

**FILED: October 9, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

DENNIS BRIAN HUTTON,  
Defendant-Appellant.

Columbia County Circuit Court  
096061

A142745

On remand from the Oregon Supreme Court, *State v. Hutton*, 353 Or 533, 300 P3d 1222 (2013).

Jenefer Stenzel Grant, Judge.

Submitted on remand July 15, 2013.

Peter Gartlan, Chief Defender, and Jedediah Peterson, Deputy Public Defender, filed the briefs for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Karla H. Ferrall, Assistant Attorney General, filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reversed and remanded.

1                    NAKAMOTO, J.

2                    In *State v. Hutton*, 250 Or App 105, 279 P3d 240 (2012), we rejected  
3 defendant's challenge to the admission of evidence of his prior bad acts, holding that the  
4 evidence was relevant to prove intent, a nonpropensity purpose; we therefore affirmed his  
5 convictions for fourth-degree assault and harassment. The case is now before us on  
6 remand from the Supreme Court for reconsideration in light of that court's subsequent  
7 decision in *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012). *State v. Hutton*, 353 Or 533,  
8 300 P3d 1222 (2013). On remand, we conclude that, in light of *Pitt* and other later-  
9 decided cases, the trial court erred in *unconditionally* admitting evidence of defendant's  
10 prior bad acts--that is, admitting the evidence in the absence of (1) defendant's concession  
11 that the charged acts occurred or (2) an instruction to the jury that it was not to consider  
12 the prior acts as evidence of defendant's mental state until it first found that defendant in  
13 fact committed the charged acts. Accordingly, we now reverse and remand on the basis  
14 of that evidentiary error.<sup>1</sup>

15                    We repeat our original description of the background of this appeal:

16                    "On Valentine's Day in February 2009, defendant and the victim,  
17 Feinstein, were 'hanging out together' and drinking alcohol in a trailer.  
18 Defendant and Feinstein had been in a romantic relationship in the past but,  
19 as of that night, were not 'officially together.'

20                    "From there, their stories diverge. According to Feinstein, they fell  
21 asleep in the bedroom of the trailer. She awoke a short time later to use the

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<sup>1</sup> Defendant also challenges the trial court's restitution award. We rejected that assignment of error in our original opinion, 250 Or App at 107 n 1, but now, in light of our remand, we do not reach the restitution issue.

1 bathroom and get something to drink. When she returned to the bedroom,  
2 defendant was sitting in the bed and smoking a cigarette. They proceeded  
3 to argue about the trailer and other 'touchy' subjects. Defendant became  
4 angry and hit her in the mouth. She took a step back, and defendant  
5 reached out, put his cigarette on her chest, and used it to push her back.  
6 Feinstein then went to the living room of the trailer, and defendant stayed in  
7 the bedroom until he left approximately an hour and a half later. The  
8 following day, her lip was swollen and sore, and she felt a burning  
9 sensation on her chest. She called the police and reported that defendant  
10 had injured her. Defendant was charged with two counts of fourth-degree  
11 assault (one count for striking Feinstein and another for burning her) and  
12 two counts of harassment (again, one count for striking Feinstein and  
13 another for burning her), and he proceeded to trial on those charges.

14 "During his opening statement, defendant's counsel advanced a  
15 different version of the events, arguing that no assault or harassment had  
16 occurred. He stated, 'My client did not strike Miss Feinstein, he did not put  
17 out a cigarette on her, and that's what we're going to prove here at the end  
18 of the day.' Defendant's theory, which he later testified in support of, was  
19 that he left the trailer around 10:30 p.m. and returned to find Feinstein  
20 passed out drunk on the floor, at which point she told him that she had  
21 burned herself.

22 "After defendant's opening statement, the prosecutor moved *in*  
23 *limine* for a ruling on the admissibility of evidence of prior misconduct--  
24 namely, evidence that, in 2007, defendant had hit Feinstein in the lip during  
25 an argument in the trailer, causing her lip to swell. Defendant had been  
26 indicted in a separate case on charges arising out of that earlier incident but  
27 still had not yet been tried on those charges by the time of trial in this case.

28 "The prosecutor argued that evidence of the prior assault was  
29 admissible under OEC 404(3) because it was relevant for 'showing intent in  
30 this case.' The prosecutor framed her argument in terms of the five-part test  
31 set forth in *State v. Johns*, 301 Or 535, 557-59, 725 P2d 312 (1986), for  
32 determining 'whether the probative value of the evidence exceeds its  
33 prejudicial nature.' The prosecutor, focusing on the 'first prong' of that test,  
34 argued that evidence of the prior assault was necessary 'to show the jury  
35 that this incident was not some odd accident--it sounds as though there's a  
36 defense that this did not--he did not commit the action on it but there's  
37 another explanation.' Relying on *State v. Wieland*, 131 Or App 582, 887  
38 P2d 368 (1994), the prosecutor argued that, as a matter of logic, 'the more  
39 often that an unusual event occurs, such as getting a fat lip or having  
40 injuries around the neck area, the less likely it is that that occurrence is

1 accidental.' *See id.* at 589 ('As a matter of logic, the more often an unusual  
2 event occurs, the less likely it is that the occurrence is accidental. Because  
3 this evidence [of a prior arson] has a tendency to make the fact that the  
4 1986 fires were caused by arson more likely, it is relevant. OEC 401.').  
5 The prosecutor further argued that the evidence was relevant to prove  
6 defendant's mental state on the harassment charges. She explained that the  
7 context of the testimony by Feinstein 'would be when we're discussing the  
8 victim's state of mind in reaction to what was happening, why did she react  
9 the way she did, because she had experienced this before,' and also argued  
10 that prior assaults by defendant against Feinstein 'are actually going to go to  
11 show his intent that's required on the Harassment charges.' The prosecutor,  
12 thus, was suggesting that because defendant had engaged in a pattern of  
13 abuse with Feinstein and had punched her in the mouth in the past, he  
14 therefore knew how she would react to that type of abuse.

15 "Defendant, meanwhile, argued that 'the defense is not that it was  
16 somehow accidental, it's that it did not happen, in fact[.]' Defendant  
17 directed the trial court to 'what was said here in opening,' when defendant's  
18 counsel stated that defendant did not strike Feinstein, did not put out a  
19 cigarette on her, and 'that's what we're going to prove here at the end of the  
20 day.' Thus, defendant argued, the prior assault was being offered only to  
21 show that defendant had a propensity to abuse Feinstein--an impermissible  
22 and highly prejudicial purpose.

23 "The trial court granted the state's motion *in limine*, explaining:

24 "[I] believe that based on the *Johns* test it--this evidence does  
25 fall within those parameters. So I would be concerned if there were  
26 other evidence that was not this specific incident date because the  
27 second prong of clearly proven may not be of--whatever else has  
28 happened may not rise to that level.

29 "So I think that the evidence of the prior incident needs to be  
30 limited to this one particular event. In part because it's--the strength  
31 of the evidence is (inaudible), but also in part because I don't want  
32 [defendant's counsel] faced with incidents that he hasn't heard about  
33 and if he already has the police report in this case at least he knows  
34 what's coming.

35 "I would agree that it is prejudicial toward [defendant] but  
36 really any evidence against him is prejudicial to some degree, and  
37 the test is whether it's unfairly prejudicial. I don't believe that it's  
38 unfairly prejudicial, nor do I believe that it is particularly

1 inflammatory compared to the other evidence that's going to come in  
2 anyway in the case in chief.

3 "So I'm going to allow this evidence but it needs to be very  
4 carefully constrained to that one incident.'

5 "Pursuant to that ruling, the state elicited testimony from Feinstein  
6 regarding the 2007 incident, as well as photographs depicting Feinstein  
7 after that earlier incident. Defendant objected to the admission of the  
8 photographs, but the trial court overruled the objection and admitted the  
9 evidence. The jury ultimately found defendant guilty of both counts of  
10 fourth-degree assault (Counts 1 and 3) and one count of harassment for  
11 burning the victim with a cigarette (Count 4). The jury acquitted defendant  
12 on Count 2, the charge of harassment predicated on defendant punching the  
13 victim in the mouth."

14 *Hutton*, 250 Or App at 107-10 (footnote omitted).

15 In his original briefing to this court, defendant argued that evidence of the  
16 2007 incident was "admitted solely to show defendant's propensity to commit assaults,  
17 which is an improper basis to admit the evidence." However, as we explained in our  
18 decision, his contentions on appeal had "narrowed to a single legal issue: whether prior  
19 bad acts can be admitted to prove intent *even if the defendant is not specifically disputing*  
20 *that element of the crime.*" *Id.* at 110 (emphasis added). The state, for its part, argued  
21 that defendant's plea of not guilty--which required the state to prove all elements of the  
22 charged offenses--had put all of the elements of the crimes, including intent, at issue in  
23 the case. Thus, the state argued that it was entitled to offer evidence of the 2007 incident  
24 regardless of defendant's theory of the case.

25 We began our analysis in *Hutton* with a survey of cases involving proof of  
26 "intent," including our decision in *State v. Pitt*, 236 Or App 657, 237 P3d 890 (2010) (*Pitt*  
27 *I*), which was then pending in the Supreme Court, *see* 349 Or 663 (2011). We

1 summarized that body of law as follows:

2 "[W]e have repeatedly held that, as a threshold matter, evidence of prior  
3 bad acts must be relevant to a contested issue in the case, and that is true of  
4 intent as well. \* \* \* Contrary to the state's argument (an argument raised  
5 but not addressed in [*Pitt I*]), intent is not a contested issue for purposes of  
6 OEC 404(3) in every case merely by virtue of the fact that the state must  
7 prove that element. If that were true, [*State v. Osborne*, 174 Or App 88, 25  
8 P3d 356 (2001),] would have been decided differently; there, too, the state  
9 bore the burden of proving that element of the charged crimes. Indeed, in  
10 [*State v. Sicks*, 33 Or App 435, 438, 576 P2d 834 (1978)], we explicitly  
11 rejected the argument the state now makes, stating that the 'better view is  
12 that evidence of similar acts with other persons will not be admitted for this  
13 purpose simply because defendant has pled not guilty.' \* \* \*

14 "At the same time, we have also rejected the categorical approach  
15 that defendant posits, namely, that, whenever a defendant denies that the  
16 charged conduct took place, the defendant's mental state is *not* a contested  
17 issue. Indeed, the facts or nature of the charges may be such that, even if a  
18 defendant denies committing the charged acts, the defendant's previous  
19 conduct will shed light on a contested issue of *mens rea*--for example, who,  
20 between the defendant and the victim, was the aggressor during a fight,  
21 [*State v. Yong*, 206 Or App 522, 542-43, 138 P3d 37, *rev den*, 342 Or 117  
22 (2006)]; whether the defendant had homicidal intent when killing the  
23 victim, [*State v. Moen*, 309 Or 45, 68-69, 786 P2d 111 (1990)]; or whether  
24 the acts, even if committed, lend themselves to some other explanation of  
25 the defendant's intent, *cf. Sicks*, 33 Or App at 438 (where the charged acts  
26 'would by themselves strongly indicate the required state of mind,' evidence  
27 of prior bad acts 'should generally be admitted only if defendant concedes  
28 the alleged act but claims that it was inadvertent or innocent'). Instead,  
29 when applying OEC 404(3), our cases have required trial courts to  
30 determine, on a case-by-case basis, whether intent, or some other  
31 nonpropensity matter, is genuinely at issue in the case."

32 *Hutton*, 250 Or App at 118-19 (footnote omitted; emphasis in original).

33 Applying those general principles, we concluded that defendant's specific  
34 intent "was a contested issue by virtue of the evidence and the nature of the harassment  
35 charges, and defendant's previous act of punching the victim after an argument and his  
36 knowledge of her reaction to a punch in the mouth in that circumstance--*i.e.*, whether it

1 caused her annoyance or particular mental distress--were relevant to that question of  
2 defendant's state of mind during the offensive contact." *Id.* at 121. Thus, we held that  
3 "the trial court did not err in concluding that intent was a contested issue despite  
4 defendant's theory of the case," and we affirmed defendant's convictions. *Id.*

5 Defendant then petitioned for Supreme Court review of our decision in  
6 *Hutton*. While that petition was pending, the Supreme Court decided two cases that, like  
7 *Hutton*, involved the admission of evidence of prior bad acts to prove intent. *See State v.*  
8 *Leistiko*, 352 Or 172, 282 P3d 857, *adh'd to as modified on recons*, 352 Or 622, 292 P3d  
9 522 (2012); *Pitt*, 352 Or 566. In the first of the two, *Leistiko*, the defendant had been  
10 charged with three counts of first-degree rape arising out of separate incidents with three  
11 different women. To prove those three charges, the state offered evidence that defendant  
12 had forcibly compelled a fourth woman to have sexual intercourse with him, arguing,  
13 among other things, that her testimony was admissible under *Johns*, 301 Or at 555-56, to  
14 show that defendant had acted intentionally as to at least one of the alleged victims.

15 The Supreme Court concluded in *Leistiko* that the evidence was not  
16 admissible to prove the defendant's intent. The court explained that the analysis in *Johns*,  
17 upon which the state relied in *Leistiko*, was based on the "doctrine of chances"--*i.e.*, the  
18 theory that "the more often [a] defendant performs the *actus reus*, the smaller is the  
19 likelihood that the defendant acted with an innocent state of mind." 352 Or at 182  
20 (internal quotation marks and citations omitted). The doctrine of chances is an exception  
21 to the general prohibition on the admission of propensity evidence, because it "does not

1 'as[k] the trier of fact to infer the defendant's conduct (entertaining a particular *mens rea*)  
2 from the defendant's subjective character'" but "depends instead on the proposition that  
3 multiple instances of similar conduct are unlikely to occur accidentally." *Id.* (quoting  
4 *Johns*, 301 Or at 554). And, when viewed in light of those motivating principles, the  
5 state's argument in *Leistikio* suffered two flaws, the first of which is relevant here:

6 "[T]he doctrine of chances rests on the proposition that *the defendant either*  
7 *concedes the act that requires proof of a mental state or the trial court*  
8 *instructs the jury not to consider uncharged misconduct evidence offered to*  
9 *prove intent unless and until the jury finds the act that requires proof of*  
10 *intent to have been done and is proceeding to determine intent. See [John*  
11 *Henry Wigmore, 2 Evidence § 302, 245 (Chadbourne rev 1979)]. Neither*  
12 *of those conditions occurred here. Defendant never conceded that he*  
13 *forcibly compelled any of the three women to engage in intercourse with*  
14 *him, and the trial court neither admitted the uncharged misconduct evidence*  
15 *as conditionally relevant nor instructed the jurors to consider that evidence*  
16 *on the issue of intent only if they first found that defendant had forcibly*  
17 *compelled the women to engage in intercourse with him. To admit the*  
18 *fourth woman's testimony in the absence of one of those conditions poses,*  
19 *as the court recognized in [State v. Gailey, 301 Or 563, 725 P2d 328*  
20 *(1986)], an unacceptable risk that the uncharged misconduct evidence is*  
21 *being admitted to prove the act, not the defendant's mental state."*

22 *Leistikio*, 352 Or at 185-86 (emphasis added).

23 A few months after *Leistikio*, the Supreme Court issued its decision in *Pitt*.

24 In *Pitt*, the defendant, who was charged with various sex offenses, argued that evidence  
25 of uncharged sexual misconduct was not relevant to prove intent or absence of mistake  
26 regarding the charges against him "because his defense was that the charged acts never  
27 occurred and, if the acts did occur, he did not commit the acts." 352 Or at 578. "Stated  
28 differently, defendant assert[ed] that the relevance of evidence of intent thus depends  
29 upon a prior finding of fact or a stipulation that establishes that defendant committed the



1 charged act." *Id.* The Supreme Court, building on its analysis in *Leistiko*, concluded that  
2 evidence of prior misconduct was only "conditionally relevant" to prove intent:

3 "When the trial court ruled on defendant's motion *in limine*, it  
4 applied the doctrine of chances, as construed in *Johns*, and determined that  
5 the uncharged acts were sufficiently similar to the charged acts to be  
6 relevant to prove intent. However, at the time of the ruling, the trial had not  
7 occurred and, consequently, the record contained no evidence sufficient to  
8 support a finding that the charged acts had occurred. Defendant had not  
9 stipulated that he had touched A's genital area in Clatsop County. *Before*  
10 *trial, and in the absence of a stipulation by defendant that he had touched*  
11 *A's genital area in Clatsop County, evidence of defendant's uncharged*  
12 *misconduct involving A and R in Lane County was only conditionally*  
13 *relevant.* That is, the uncharged misconduct evidence might have become  
14 relevant if certain conditions had occurred concerning the trial court record.  
15 First, in the absence of defendant's stipulation, the state would have to  
16 introduce evidence at trial sufficient to permit the factfinder to find beyond  
17 a reasonable doubt that, in fact, defendant had touched A's genital area in  
18 Clatsop County, as charged. Second, the court would have to instruct the  
19 jury that it could not consider the evidence of defendant's uncharged  
20 misconduct for any purpose unless it first found as a fact that defendant had  
21 touched A's genital area in Clatsop County, as charged. *If the record*  
22 *demonstrated that those conditions were satisfied, then the court could*  
23 *allow the state to offer and the jury to consider the evidence of defendant's*  
24 *uncharged conduct for the purpose of deciding whether defendant had*  
25 *committed the charged acts intentionally.*

26 "The trial court, however, did not decide that the evidence of  
27 defendant's uncharged misconduct was conditionally admissible in the  
28 manner that we have described above. *It ruled instead, without conditions,*  
29 *that the uncharged misconduct evidence was relevant and admissible. In*  
30 *light of the record that existed when the trial court addressed the motion in*  
31 *limine, the court's ruling was erroneous."*

32 *Pitt*, 352 Or at 580-81 (footnote omitted; emphasis added). Thus, the court reversed the  
33 defendant's convictions and remanded the case to the trial court for further proceedings.

34 *Id.* at 582.

35 In the wake of *Pitt*, the Supreme Court allowed defendant's petition for

1 review in this case, vacated our decision, and remanded to us for reconsideration. On  
2 remand, defendant has filed a supplemental memorandum, in which he now argues that  
3 the analysis in our original opinion, which focused on whether intent was a contested  
4 issue, is beside the point. According to defendant, *Pitt* establishes that, *even if intent is*  
5 *contested*, evidence of prior bad acts nonetheless is admissible to prove intent only if two  
6 conditions are met: (1) in the absence of a stipulation, the state has offered sufficient  
7 evidence to allow a factfinder to find the *actus reus* and (2) the court instructs the jury  
8 that it is to consider the prior bad acts as evidence of intent only if it first finds that  
9 defendant committed the *actus reus*.<sup>2</sup>

10           We have since endorsed defendant's reading of *Pitt*. In *State v. Jones*, 258  
11 Or App 1, \_\_\_ P3d \_\_\_ (2013), we reconsidered a decision that, like *Hutton*, had issued  
12 before *Leistikio* and *Pitt*. Our original opinion in *Jones* had affirmed the defendant's  
13 convictions, on the ground that he had not preserved for appeal the application of *Johns*  
14 to "bad acts" evidence admitted at trial. 246 Or App 412, 417-18, 266 P3d 151 (2011).  
15 The Supreme Court, however, vacated our decision and remanded for reconsideration in  
16 light of *Leistikio*. *State v. Jones*, 353 Or 208, 297 P3d 480 (2013). At that point, the  
17 defendant argued that the preservation issue that we identified in our original opinion was  
18 no longer an obstacle, because the error was now apparent on the record in light of  
19 *Leistikio*. See *State v. Jury*, 185 Or App 132, 57 P3d 970 (2002), *rev den*, 335 Or 504  
20 (2003) (holding that "plain error" is determined by reference to the law existing at the

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<sup>2</sup> The state has not filed supplemental briefing on remand.

1 time the appeal is decided).

2           We agreed with the defendant's contention on remand in *Jones* that, under  
3 *Leistiko*, it was not only error, but "plain error," to admit evidence of prior bad acts in a  
4 case in which (1) the defendant had not admitted committing the *actus reus* and (2) the  
5 jury was not instructed that it must first find that the defendant committed the *actus reus*  
6 before considering the evidence of other crimes to determine intent. We explained:

7           "Here, as in *Leistiko*, defendant did not concede that he had engaged  
8 in the *actus reus*; nor was the jury instructed to consider the uncharged  
9 misconduct evidence as 'evidence on the issue of intent only if they first  
10 found that defendant had [committed the *actus reus*].' *Leistiko*, 352 Or at  
11 186. Those circumstances are patent and uncontroverted, and the  
12 application of *Leistiko*'s principles on this record is not 'reasonably in  
13 dispute.'"

14 258 Or App at 8 (alterations in *Jones*). We also made explicit that it was incumbent upon  
15 the state, "[a]s the proponent of the 'prior acts' evidence proffered to prove intent in a case  
16 in which the defendant had not admitted or otherwise stipulated to his or her commission  
17 of the *actus reus*, \* \* \* to ensure that the prerequisites of admissibility were satisfied."  
18 *Id.* at 8 n 5.

19           In our view, this case is indistinguishable from *Jones*, save for the fact that  
20 defendant actually preserved for appeal whether evidence of his prior bad acts was  
21 admissible to prove intent. Here, as in *Pitt*, *Jones*, and *Leistiko*, defendant did not admit  
22 committing the *actus reus*, nor was the jury instructed to consider evidence of defendant's  
23 prior bad acts only after finding that he committed the charged acts. As described above,  
24 after defendant's opening statement but before any witnesses had been presented, the state

1 sought a ruling on the admissibility of evidence that defendant had punched Feinstein  
2 during an argument in a trailer in 2007, arguing that the evidence was admissible under  
3 *Johns* to prove defendant's intent with regard to the charged crimes, which stemmed from  
4 a 2009 incident between the two in the same trailer. By the time the state sought that  
5 ruling, defendant's counsel had explained that defendant denied committing the charged  
6 acts and would proffer a different version of the 2009 events in question. The trial court,  
7 over defendant's objection, allowed the state to introduce evidence of the 2007 incident  
8 unconditionally--that is, without any limitation on the jury's use of the evidence. The  
9 unconditional admission of the evidence created the same type of risk that the Supreme  
10 Court identified in *Pitt* and *Leistikio*, and that required a reversal in *Jones*: that the jury  
11 would use the 2007 incident to decide that defendant had a propensity to act violently  
12 toward Feinstein and acted in conformity with that propensity in 2009.

13           Thus, upon further consideration in light of *Pitt*, *Leistikio*, and *Jones*, we  
14 now conclude that the trial court erred by unconditionally admitting evidence of  
15 defendant's 2007 incident with Feinstein. Because the evidentiary error was not  
16 harmless, *see Jones*, 258 Or App at 9 n 6 (identifying the harm resulting from the  
17 unconditional admission of evidence of other crimes), the case must be reversed and  
18 remanded.

19           Reversed and remanded.