asserts that the trial court erred by admitting evidence of prior uncharged acts of domestic violence against the same victim. The trial court admitted that evidence under OEC 404(3), as relevant to showing defendant's motive for the charged acts. Defendant contends that the other-acts evidence was not relevant to motive and, instead, was improper character evidence. We agree with defendant that, on this record, the evidence should not have been admitted as motive evidence under OEC 404(3) and that the error was not harmless.[1] Accordingly, we reverse and remand defendant's convictions.

I. THE RECORD

A. *Pretrial Offer of Proof*

OEC 404(3) is an inclusionary rule that allows trial courts to admit other-acts evidence on "'any theory of logical relevance'" that does not depend on propensity-based reasoning. *State v. Jones*, 285 Or App 680, 682 n 2, 398 P3d 376 (2017) (quoting *State v. Johns*, 301 Or 535, 548, 725 P2d 312 (1986)). We review a trial court's decision to admit other-acts evidence in light of the record before the trial court at the time of its decision. *State v. Rice*, 289 Or App 282, 283, 410 P3d 282 (2017), *rev den*, 362 Or 795 (2018). Here, the state moved pretrial to admit evidence of "prior threats and acts of violence" committed by defendant against T, and defendant moved pretrial to exclude such evidence as inadmissible. The trial court held a pretrial hearing, during which the state made an offer of proof, and after which the court ruled. We therefore summarize the state's offer of proof[2] as

[1] Given that conclusion, we do not reach defendant's alternative argument under OEC 403, *see State v. Baughman*, 361 Or 386, 404-05, 393 P3d 1132 (2017) (even if evidence is admissible under OEC 404(3), it is to be excluded under OEC 403 if the danger of unfair prejudice substantially outweighs its probative value), or his other assignments of error.

[2] Two witnesses testified during the state's offer of proof: T, and the landlady of the boarding house where defendant and T lived at the time of the charged

the record before the trial court at the time of its decision. *See Rice*, 289 Or App at 283-84.

Defendant and T began a relationship in 2015. Defendant was physically abusive from the beginning. He first hit T during their second week together, and there were "many" incidents of abuse thereafter. Defendant and T are both alcoholics, and alcohol was a recurring factor in the abuse. When asked what led defendant to hit her on one particular occasion, T responded, "Just—it's always alcohol. There's always—I don't remember what that specific one was about."

For the first 13 months of their relationship, defendant and T were "camping, homeless, or renting hotel rooms, trying to save up to get a home." During that time period, there were multiple incidents in which defendant and T would rent a motel room, defendant would get drunk and try to kick T out of the room, and then defendant would assault T. T described the typical sequence of events as follows: When they checked into a motel, defendant would put only his name on the register, which T perceived as "almost like this control thing." Then defendant would start drinking. At some point, he would try to eject T from the room, even if it was the middle of the night, and regardless of the weather or how she was dressed, citing the fact that her name was not on the register in support of his right to make her leave. When T resisted leaving, defendant would "start throwing [her] around the room." Then defendant would call the police to have her removed. There were multiple incidents at several motels, including the Rainbow Motel and the Bend Value Inn, that followed that same pattern.

Another time, defendant and T were renting a room at a Motel 6. T encountered a friend of defendant's while waiting for defendant to return from work. Defendant had stopped on his way home to drink vodka. When defendant arrived, T told him that his friend, who was renting the room next door, wanted to see him. Defendant "started saying all these foul things about what [T] probably had been doing

---

acts. The landlady's testimony is not significant to our analysis, and neither party relies on it on appeal, so we limit our summary of the pretrial record to T's testimony.

with this man while [defendant] was at work." Defendant physically picked up T, threw her against the wall "a couple times," and threw her out of the room. He tossed all her clothes and belongings in the dumpster. Someone called the police.

At some point, defendant and T moved into a room in a boarding house together. Defendant continued to be physically abusive. T "had marks quite a few times," and, once, the landlady "just pointblank asked [T] how long he'd been hitting [her]." In late September (about three weeks before the charged acts), defendant came home in the middle of the night "completely wasted" and "just drunk off his butt." He started with "the same stuff" as usual—calling T an offensive name, telling her to leave, telling her that she was not on the rental agreement, and throwing T around and trying to throw her out. He may have "tried to flip the mattress over on [T]," and T "think[s] he even got [her] by the neck that time, too." Then he called the police.

The charged incident occurred on October 13. The night before, defendant and T each drank a small amount of beer at the end of defendant's workday. Sometime thereafter, T went outside to ask defendant a question. Defendant "cussed [her] out in front of the neighbors" and "called [her] a bitch because [she] was embarrassing him because [she] was bugging him while he was smoking pot with his friends." T went back inside. When defendant came inside, he "acted like he hadn't even done anything" and was back to being "loving [and] caring." At that point, defendant and T resumed drinking, with each consuming a 40-ounce beer. Defendant said something about getting vodka. T asked him not to get vodka. Because they were both alcoholics, defendant and T "had agreed that there wouldn't be any more hard alcohol around, because it tends to escalate things and, you know, turn things bad quickly." Nonetheless, defendant went to the store and bought vodka. Defendant drank the entire bottle of vodka in 25 minutes, except for one "tiny sip" that T took. Defendant left to go buy marijuana, returned briefly, and then left again without explanation. T fell asleep.

Around 2:00 a.m. on October 13, defendant returned to the room. He was "extremely intoxicated" and could hardly

walk. T asked where he had been, to which defendant responded by calling T offensive names and demanding that she leave. T replied that it was the middle of the night and that she was not going to leave. She told him to calm down and lower his voice so that they would not get kicked out. Defendant tried to flip the mattress over T, then picked her up and slammed her against the wall. He "got [her] by the neck" and "squeezed really hard and slammed [her] head into the back of the wall." T briefly got away, but defendant grabbed her and "kept banging [her] against the sliding glass door." Defendant began saying that "he was going to call the police because [T] wasn't *** on the rental agreement." T tried to talk him out of it, because she did not want him to get into trouble, but defendant insisted, so she finally gave him the phone and he called 9-1-1.

Defendant was arrested. A grand jury indicted him on charges of assault, harassment, and strangulation.

B. *Pretrial Arguments and Ruling*

Before trial, the state filed a written motion to admit evidence of prior acts of domestic violence committed by defendant against T, and defendant moved to exclude such evidence. The state asserted multiple potential grounds for admission in its written motion. The state's primary argument was that the evidence was admissible under a "hostile motive" theory—that defendant's "past violent acts, threats, and coercive behavior toward [T] show that he has a pattern of abusing her when he is intoxicated, and when she does not cooperate with him"; show his "ongoing bitterness toward [T]"; and show that defendant has a hostile motive toward his domestic partners, "a class of persons to which [T] belongs." Under a separate heading, the state posited alternative bases for admission: first, as evidence of defendant's intent and lack of mistake, because the charged crimes required the state to prove that defendant acted intentionally, and, second, as "context" evidence to explain the relationship between the parties, including why T did not call the police herself, because the state "anticipate[d]" that defendant would try to undermine T's credibility by pointing to her "lack of disclosure and [her] long-term relationship with defendant."

At the hearing, the state began by saying that it would let its written motion speak for itself, and then briefly reiterated that the evidence was admissible as relevant to (1) motive, (2) intent and lack of mistake, and (3) explaining the parties' relationship, specifically "why the victim herself did not call police, why it was the defendant that called police, and why she did not leave this relationship early." The state then put on its offer of proof. Finally, the parties made closing arguments. The state focused on the motive ground for admission in its closing, arguing:

> "[T]hese prior bad acts are almost identical to the act in question in this case, Your Honor. Defendant gets intoxicated, he wants the victim to leave, he ends up throwing her around and roughing her up, leaving marks. This happened multiple times before this, as the victim described.
>
> "[The landlady] noted that the victim would come to her and say that he was roughing her up. She had visible bruising after that.
>
> "Again, Your Honor, under the case law, this is admissible for nonpropensity purpose or for motive. Again, these are almost identical acts. They show his motive each and every time. He wants the victim to leave the apartment, she's not complying with what he wants her to do, so he resorts to physical violence."

In response to the state's arguments, particularly regarding motive, defendant argued that there was "a very fine line" between motive and propensity evidence and that the evidence the state sought to offer was both irrelevant and unfairly prejudicial. Defendant challenged the "logical relevance" in "saying that these prior alleged actions in some way establish a motive here in this situation to commit these alleged acts."[3]

In rebuttal at the hearing, the state again pointed to the similarity of the occurrences as evidence of motive,

---

[3] We disagree with the dissent's suggestion that defendant initially agreed that the proffered other-acts evidence was relevant to motive. *See* 299 Or App at 55 (Hadlock, P. J., dissenting). Based on the transcript, defense counsel's phrasing of a certain statement briefly confused the court, but then the court realized—and defendant confirmed—that defendant was saying only that motive is generally a legitimate ground to admit other-acts evidence under OEC 404(3), whereas propensity is not.

arguing that the other incidents were "almost exactly the same as what occurred on the night of October 13th." When the trial court asked how similarity showed motive, as opposed to showing "prior bad acts in conformity," the state initially answered that the evidence *did* establish prior bad acts in conformity. After the trial court correctly noted, "That's not motive," the state concluded its closing by stating:

> "[T]hat's not, in and of itself, motive. But that is one of the requirements that we would need to prove in order to get these in, that these are substantially similar.
>
> "It does prove motive, Your Honor, as to why he engaged in the acts he did on the night in question when he's engaged in the exact same behavior prior to this on a number of occasions with the same victim, doing the exact same things and the same scenario. It provides a reason as to why he did it on this night.
>
> "Now, the jury's naturally going to be wondering why the defendant was the one to call police, what his motive would be. But when we have these other incidents, where he's done the exact same thing each and every time, with the exact same motive, it provides the motive in this case as well, Your Honor.
>
> "*****
>
> "So for that, Your Honor, I think these are admissible under the case law."

Because it is relevant to an issue raised by the dissent, we note that the state's final response commingled the three separate grounds on which it had moved to admit the evidence, all of which were before the court, in a way that was confusing but that we do not view as having been meant to *change* its previously articulated and well-developed arguments. *See Maxfield v. Nooth*, 278 Or App 684, 687, 377 P3d 650 (2016) (written arguments are properly before the trial court, whether or not reiterated orally). The state's initial point, regarding the need to prove the similarity of the acts, confused motive with the alternative nonmotive ground of "intent and lack of mistake." *See State v. Turnidge (S059155)*, 359 Or 364, 435-37, 374 P3d 853 (2016), *cert den*, 137 S Ct 665 (2017) (for evidence to be relevant to lack of

mistake on a doctrine-of-chances theory, the prior bad acts must be similar to the charged acts, but that is not necessary for evidence to be relevant to motive). The next point, regarding the similarity between the acts and "why he did it," reiterated the state's motive argument. And the last point, referring to defendant's "motive" to call the police, ties to the state's argument that the evidence should be admitted as "context" evidence (a nonmotive basis) to explain why it was defendant who called the police, rather than T, and why T did not leave.[4]

At the conclusion of the hearing, the trial court found that the state had proved by a preponderance of the evidence that defendant had committed uncharged acts of domestic violence against T. The court later ruled that the evidence of those acts was admissible under OEC 404(3) as relevant to motive:

> "Rule 404 enumerates motive, as I said, and, as you both have detailed and outlined in your motions, it's one of the nonpropensity purposes of admitting evidence of a person's uncharged acts.
>
> "Evidence is relevant to prove motive if it tends to show why the defendant committed the charged crime. The Court finds that the allegations of physical abuse that [T] says took place approximately three weeks prior to the October 13 incident and those she alleges took place at the EconoLodge, Motel 6, Rainbow Motel, and the Bend Value Inn, are relevant for the nonpropensity purpose of showing motive to commit the crimes charged. The probative value of this evidence is not outweighed by its potential prejudicial effect. So those specifically alleged prior bad acts are admissible."

---

[4] To be clear, we are saying both that the state did not *present* its alternative bases for admission as motive theories *and* that they legally are *not* motive theories. The dissent disagrees on the former, *see* 299 Or App at 33-34 (Hadlock, P. J., dissenting), but the latter is equally important. *See Turnidge (S059155)*, 359 Or at 435-37 (similarity of prior acts to charged acts pertains to lack of mistake, not motive); *State v. Zybach*, 308 Or 96, 99-100, 775 P2d 318 (1989) (evidence offered to explain "why the victim delayed reporting the crime" is "admissible under OEC 404(3), even though not included in the specific illustrations"). The state relied on *Zybach* and cases citing *Zybach* as the authority for its "context" argument in the trial court.

The trial court did not address any of the other grounds that the state had argued to admit the evidence. It admitted the evidence only as relevant to motive.

C. *Trial*

When other-acts evidence is admitted, and the defendant is convicted after trial, we look to the trial record to determine whether any error in admitting that evidence was harmless. *See State v. Pitt*, 352 Or 566, 582, 293 P3d 1002 (2012). We therefore summarize the relevant trial evidence and argument.

At trial, the state opted to present evidence of two uncharged acts of domestic violence—an incident at the Rainbow Motel and the incident at Motel 6. The trial evidence regarding those incidents was consistent with the state's pretrial offer of proof. In closing argument, the state drew the jury's attention to the other acts and tied all of the incidents together as part of the "same cycle and kind of behavior":

> "Everywhere they went, [defendant] always kind of engaged in the same thing. He would want his name on the rental agreement or lease for the hotels or for homes they were staying in. Then he would drink. And he would be fine—throughout the day he'd be fine—but, until he started consuming alcohol, then kind of something else came out. He would begin accusing her of things. Would tell her she needed to get out. One time he threw her items out into a dumpster.
>
> "But eventually, if she didn't comply with his requests, no matter what the time of day was, no matter the weather conditions outside, he would begin to harm her and throw her around the room. And this happened at the Rainbow [Motel] *** and Motel 6 *** and of course the [boarding house]. The same cycle and kind of behavior each and every time."

D. *Verdict*

The jury found defendant guilty of fourth-degree assault, ORS 163.160(3), and harassment, ORS 166.065(3). It acquitted him of second-degree assault, ORS 163.175, and strangulation, ORS 163.187.

II. LEGAL ANALYSIS

OEC 404(3) provides:

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

(Emphases added.)

For purposes of OEC 404(3), "'character' refers to disposition or propensity to commit certain crimes, wrongs or acts." *Johns*, 301 Or at 548; *see also* David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 8.3, 493-94 (2009) ("Character is thought to be a generalized tendency to act in a particular way, caused by something internal to the actor that arises from that person's moral bearing."). "OEC 404(3) unquestionably forbids the admission of evidence solely to show propensity or that the defendant is a bad person." *Johns*, 301 Or at 548-49. Notably, evidence of a person's character "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 US 469, 475-76, 69 S Ct 213, 93 L Ed 168 (1948). That is, character evidence is generally excluded "*despite* its admitted probative value," so as to "prevent confusion of issues, unfair surprise and undue prejudice." *Id.* (emphasis added).

Evidence that a defendant has engaged in similar criminal conduct in the past, offered "to show that, if he did this before, it is more likely that he did it this time," is propensity evidence; that is, it is character evidence. *State v. Bunting*, 189 Or App 337, 340, 345-46, 76 P3d 137 (2003) (holding that the trial court erred in admitting evidence of the defendant's prior crimes, under OEC 404(3), where the evidence "served only to show defendant's propensity to offer a victim alcohol and make sexual advances—to show that, if he did this before, it is more likely that he did it this time"

(internal quotation marks omitted)); *see also Johns*, 301 Or at 548 ("once a burglar always a burglar" is a propensity theme).

At the same time, if evidence of a defendant's other crimes, wrongs, or bad acts is relevant to a nonpropensity purpose, it *is* admissible under OEC 404(3), so long as its probative value is not substantially outweighed by the danger of unfair prejudice under OEC 403. *Baughman*, 361 Or at 404-05. Here, the trial court admitted the challenged evidence as relevant to proving defendant's motive to allegedly assault, strangle, and harass T on October 13. That was the sole basis on which the trial court deemed the evidence relevant. As such, that is the ruling that we are reviewing.

"Motive is a cause or reason that moves the will and induces action, an inducement which leads to or tempts the mind to commit an act." *State v. Hampton*, 317 Or 251, 257 n 12, 855 P2d 621 (1992) (citation omitted). It "refers to why a defendant did what he did." *Id.* Although motive "generally need not be established by the prosecution to prove guilt," it is "often pertinent as the basis to infer that the act was committed, or to prove the requisite mental state, or to prove the identity of the actor." *Id.*

Whether evidence is relevant to motive is a question of law. *State v. Carreiro*, 185 Or App 19, 22, 57 P3d 910 (2002); *see also* OEC 401 (evidence is "relevant" if it has "any 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"). "The state, as the proponent of the evidence, bears the burden of demonstrating relevance." *State v. Wright*, 283 Or App 160, 170, 387 P3d 405 (2016). To meet that burden, the state must show "some substantial connecting link" between the uncharged misconduct and the charged offense. *Turnidge (S059155)*, 359 Or at 451 (citation omitted). That is, there must be "a sufficient logical connection" between the uncharged acts and the asserted motive for the charged acts. *Id.* at 450. "[T]he required connection can be inferred when the nature of the evidence at issue, evaluated in light of the circumstances of the crime, makes the inference a logical one." *Id.* However, the "mere possibility" that a defendant had the

same motive for two acts is not sufficient to establish relevance. *Wright*, 283 Or App at 174.

In assessing other-acts evidence proffered as relevant to motive, "courts must evaluate [the other] act to determine, first, what motive [it] demonstrates, and, second, whether the circumstances of the charged crime support an inference that the same motive is at work." *Id.* at 176. In making that evaluation, we have expressly cautioned against the risk of "admitting evidence that is ostensibly for the purpose of showing 'motive,' but that may, in reality, depend for its relevance on an inference about the defendant's character." *State v. Davis*, 290 Or App 244, 252, 414 P3d 887 (2018). "[C]ourts must be on guard to prevent the motive label from being used to smuggle forbidden evidence of propensity to the jury." *Hampton*, 317 Or at 257 n 12 (quoting Wright & Graham, 22 *Federal Practice and Procedure* 479, § 5240).

Given how difficult it sometimes is to distinguish between motive and character evidence, it can be helpful to keep in mind some general principles. One is that permissible, motive-based reasoning usually "'assume[s] that a motive might exist because *any person* might possess one under those specific circumstances'"—that is, "'[t]he tendency to have such a motive is simply *human*'"—whereas character-based reasoning derives "'from a trait of character specific to the person involved in the trial'" and is "'based on inferred behavioral disposition or propensities.'" *Davis*, 290 Or App at 252-53 (quoting Leonard, *The New Wigmore* § 8.3 at 496, and Kenneth S. Broun ed., 1 *McCormick on Evidence* § 186 (7th ed 2016)) (brackets in *Davis*; emphases in *The New Wigmore*). "When the asserted connection between the charged offense and the other-acts evidence would be merely conjectural without resort to character-based inferences, such evidence is not admissible as noncharacter motive evidence." *Id.* at 253. The specificity of an alleged motive also may be telling. Although there are exceptions—the most notable one being hate crimes[5]—motive inferences tend to be specific to the circumstances and the individual victim,

[5] Hate crimes raise unique issues, *see* Leonard, *The New Wigmore* § 8.3 at 496, and caution should be used in analogizing between motive evidence for hate crimes and motive evidence for other crimes. *See* 299 Or App at 60 (Hadlock, P. J., dissenting).

whereas character inferences tend to be more generalized. *See* Leonard, *The New Wigmore* § 8.3 at 496. Typically, "the more generalized the motive inference, the more like character it becomes." *Id.* "The motive theory should not apply *** when the 'motive' is so common that the reasoning that establishes relevancy verges on ordinary propensity reasoning or when 'motive' or 'intent' is just another word for propensity." *Davis*, 290 Or App at 252 (quoting, parenthetically, Broun, 1 *McCormick on Evidence* § 190 (ellipsis in *Davis*)).

In *State v. Tena*, 362 Or 514, 516, 412 P3d 175 (2018), the Supreme Court recently considered the admissibility of purported motive evidence in a trial involving domestic violence charges. The defendant in *Tena* had a history of abusing intimate partners. *Id.* at 516-17. At trial, over the defendant's objection, the trial court admitted evidence that the defendant had previously assaulted two other intimate partners, as evidence of his "hostile motive" to assault his current intimate partner. *Id.* On review, the Supreme Court reversed. It rejected the state's "*assum*[*ption*] that, because defendant assaulted two of his prior intimate partners, those assaults were motivated by the fact that they were his intimate partners." *Id.* at 524 (emphasis in original). Although "those assaults, in theory, *could have* been motivated by the fact that the victims were his intimate partners," the "evidence indicated that the prior assaults involved other motives, such as a disagreement about child-care issues, the victim's desire to work, and jealousy." *Id.* (emphasis in original). The other acts also were "relatively isolated and not close in time." *Id.* The Supreme Court held that the trial court had erred in concluding "that the evidence of the two prior assaults had probative value for the nonpropensity purpose of establishing defendant's motive." *Id.*

We turn to the facts of this case. As noted, defendant contends that the trial court erred in admitting evidence of prior acts of domestic violence against T, under OEC 404(3), as relevant to defendant's motive to commit the charged acts. In his view, the evidence is purely character evidence, not relevant to his motive on October 13, and was "intended to show that, when defendant assaulted T as charged, he

was acting in conformity with the same bad behavior he had exhibited on prior occasions." In response, the state defends the trial court's ruling. It argues that the three incidents presented to the jury (two uncharged and one charged) were logically connected because of the similarity of defendant's conduct each time, and that the other-acts evidence tended to prove that defendant's conduct on October 13 was motivated by "defendant's hostility toward [T] and his desire to exert control over her."

For the reasons that follow, we agree with defendant that the state failed to establish that the other-acts evidence was relevant to defendant's motive on October 13.

First, although there were factual similarities between the three incidents,[6] motive refers to "why" a person did something, not to what the person did. *Hampton*, 317 Or at 257 n 12. It cannot be assumed that, because a person has acted similarly on multiple occasions, all the acts shared a common motive. In *Tena*, 362 Or at 524, the court rejected the state's "assumption" that the defendant's repeated assaults on intimate partners reflected a common motive. In discussing motive, the court referred to the impetus for individual assaults—"disagreement about child-care issues, the victim's desire to work, and jealousy"—rather than speculating about the possibility of an underlying personal issue that might have more globally explained the defendant's practice of assaulting intimate partners. *Id.* Similarly, here, motive pertains to why defendant assaulted T, not to the similarity of the assaults themselves. On that point, the evidence is that any number of things, coupled with intoxication, triggered defendant's violence. Of the three instances presented to the jury, for example, there is no evidence as to the impetus for the Rainbow Motel incident, the Motel 6 incident began when defendant accused T of sexual infidelity, and the charged acts began when T questioned defendant about his recent several-hour absence.

Second, in conducting the requisite legal analysis, we must "evaluate [the other] act to determine, first, what motive

[6] The state focuses on the three incidents presented to the jury, so we do so as well for purposes of discussion, but we have considered all evidence that was before the trial court when it ruled.

[it] demonstrates, and, second, whether the circumstances of the charged crime support an inference that the same motive is at work." *Wright*, 283 Or App at 176. In this case, the trial court did not say what motive it believed that the prior acts demonstrated. On appeal, the state argues that the prior acts demonstrate defendant's general "hostility" toward T, which is essentially the same argument that it made to the trial court, as well as his "desire to exert control over her," which is a newly raised take on the evidence.

The difficulty with the state's generalized hostility argument is that it seems to depend on an assumption that anyone who assaults someone repeatedly must be generally hostile toward them, rather than rely on the specific record before the court in this case. Although repeated instances of hostile interactions between two people may give rise to a permissible inference of generalized hostility in some circumstances, it will depend on the record, and domestic violence situations are especially complicated. Here, defendant and T were living together and had been in an intimate relationship for over a year at the time of the charged acts. There was no evidence of significant animosity between them *except* for the domestic violence incidents. In our view, the existence of domestic violence in an intimate relationship is not enough, in and of itself, to allow an inference of "generalized hostility" as a common motive for all acts of violence over an extended period of time.

As for wanting to "control" T, the state never argued to the trial court that the other-acts evidence was admissible to show that defendant's motive for the alleged crimes on October 13 was to control T. The state made no mention of "control" in its written motion or during the pretrial hearing. The *only* time that the state mentioned "control" was in its closing argument to the jury—long after the trial court had ruled on the evidentiary issue—when it reminded the jury that the October 13 incident was not the first time that defendant had assaulted T and said that the prior incidents showed him being "engaged in the same cycle of power and control and the same cycle of violence." We are therefore skeptical, to say the least, that the trial court admitted the evidence as relevant to showing a motive of "control." *See*

Wright, 283 Or App at 176 (first step of analysis is to determine "what motive" the prior act demonstrates).

Even setting aside that procedural issue, the state's "control" argument comes dangerously close to the line between motive and character evidence and, in our view, at least on this record, falls on the side of character evidence. There is no direct evidence that defendant assaulted T to control her. The only direct evidence regarding control is T's testimony that she viewed defendant's practice of putting only his name on rental agreements as "almost a control thing"—which is different than his *assaults* being about control. Given the lack of direct evidence, what the state is necessarily arguing is that it is permissible to *infer* that defendant's practice of assaulting T was motivated by a desire to control her.

There is certainly intuitive appeal to the idea that people who engage in domestic violence are trying to control their victims—and that may well be true. But when we talk about motive evidence explaining "why" a defendant committed a crime, *Hampton*, 317 Or at 257 n 12, we generally mean the more direct and immediate reasons for the crime (such as assaulting a romantic partner because she was unfaithful), rather than deep-seated psychological reasons (such as responding violently to conflict because of childhood trauma) or moral reasons (such as holding socially unacceptable views of right and wrong). *See Tena*, 362 Or at 524. Although there may be psychological or moral explanations for a person's criminal act, which may explain at some level a whole host of their past behaviors, that expansive view of "motive" tips toward character and propensity reasoning. At least on this record, we are unpersuaded that the other-acts evidence was admissible to prove that all of defendant's violence against T was motivated by a "desire to control" her—a motive that the state never even posited to the trial court.

Finally, this case is distinguishable from *State v. Hagner*, 284 Or App 711, 395 P3d 58, *rev den*, 361 Or 800 (2017), and *State v. Edwards*, 282 Or App 328, 385 P3d 1088 (2016), *rev den*, 361 Or 801 (2017), on which the state relies.

In *Hagner*, the defendant claimed to have accidentally shot his wife. 284 Or App at 715. We affirmed the trial court's admission of evidence that the defendant had slapped his wife seven days before he shot her and yelled at her four days before he shot her, because that evidence "tended to show that defendant had a hostile relationship with the victim in the week immediately preceding the shooting" and "a jury could find that he had been motivated by the *same animosity* when he fired the fatal shot." 284 Or App at 720 (emphasis added). The temporal connection between the two hostile acts would allow a jury to "find [that] *that same animosity* motivated defendant" to commit both acts, because it would allow the jury to infer that defendant's hostility toward the victim "*persisted* until the time of the shooting and also motivated that crime." *Id.* at 721 (emphases added). The mere fact that the two acts involved the same victim was not dispositive—it was the very short timeline that allowed the inference of a common motive that persisted for the entire week leading up to the victim's murder.

In *Edwards*, the defendant was charged with crimes related to two acts of violence against his girlfriend—on September 21 and October 18—and the trial court admitted evidence of an uncharged act on September 13. 282 Or App at 329-31. We rejected the defendant's argument that the evidence from September 13 was not relevant to his motive to commit the charged crimes. *Id.* at 332-33. We did so because "[t]here was sufficient evidence in the record to support an inference that the *same* 'jealousy issue' that led to defendant's assault of [the victim] on September 13 led to assaults against [the victim] on the charged occasions." *Id.* at 332 (emphasis added). That evidence included that the defendant had expressed jealousy or questioned the victim's faithfulness during all three incidents; that the September 21 incident was essentially a continuation of the September 13 incident, in that the victim left the defendant's residence on September 13 and did not return until September 21; and that all three incidents occurred in a relatively short time period. *See id.* at 329-30. On that record, a jury could infer that all three acts were motivated by jealousy that arose on or before September 13 and continued through October 18.

See id. at 323. The existence of a common motive was more than a "mere possibility." *Wright*, 283 Or App at 174.

By contrast, here, the other-acts evidence offers no possible explanation as to why defendant started an altercation with T on October 13, when she questioned where he had been. It shows only that defendant has a propensity to drink alcohol to excess, get upset with T, demand that she leave, and then verbally and physically assault her. That is character evidence that, on this record, lacks any relevance to defendant's motive for allegedly committing the charged crimes on October 13.

Even if one considers a narrower possible motive for the charged crimes than the state posits—that defendant assaulted T on October 13 because he believed that she was trespassing and was trying to get her out of the room[7]—the other-acts evidence would not be relevant to that motive. A *similar* motive for two acts is not the same as a *common* motive. *See* Leonard, *The New Wigmore* § 8.3 at 499 (explaining the important distinction between a "common" motive for multiple acts and "similar" motives for multiple acts). To establish a common motive of trying to get T out of the room, it would have to be reasonable to infer that defendant had been trying to get T out of the room for weeks or months and had repeatedly assaulted her to achieve that singular purpose. That is not a reasonable inference on this record. Unlike the situations in *Hagner* and *Edwards*, the prior-acts evidence here does not allow an inference of a common motive, *i.e.*, a single motive that persisted over a period of time and motivated multiple acts of violence during that time.

In sum, the trial court erred in admitting the evidence of prior acts of domestic violence against T, under OEC 404(3), as relevant to defendant's motive to commit the charged acts. The challenged evidence served only to suggest "that, if he did this before, it is more likely that

[7] The dissent posits as defendant's motive for the charged crimes that he was trying to get T out of the room because he believed that she was trespassing. 299 Or App at 56-57, 59 (Hadlock, P. J., dissenting). The state briefly made an argument to that effect in its pretrial motion, but it has not reasserted it on appeal. We address it only because the dissent raises it.

he did it this time." *Bunting*, 189 Or App at 345. That may well be true—which is why propensity evidence is so powerful—but it is not a permissible basis to admit evidence under OEC 404(3). To be admissible as relevant to motive, the challenged evidence had to offer an explanation as to *why* defendant allegedly assaulted, strangled, and harassed T on October 13. It did not do that here, beyond suggesting that defendant did so because that is what he always does when he gets intoxicated, becomes upset, and T refuses to leave. The evidence was not relevant to motive and, instead, simply invited the jury to think, "once an abuser, always an abuser." *See Johns*, 301 Or at 549 ("once a burglar always a burglar"). Because the trial court admitted the challenged evidence only as relevant to motive, we do not consider and express no opinion on its potential admissibility for other nonpropensity purposes.[8]

Finally, the error was not harmless. "Oregon's constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict?" *State v. Davis*, 336 Or 19, 32, 77 P3d 111 (2003). Evidentiary error is not presumed to be prejudicial. OEC 103(1). Here, defendant asserts—and the state does not contest—that the error was prejudicial, and we agree. The state overtly encouraged the jury to view defendant as someone with a propensity to engage in domestic violence when intoxicated. In closing argument, the state described defendant as engaging in the same pattern of behavior over and over: he would be "fine" until he starting drinking, but, once he started consuming alcohol, "kind of

[8] For example, we express no opinion on its potential admissibility to explain why defendant called the police instead of T, which, as discussed earlier, was an alternative ground for admission that the state argued and that the trial court either rejected or did not reach. The state has not presented that as an alternative basis to affirm on appeal. As for the dissent's arguments on that issue, 299 Or App at 59 (Hadlock, P. J., dissenting), the dissent frames the issue differently than the state did. In our view, it is clear from the record as a whole that the state did *not* view or present the issue of why defendant called the police instead of T as a "motive" issue in the OEC 404(3) sense, notwithstanding its somewhat inartful response to a difficult question from the court at the end of the pretrial hearing. In any event, evidence admitted for that purpose would *not* be relevant to motive, because the fact that defendant was the one to call the police after some of the earlier assaults is not relevant to why defendant assaulted T on October 13. Thus, when the trial court admitted the other-acts evidence as relevant to motive, it both did not and could not have admitted the evidence for that purpose.

something else came out," and he would begin "accusing [T] of things," tell her that "she needed to get out," and, "if she didn't comply with his requests," he "would begin to harm her and throw her around the room." As described by the state, defendant engaged in the "same cycle and kind of behavior each and every time," including at the Rainbow Motel, at the Motel 6, and at the boarding house. On this record, we cannot say that the error had little likelihood of affecting the verdict.

Judgment of conviction for fourth-degree assault and harassment reversed and remanded; otherwise affirmed.

HADLOCK, P. J., dissenting.

In my view, the trial court did not err when it admitted evidence of defendant's prior assaults of the victim, T. Accordingly, I respectfully dissent.

My main point of departure from the majority opinion does not relate to its explanation of the law. Rather, I primarily disagree with its characterization of the parties' arguments. In particular, I do not agree that the state's arguments regarding hostile motive, context, and the significance of who did and did not call the police presented distinct theories, each thread of which should be examined separately and in isolation. That is, I do not agree that the state was arguing about something other than, and separate from, motive when it explained the relevance of defendant's pattern of exerting control over T by putting only his own name on rental agreements for living spaces and then forcibly ejecting T from those premises, sometimes calling police because he claimed that T was not entitled to be in the space that he had rented. In my view, the majority too strictly separates the state's arguments, as articulated at different times during the proceedings, into distinct threads. Then, instead of acknowledging the close and intertwined relationship among those arguments, the majority accuses the state of having somehow "commingled" them—and having done so in a way that nonetheless means that we cannot consider those threads together, woven together into a single narrative. *State v. Morrow*, 299 Or App 31, 38-39, ___ P3d ___ (2019). I view the state's discussion as having presented *all*

the facts as part of the narrative of the state's motive theory and, therefore, part of the theory of relevance that we must consider on appeal. To explain why that is so, I recount the motion *in limine* proceedings in some detail.

The charged incident relates to events on October 13, 2016. Before trial, the state moved to admit evidence that defendant had previously threatened and assaulted T. In its written motion, the state argued that defendant's previous conduct was admissible to prove, among other things, his "motive to commit the charged act." The state explained that the evidence was relevant under what it labeled a "hostile motive" theory because the evidence "demonstrate[d] the Defendant's ongoing bitterness toward [T]; Defendant, in abusing [T], was in an effort to get [T] to cooperate with his demand that she leave the apartment." The state also, in a different section of its motion not labeled "motive," asserted that the evidence would be relevant to explain the circumstances of the case, "as it was Defendant, and not [T], who initially called the police." In that regard, the state argued that the other-acts evidence would help the jury to understand the "context" of the parties' relationship. The state also argued that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under OEC 403. A few days after the state filed its written motion, defendant filed his own motion *in limine*, seeking to exclude the prior-acts evidence.

At the hearing on the parties' competing motions, the state introduced its motion this way, after asserting that evidence would prove that the alleged prior acts had occurred:

> "The State is alleging that these are admissible as evidence of motive, Your Honor; defendant's motive to harm the victim in this case.
>
> "Your Honor, the defendant in this case, when he was contacted by law enforcement, he has said essentially that she did these acts to herself, she caused these injuries to herself. Part of this evidence would be to rebut that claim. It would also explain the relationship between these two people. It would also explain why the victim herself did not call police, why it was the defendant that called police, and why she did not leave this relationship early, Your Honor."

The court then asked the prosecutor if that evidence would come in even if defendant did not take the stand, and the prosecutor explained why it would, stating, "We are arguing that this comes in as motive evidence ***."

In response, defense counsel did not initially mount a direct challenge to the state's assertion that the prior-acts evidence was relevant to show motive, although he summarily asserted that it was irrelevant. Rather, defense counsel focused on contending that the trial court should exclude the evidence under OEC 403 because it was highly prejudicial.

After those introductions, T testified as to what happened on the night of the charged incident, including the following events that occurred at about 2:00 a.m. after defendant, who was "extremely intoxicated," came into the residence (located on Hill Street) where he and T were staying, in a bedroom that defendant had rented:

> "[T]. I think I asked him, I said—I said, 'Where have you been?' I said, 'I thought you were just in the bathroom.'
>
> "And he—that's when he started with the—you know, same stuff. I was hearing the same thing, you know. Hood rat, [other offensive terms]. 'It's time for you to get out.'
>
> "Sort of a pattern. No matter where we stayed, there seems to be an escalation, and then he tries to throw me out of whatever motel room or wherever we're at.
>
> "Q. Okay. Well, let's talk specifically about—it's the early morning hours of October 13th. He comes in, he's calling you some offensive names. What does he do next?
>
> "A. He just demanded that I leave. And I told him that it was the middle of the night and I wasn't going to leave. And then I asked him to lower his voice so that we didn't get kicked out of there.
>
> "*****
>
> "And then he—he tried to like, flip the mattress over me to get me out of the bed. He then—he started picking me up and slamming me against the wall. And before, while he was flipping me out of the bed, I was able to reach down and grab a pair of blue jeans, because I knew he was going to try to throw me out and I didn't want to go outside with just my—my gown on. So I had my Levi's on, my nightgown."

T's testimony continued with a description of how defendant assaulted her by squeezing her neck, slamming her head into a wall, and banging her against a sliding glass door. After she got free from defendant's grip, T asked him to "just settle." At that point, T testified, defendant "started saying that he was going to call the police because I wasn't—my name wasn't on the rental agreement." Despite T's warning that he would get in trouble, defendant called 9-1-1. When the police arrived, defendant demanded that officers make T leave.

The prosecutor then asked T to describe previous episodes of domestic violence between her and defendant. She first testified about another incident that had occurred, about three weeks before the charged incident, at the same Hill Street residence. That episode "started with the same thing, you know. 'Cunt, you have to get out. You need to leave. You're not on this—you're not on the rental agreement.' Just the same." T testified that defendant had assaulted her, then had called the police. Responding officers asked if T wanted to have defendant arrested and she said that she did not; instead, she "would just leave." And T did so, collecting her things and spending the night at a friend's house.

T also described an earlier incident at the Rainbow Motel, characterizing it as "[p]retty much the same thing." After drinking, defendant

> "would decide that—he would decide that my name wasn't on the—the rental thing. Like, you know, he'd make sure his name was on the check. And so he'd decide that he was going to throw me out in the middle of the night. And I didn't want to go, so then he'd start throwing me around the room. And once again, he would be the one that called the police, you know."

In addition, T testified about defendant having assaulted her at the Bend Value Inn, which she called "[t]he same thing":

> "Just, I mean, like, start drinking. And then it was almost like this control thing that, you know, he had to have his name on the register for the motels. And then he would use that as a reason to decide to throw me out, you know. *** [H]e was going to make sure that I had to leave, you know."

Finally, T testified about an incident at a Motel 6, saying that defendant threw her out of the room after assaulting her. She could not remember whether defendant or somebody else had called the police that time. Before the charged incident, T "never would press charges" against defendant when police arrived.

The only other witness at the hearing on the motions *in limine* was the landlord of the Hill Street residence, who confirmed that only defendant, and not T, was "on the lease" there, although T lived with defendant in a rented room in the house. The landlord sometimes heard "commotion" from defendant and T and saw bruises on T that T said were the result of her fights with defendant.

After the landlord testified, the prosecutor argued that the other-acts evidence was admissible. He began by remarking on the similarities between the incidents, including that defendant "wants the victim to leave." The prosecutor then presented the state's motive theory:

> "Again, these are almost identical acts. They show his motive each and every time. He wants the victim to leave the apartment, she's not complying with what he wants her to do, so he resorts to physical violence."

In response, defense counsel initially agreed that it would be "legitimate" for the state to offer the evidence to establish motive. He then started to argue that the state had not established that the prior acts occurred, but the court interrupted to clarify whether defendant was actually conceding that the prior-acts evidence was relevant to establish motive. Defense counsel did not immediately catch the lifeline that the court had thrown, but persisted in arguing only that the evidence was inadmissible for a lack of proof that the prior events had occurred and that, in all events, the court should exclude the evidence after conducting balancing under OEC 403. Finally, after more questioning from the court about whether defense counsel thought that the prior acts "fit into motive," counsel said he "would have issues with that" because he did not see "the logical relevance" connecting the prior acts to motive for the charged offense.

Having questioned defense counsel in a way that prompted him to ultimately challenge the relevance of the prior-acts evidence to a motive theory, the court also questioned the prosecutor in a way that led him to more fully develop his argument. Thus, after the prosecutor emphasized the similarities between all of the incidents, the court asked, "[A]ren't these prior bad acts in conformity?" When the prosecutor answered affirmatively, the court said, "That's not motive." The prosecutor then explained the state's theory in more detail:

> "It does provide motive, Your Honor, as to why he engaged in the acts he did on the night in question when he's engaged in the exact same behavior prior to this on a number of occasions *** with the same victim, doing the exact same things and the same scenario. It provides reason as to why he did it on this night.
>
> "Now, the jury's naturally going to be wondering why the defendant was the one to call police, what his motive would be. But when we have these other incidents, where he's done the exact same thing each and every time, with the exact same motive, it provides the motive in this case as well, Your Honor."

Having thoroughly explored the parties' theories, the trial court announced its ruling:

> "The court finds that the allegations of physical abuse that [T] says took place approximately three weeks prior to the October 13 incident and those she alleges took place at the Econolodge, Motel 6, Rainbow Motel, and the Bend Value Inn, are relevant for the nonpropensity purpose of showing motive to commit the crimes charged. The probative value of this evidence is not outweighed by its potential prejudicial effect. So those specifically alleged prior bad acts are admissible."

In my view, that sequence of events demonstrates that the state's theory was that evidence of the prior incidents was relevant to establish that defendant had a specific motive for assaulting T that went beyond a generalized hostility toward her. That is, according to the state, the evidence explained that defendant assaulted T and then called police because he believed that he was entitled to eject her from their shared living space and, when T would not

leave in response to his verbal demands, assaulted her in a continued effort to remove her from the premises. As the state argued at the very beginning, in its written motion *in limine*, the prior incidents were relevant to establish motive because they demonstrated defendant's "effort to get [T] to cooperate with his demand that she leave the apartment." Defendant's subsequent phone calls to police were an integral part of that same narrative, further demonstrating defendant's belief that he was entitled to eject T from his living quarters, using physical force if necessary. That is the essence of the motive theory that the state presented below and that it argues on appeal. I turn to addressing the merits of that argument.

I start with basic principles. In this case, the state charged defendant with four crimes: felony fourth-degree assault, harassment, second-degree assault, and strangulation. As charged in this case, the state had the burden to prove, with respect to those alleged crimes, that defendant acted intentionally when he physically injured T and subjected her to offensive physical contact, and that he acted knowingly when he strangled her. That is, the state had to establish both that defendant engaged in the wrongful physical conduct and that he did so with the specified culpable mental state. Evidence would be relevant, therefore, if it had "any tendency to make the existence of" either of those things "more probable or less probable." OEC 401; *see State v. Cox*, 337 Or 477, 485, 98 P3d 1103 (2004), *cert den*, 546 US 830 (2005) ("Evidence is relevant if it increases or decreases, even slightly, the probability of the existence of any material fact in issue.").

Under OEC 404(3), evidence that a defendant has engaged in "other crimes, wrongs or acts" may be relevant and admissible to prove motive. In this context, "motive" "refers to a 'cause or reason that moves the will and induces action, an inducement which leads to or tempts the mind to commit an act.'" *State v. Tena*, 362 Or 514, 521, 412 P3d 175 (2018) (quoting *State v. Hampton*, 317 Or 251, 257 n 12, 855 P2d 621 (1993)). Although a defendant's motive for engaging in criminal conduct generally is not an element of the crime, motive evidence nonetheless may be relevant "because it

makes more probable the fact that defendant committed the crime than if such a motive were not established." *Hampton*, 317 Or at 258. Put differently—and phrased in terms specific to this case—jurors may be more likely to believe accusations that a defendant intentionally assaulted or knowingly strangled another person if the jurors are aware of evidence that the defendant had a specific motivation for doing so. *See, e.g.*, *State v. Haugen*, 274 Or App 127, 153-54, 156, 360 P3d 560 (2015), *rev'd on other grounds*, 361 Or 284 392 P3d 306 (2017) ("other act" evidence about the defendant's gang affiliation was "highly relevant" to show "why defendant *** would have felt justified in assaulting the victim, who was a friend of a 'snitch'"); *State v. Edwards*, 282 Or App 328, 332, 385 P3d 1088 (2016), *rev den*, 361 Or 801 (2017) (evidence of the defendant's previous uncharged attack on his domestic partner was relevant in a domestic-violence case where the record "support[ed] an inference that the same 'jealousy issue' that led to defendant's assault of [the victim on the earlier occasion] led to assaults against [her] on the charged occasions"). And the probative value of motive evidence may be enhanced if, in the absence of such evidence, the defendant's alleged acts might seem unusual or implausible to the jury. *See Haugen*, 274 Or App at 157 (trial court permissibly determined that gang evidence "was indispensable to the state's theory of motive because the assault was otherwise 'inexplicable'").

As the majority discusses in some detail, courts must caution against admitting other-acts evidence on a motive theory when, in reality, the proffered evidence is nothing more than propensity evidence in disguise. 299 Or App at 43-44. To determine whether the other-acts evidence has nonpropensity relevance, a court must determine whether "the asserted connection between the charged offense and the other-acts evidence would be merely conjectural without resort to character-based inferences." *State v. Davis*, 290 Or App 244, 253, 414 P3d 887 (2018). Thus, "the *mere possibility* that the same motive that caused an earlier crime or act also caused the charged crime is not enough to make evidence of the prior act relevant." *State v. Wright*, 283 Or App 160, 174, 387 P3d 405 (2016) (emphasis added). However, "when some aspect of the charged offense confirms that there is a

logical connection between the other-acts evidence and the charged offense, *and* that connection does not depend on a character-based inference, the other-acts evidence may be admissible as noncharacter motive evidence." *Davis*, 290 Or App at 254 (emphasis in original).

Applying those principles here, I readily conclude that the trial court did not err when it ruled that the challenged other-acts evidence was admissible under OEC 404(3) as demonstrating defendant's motivation to engage in the charged acts. The evidence at issue is that defendant had, on previous occasions, assaulted T in conjunction with trying to get her to leave the place where they had been living, and that he had felt so entitled to do so that he sometimes called the police for assistance. That evidence was relevant to show a very specific motivation for defendant's actions on the night of the charged incident, when he again called police after attacking T, demanding that officers make T leave their shared living space. That motive evidence was particularly probative because it helped explain why defendant did something that jurors might otherwise find hard to believe, namely, calling the police himself after he assaulted his girlfriend.

Thus, a logical connection exists between evidence of defendant's prior assaults on T and the charged offense. Moreover, no character-based inference is necessary to draw that logical connection. The link is not solely based on a *generalized* theory that defendant seeks "control" in his relationship with T because of underlying "psychological or moral" traits that govern his general approach to particular situations, as the majority suggests. 299 Or App at 47. Rather, the link is based on defendant's logical (at least, logical to him) reasons for assaulting T—because she is not on the rental agreements of the motel rooms or other living spaces that they share and, therefore, has no right to remain in those spaces when he demands that she leave.[1]

[1] Because I conclude that the "other acts" evidence was relevant to show that defendant had a specific motivation for assaulting T—to get her to leave defendant's living space, which defendant believed he was entitled to do—I do not view this as a case in which the state has relied only on a more generic "hostile motive" theory to introduce evidence of previous assaults against the same victim in a domestic-violence case. *Cf. State v. Hagner*, 284 Or App 711, 720, 395 P3d 58,

In the end, the difficulty is that much permissible motive evidence can also be described in ways that make it seem character based. Take the motive evidence that the Supreme Court held admissible in *State v. Turnidge*, 359 Or 507, 373 P3d 138 (2016), in which the defendant was charged with planting a bomb at a bank, with the result that responding law enforcement officers were killed and injured. The court held that evidence of the defendant's anti-police beliefs was relevant to establish that he "was motivated by his beliefs and hostility to plant a bomb in circumstances that would result" in, among other things, "killing law enforcement officers who might try to disarm the bomb." *Id*. at 515. That evidence provided the necessary logical connection between the "other acts" evidence of the defendant's anti-police beliefs and the charged acts related to the bombing. But the evidence, which included such things as the defendant's "longstanding anti-government sentiments," *id*. at 514, also could be viewed as reflecting the underlying "psychological or moral" reasons that explain his conduct. By nonetheless deeming that evidence relevant to establish motive, *Turnidge* confirms that motive evidence that logically supports the state's theory about why a defendant committed a crime does not become inadmissible under OEC 404(3) simply because the evidence *also* illuminates some aspect of the defendant's approach to life, that is, his character. Similarly, here, the relevance of defendant's *specific* motivation for assaulting T in each of the "leave my rental space" incidents is not defeated by the fact that defendant's pattern of behavior toward T may *also* show that he generally is hostile and controlling of her.

Because I would hold that the trial court did not err in determining that the other-acts evidence was admissible motive evidence under OEC 404(3), I would also consider whether the trial court abused its discretion when it weighed the probative value of that evidence against the

---

rev den, 361 Or 800 (2017) (evidence that the defendant "had a hostile relationship with the victim in the week immediately preceding the shooting" was relevant "to show that he intentionally shot her, because a jury could find that he had been motivated by the same animosity when he fired the fatal shot"). Accordingly, I do not address whether the evidence of defendant's prior assaults of T would have been admissible if they were probative of nothing more than defendant's general hostility toward T.

danger of unfair prejudice under OEC 403. I would conclude that it did not. Accordingly, I would affirm.

I respectfully dissent.