

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

FRANK MARVIN PHILLIPS, JR.,
Defendant-Appellant.

Marion County Circuit Court
16CR66428; A165985

Mary Mertens James, Judge.

Argued and submitted May 29, 2019.

Zachary Lovett Mazer, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Benjamin Gutman, Solicitor General, argued the cause for respondent. Also on the brief was Ellen F. Rosenblum, Attorney General.

Before Ortega, Presiding Judge, and Powers, Judge, and Sercombe, Senior Judge.

ORTEGA, P. J.

Affirmed.

ORTEGA, P. J.

Defendant seeks reversal of a judgment of conviction for one count of fourth-degree assault, ORS 163.160, and one count of strangulation, ORS 163.187. On appeal, defendant argues that the trial court erred by allowing into evidence, for impeachment purposes under OEC 609, a prior conviction for second-degree assault that was originally entered in 1994 and then, following post-conviction relief that led to a retrial, was entered a second time in 2011.¹ Defendant argues that the conviction was more than 15 years old, dating from the original 1994 entry date, and therefore was not admissible under that rule. The state counters that defendant invited the error that he now challenges and, on the merits, that the second entry date brings defendant's prior conviction within the rule. We conclude that defendant's assignment of error is properly before us, but that the trial court did not err. Consequently, we affirm.

The relevant facts are undisputed. A verbal argument between the victim and defendant led to a physical altercation between the two men, ultimately leading to defendant's assault and strangulation convictions. Before trial, defendant sought to exclude evidence of a prior assault conviction that was originally entered in 1994, but, after post-conviction proceedings and a new trial, a new judgment of conviction was entered in 2011. Defendant argued that, because the original conviction was in 1994, it was outside the 15-year period limiting prior convictions that may be used for impeachment under OEC 609. The state argued that the 2011 reconviction date brings the conviction within the 15-year period for admissibility, and the trial court agreed. Defendant then sought and obtained permission to explain to the jury that the 2011 conviction was from an incident that occurred in 1993, and he did so during direct examination before the state made use of that conviction to impeach his testimony.

On appeal, defendant argues that the trial court erred in allowing the state to use the prior assault conviction

¹ In a second assignment of error, defendant argues that the trial court erred in excluding nonscientific expert testimony that he sought to introduce under OEC 702. We reject that assignment of error without further discussion.

for impeachment purposes under OEC 609. Before considering the merits of defendant's argument, we first consider the state's argument that we should not address the merits because defendant invited any error. The state contends that, because defendant introduced the issue of his prior conviction on direct examination, he waived his right to challenge the use of that conviction to impeach him. For that argument, the state relies on *Ohler v. United States*, 529 US 753, 120 S Ct 1851, 146 L Ed 2d 826 (2000). In that case, after the trial court granted a pretrial motion to admit evidence of the defendant's prior conviction for impeachment purposes, the defendant testified about the conviction on direct examination. *Id.* at 754. The Court held that, by doing so, the defendant waived appellate review of the admission of his conviction. *Id.* at 760.

As the state acknowledges, *Ohler* was decided under federal law and does not bind this court. Indeed, the Oregon Supreme Court reached a different conclusion in a related context in *McCathern v. Toyota Motor Corp.*, 332 Or 59, 23 P3d 320 (2001). In *McCathern*, the court concluded that when a party's objection is made and overruled, that party "is entitled to treat [that] ruling as the 'law of the trial' and to explain or rebut, if he can, the evidence admitted over his protest." 332 Or at 69 (quoting John W. Strong, 1 *McCormick on Evidence*, § 55, 246-47 (5th ed 1999)). Accordingly, the court held that, having lost a pretrial motion to deny admission of evidence of an expert witness's files, a defendant did not waive its appellate challenge to that ruling by later stipulating to admission of the entire files to challenge the plaintiff's evidence regarding some of what the files contained. As the court explained, "A party has the right to meet its opponent's evidence admitted under the trial court's rulings. After making the proper objections, a party may counter its opponent's evidence, whether correctly admitted or not, without waiving its evidentiary objection on appeal." *Id.* at 70.

McCathern controls in this case. Once the trial court concluded that the evidence of defendant's prior conviction was admissible, that ruling was law of the trial and defendant did not waive his objection to its admission by bringing it up in his direct testimony. Thus, defendant also

did not waive his appellate challenge to that ruling by doing so.

We turn to the merits. This case presents a question of statutory interpretation of OEC 609, which we approach with the goal of ascertaining and giving effect to the intent of the legislature. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). We do so by examining the text and context of the statute, along with any pertinent legislative history, resorting to general maxims of statutory construction only if the legislature's intent remains unclear. *Habitat for Humanity v. Dept. of Rev.*, 360 Or 257, 261, 381 P3d 809 (2016).

There is no dispute that defendant's prior conviction is within the category of prior convictions admissible to impeach under OEC 609; however, such a conviction "is not admissible if *** [a] period of more than 15 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date ***." OEC 609(3)(a). As noted, defendant argues that the original date of conviction puts his conviction outside the 15-year window for admissibility in this case. The state responds that we can only reach the conclusion asserted by defendant by adding the word "first" into the text of OEC 609, which we are not permitted to do. Rather, the state argues, under the plain text of OEC 609, defendant has a conviction within the 15-year window.

We agree with the state. The plain text of OEC 609 provides that the 15-year window runs from "the date of the conviction," without further qualification. Here, defendant's 1994 conviction was vacated and, thus, is no longer a conviction. However, defendant was retried, and a qualifying conviction was entered against defendant in 2011, which is within the statutory period. Accordingly, the trial court did not err when it allowed admission of that conviction for impeachment purposes under OEC 609.

Affirmed.