

**FILED: August 29, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

KIERIN DIANE NICHOLS,  
Defendant-Appellant.

Josephine County Circuit Court  
08CR0002

A141527

Thomas M. Hull, Judge.

Submitted on May 25, 2011.

Peter Gartlan, Chief Defender, and Laura A. Frikert, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Jeremy C. Rice, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Brewer, Judge, and Sercombe, Judge.

ORTEGA, P. J.

Affirmed.

1                   ORTEGA, P. J.

2                   Defendant appeals from a judgment convicting her of murder, ORS  
3 163.115; first-degree theft, ORS 164.055; and unlawful possession of a controlled  
4 substance, *former* ORS 475.840(3) (2009), *renumbered as* ORS 475.752 (2011). We  
5 reject three of her four assignments of error without further discussion and write only to  
6 address her third assignment of error, which challenges the exclusion of testimony from  
7 her expert witness. Because the proposed testimony would not have been helpful to the  
8 jury, the trial court's decision to exclude it was not error. Accordingly, we affirm.

9                   We begin with a brief overview of the case background and the evidence  
10 presented by the state at trial. We then discuss in more detail the testimony about  
11 defendant's behavior in the beginning stages of the police investigation of the murder at  
12 issue because that testimony is central to our discussion of whether the proffered expert  
13 testimony would have been helpful to the jury.

14                   Defendant was convicted of murdering her elderly neighbor, Lola Pierce, in  
15 Pierce's home.<sup>1</sup> Pierce was last seen alive at a local Safeway store on November 15,  
16 2007. She missed a doctor's appointment the following morning and her friend,  
17 Westerman, noticed that Pierce's front door was locked and had a "do not disturb" sign  
18 hanging from the doorknob. Westerman became concerned about Pierce's well-being and  
19 investigated. She called the police after she discovered that the back sliding glass door at

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<sup>1</sup> Defendant was also convicted of theft and possession of a controlled substance, but her appeal is focused solely on rulings related to her murder conviction.

1 Pierce's home was partially open. The responding officers discovered Pierce's body on  
2 the kitchen floor. Initially they believed that she had died of natural causes, but her death  
3 was later ruled a homicide caused by asphyxiation due to strangulation with multiple  
4 blunt head and facial injuries.

5           The ensuing police investigation revealed that the relationship between  
6 Pierce and defendant had recently been strained. Pierce had accused defendant of  
7 entering her home uninvited and stealing her Oxycodone medication the month before  
8 her murder. The police investigation of that theft did not result in charges against  
9 defendant, though defendant was taken into custody for a parole violation. Nevertheless,  
10 when police discovered Pierce's body, they investigated defendant.

11           That investigation ultimately resulted in defendant's arrest for Pierce's  
12 murder and the theft of Pierce's Oxycodone and other property. At trial, the state's theory  
13 was that defendant killed Pierce while attempting to steal from her. The state introduced  
14 evidence of a recorded conversation between defendant and her husband that included  
15 potentially incriminating statements, as well as evidence of incriminating statements by  
16 defendant from four inmates incarcerated with her. The investigating detectives testified  
17 as to her strange behavior during some early interviews, and the state presented evidence  
18 that defendant possessed and had hidden Pierce's property immediately after her death.  
19 Defendant gave inconsistent statements to police about the stolen items as well as  
20 statements that were inconsistent with other known historical facts. At the close of the  
21 trial, the jury returned a guilty verdict on all counts. Defendant appeals from the

1 resulting judgment.

2           Defendant contends that the trial court erred when it excluded expert  
3 testimony about defendant's addiction and mental health issues. She asserts that her  
4 expert's testimony would have provided an alternative explanation for defendant's strange  
5 behavior during the early stages of the investigation. To frame our discussion of that  
6 assignment of error, we recount the relevant testimony and facts.

7           Detective Brissett informed defendant of Pierce's death on November 20,  
8 2007, four days after police discovered her body. Although defendant and Pierce shared  
9 a driveway and defendant had been home most of the intervening four days, she  
10 expressed surprise at the news. On November 23, detectives Lidey and Vorberg  
11 interviewed defendant in her home, and they testified at trial about her behavior during  
12 that interview. They recounted an incident at the end of the interview, in which  
13 defendant asked if she could go to the store to get some pain medication. The detectives  
14 informed her that they would first like to complete their search of her home. Defendant  
15 agreed but then "sprung up from the couch" and "bee-line[d] down the hall." The  
16 detectives followed her and watched her remove a videotape from her closet and a small  
17 plastic bag apparently concealed in the videotape cover. Then, in plain view of the  
18 detectives, she moved in a way that indicated that she was removing a ring from her  
19 finger, and then quickly placed her hand in her front pants pocket. When the detectives  
20 asked her what she was doing, she responded "Nothing." Lidey, with defendant's  
21 consent, searched her and discovered a large gold and diamond ring and a plastic bag

1 containing Oxycodone. In response to further questions, defendant indicated to Lidey  
2 that she had stolen the pills from Pierce in October. At first, defendant claimed that she  
3 owned the ring, but when pressed by Brissette later that day, she admitted that she had  
4 also stolen the ring from Pierce, again claiming that she did so in October. Defendant  
5 also made inconsistent statements to Brissette about her theft of the Oxycodone.

6 To counter the testimony of Lidey, Vorberg, and Brissett, defendant sought  
7 to have her counselor testify about her mental health issues. In particular, defendant  
8 contended that, because the state was using her inappropriate responses and behavior  
9 during the investigation to imply that she was guilty, she should be allowed to introduce  
10 evidence, in the form of expert testimony, of possible other explanations for her conduct.  
11 Defendant contended that the proposed expert testimony was relevant to show that her  
12 behavior was not an indication of guilt but, rather, was a result of her mental illness. The  
13 state objected to the proposed testimony on grounds of relevance, OEC 401, and that it  
14 would not assist the trier of fact, OEC 702.

15 To address the state's objections, the trial court allowed defendant to  
16 present the counselor's testimony in an offer of proof outside the presence of the jury  
17 before ruling on its admissibility. The counselor testified that he began working with  
18 defendant before her incarceration and that he had performed a mental health assessment  
19 that revealed that she suffered from bipolar disorder and borderline personality disorder,  
20 and that she had a long history of substance abuse dependency for a variety of substances  
21 and a history of kleptomania. He also mentioned that he observed manifestations of

1 defendant's self-destructive behavior in the form of "picking on herself and scars \* \* \*  
2 from the scabs healing over and then \* \* \* she would pick on those scabs and, and re-  
3 injure herself in that fashion." At the conclusion of the offer of proof the state renewed  
4 its objections on the basis of relevancy and that the proposed testimony would not be  
5 helpful to the trier of fact.

6           The trial court excluded the proposed testimony because it did not establish  
7 a specific link between the disorders the counselor identified and defendant's behavior  
8 during the investigation. That is, although the counselor testified generally that defendant  
9 suffered from the identified mental illnesses, he did not explain how people with those  
10 illnesses behave or how he might have expected them to behave--he simply listed the  
11 diagnoses and left it at that, offering no link between the diagnoses and the behavior that  
12 defendant sought to explain through the counselor's testimony. The trial court explained:

13           "\* \* \* I haven't heard any testimony that relates how these things that he's  
14 talking about would explain why she might answer too quickly \* \* \* or  
15 what I anticipate's going to be coming in \* \* \* from the two officers who  
16 were \* \* \* interviewing her, at least Detective Lidey as to the bizarre  
17 behavior that Detective Brissette was talking about."

18 Accordingly, the trial court concluded that the testimony would not be helpful to the jury  
19 and excluded it.<sup>2</sup>

20           To be admissible, expert testimony must be relevant under OEC 401<sup>3</sup> and it

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<sup>2</sup> Evidence of defendant's substance abuse and dependency was introduced in other forms during the trial.

<sup>3</sup> OEC 401 explains:

"'Relevant evidence' means evidence having any tendency to make

1 must provide some assistance to the trier of fact under OEC 702. If those conditions are  
2 satisfied, "the testimony will be excluded only if it is unduly prejudicial, repetitive, or  
3 falls under some other exclusionary provision as provided in OEC 403 \* \* \*." *State v.*  
4 *Brown*, 297 Or 404, 409, 687 P2d 751 (1984). Because the trial court excluded  
5 defendant's counselor's testimony only on the basis that it would not assist the jury, we  
6 limit our review to that issue.

7           We review the exclusion of expert testimony under OEC 702 for errors of  
8 law and, if a correct application of law allows for more than one option, for abuse of  
9 discretion. *See State v. Rogers*, 330 Or 282, 312-15, 4 P3d 1261 (2000) (clarifying that  
10 appellate courts review for errors of law "whether a trial court properly applied OEC 702  
11 to decide whether an expert is qualified to give testimony *relative to a particular topic*,  
12 because that determination is a question of the application of law") (emphasis in  
13 original); *Madrid v. Robinson*, 324 Or 561, 563, 931 P2d 791 (1997) (reviewing the  
14 exclusion of expert testimony to determine whether the trial court applied the correct  
15 principle of law); *State v. Gherasim*, 329 Or 188, 198, 985 P2d 1267 (1999) ("We review  
16 the trial court's order to exclude expert testimony to determine whether the court applied  
17 the correct principles of law and did not abuse its discretion."). The test under OEC 702  
18 has been stated rather simply as "whether the expert's testimony, if believed, will be of  
19 help or assistance to the jury." *State v. Stringer*, 292 Or 388, 391, 639 P2d 1264 (1982).

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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."

1 To assist the trier of fact, "the subject of the testimony must be within the expert's field,  
2 the witness must be qualified, and the foundation for the opinion must intelligibly relate  
3 the testimony to the facts." *Brown*, 297 Or at 409.

4 On appeal, the parties generally reprise their arguments before the trial  
5 court. Accordingly, this case turns on whether the trial court correctly concluded that the  
6 counselor's testimony would not assist the jury because he simply listed defendant's  
7 mental health issues without explaining how those issues might be manifested in  
8 defendant's behavior, particularly the behavior that defendant hoped to explain away at  
9 trial. To answer that question, we look to prior case law applying the OEC 702  
10 requirement that the testimony "assist the trier of fact."

11 Two cases in particular are instructive. In *Gherasim*, the Supreme Court  
12 reviewed a trial court's order that excluded expert testimony concerning the expert's  
13 diagnosis of a rape victim with dissociative amnesia. 329 Or at 192. In that case, the  
14 victim had identified the defendant as her assailant, but the defendant asserted that  
15 someone else had assaulted the victim and he merely arrived at the scene and attempted  
16 to help her. There was no eyewitness or forensic evidence introduced, so the jury's  
17 choice of whose account to believe was critical to its determination of guilt. At trial, the  
18 defendant sought to introduce the testimony of a psychiatrist, who would have testified  
19 that the victim experienced dissociative amnesia, which had affected her ability to recall  
20 the events of the assault accurately at trial. After the state objected, the trial court  
21 allowed an offer of proof, which went into the specifics of what aspects of the victim's



1 behavior suggested the presence of dissociative amnesia. However, the trial court  
2 ultimately excluded the testimony.

3           The Supreme Court concluded that the expert's testimony would have been  
4 helpful and that its exclusion was not harmless because

5           "[t]he determination of defendant's guilt primarily depended on whether the  
6 jury believed the victim's or defendant's version of what had occurred.  
7 Defendant's expert would have testified that, in his opinion, the victim  
8 suffered from dissociative amnesia and that that condition affected her  
9 capacity to remember what had occurred on the night that she was  
10 assaulted. The testimony was evidence that defendant was entitled to  
11 present to the jury. The state argues that the expert's testimony would not  
12 have been helpful, because the expert 'offered his diagnosis without telling  
13 the court what the diagnosis meant.' Although the expert did not explain  
14 his diagnosis in detail, that lack of detail did not render his testimony  
15 'unhelpful' to the jury."

16 *Id.* at 198 (citation omitted).

17           *State v. Middleton*, 294 Or 427, 429-30, 657 P2d 1215 (1983), involved a  
18 social worker's expert testimony that the victim's reaction to rape was typical of most  
19 victims of family sexual abuse. The victim testified at trial that her father had raped her.  
20 Her father, who denied that the rape occurred, introduced statements by the victim that  
21 were inconsistent with her claim of rape. Two social workers testified for the state  
22 regarding the reactions of young victims of family sexual abuse. One of the social  
23 workers testified that the victim's behavior was typical of most victims. The victim's  
24 father challenged the admission of that testimony at trial, in part, on the basis that it was  
25 not helpful to the jury. *Id.* at 434. The Supreme Court concluded that the testimony was  
26 admissible because it could help the jury better assess the witness's credibility by

1 explaining her "superficially bizarre behavior" (*i.e.* making inconsistent statements about  
2 whether the rape occurred) by identifying "its emotional antecedents[.]" *Id.* at 436.

3           This case lacks the kind of evidence that, in *Gherasim* and *Middleton*,  
4 established the connection between the proffered diagnoses and the behavior the expert  
5 sought to explain. In *Gherasim*, the expert addressed the signs that the victim likely  
6 suffered from dissociative amnesia and explained that, as a result, her capacity to  
7 remember what had occurred on the night she was assaulted was impaired. In *Middleton*,  
8 the expert identified the aspects of the victim's behavior that were characteristic of most  
9 victims of family sexual abuse. In this case, however, defendant's counselor simply  
10 testified that he had diagnosed defendant with bipolar disorder, borderline personality  
11 disorder, and a history of substance abuse dependency and kleptomania, without offering  
12 any explanation as to how those diagnoses might generally affect someone's behavior, let  
13 alone how they might have affected defendant's behavior. As a result, the jury would  
14 have been left with diagnoses but no further explanation as to how those diagnoses might  
15 affect defendant's behavior. Such testimony would not have assisted the jury in assessing  
16 defendant's behavior.

17           In *Gherasim*, the expert's failure to explain his diagnosis in detail was not  
18 fatal to the admissibility of his testimony, but here defendant failed even to offer the level  
19 of explanation offered in *Gherasim*. That is, in *Gherasim* the expert explained that the  
20 victim's condition affected her capacity to remember and to accurately recount what  
21 occurred on the night that she was assaulted. In this case, defendant's counselor failed to

1 offer even a rudimentary explanation that would link defendant's behavior to her mental  
2 health issues. Accordingly, the trial court did not err in excluding the testimony of  
3 defendant's mental health counselor.

4 Affirmed.