

VII. ANTICIPATED EVIDENTIARY ISSUES

The following outline of evidence law is submitted as an aid to the Court in addressing evidentiary issues likely to arise at trial, either through cross-examination of the State's witnesses, or during the defense case-in-chief.

1. Any character trait of Ms. Richmond that is relevant is admissible

OEC Rule 404(2)(b) provides:

(2) Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor.

Proof of character under this provision is limited to testimony in the form of opinion or reputation. OEC 405. In *State v. Marshall*, 312 Or. 367 (1991), the court delineated the types of evidence that reflect a "trait of character":

Character evidence, therefore, is evidence of a particular human trait, such as truthfulness, honesty, temperance, carefulness, or peacefulness, *etc.* A person's character with respect to truthfulness means that person's propensity to tell the truth in all the varying situations of life. A person's character with respect to carefulness means that person's propensity to act with care in all the varying situations of life. *Id.* at 372.

See also Laird C. Kirkpatrick and Christopher B. Mueller, 1 *Federal Evidence* §101 at 551 (2nd ed 1994)("character evidence means proof relating to commonly-recognized human qualities that might be called innate or essential to the person being described").

Testimony that the alleged victim was “very volatile, could be very ballistic” and had a “mean” temper,” is properly admitted character evidence when relevant to the defense. *State v. Whitney-Biggs*, 147 Or App 509, 525-526 (1997). Ms. Richmond’s character of becoming mean and spiteful towards DuBois when drunk may be admissible as relevant to bias.

Ms. Richmond’s character or propensity to exaggerate in recounting events may be admissible as relevant to her competency as a witness. See OEC 601 & 611. Although not specifically stated in the Rules of Evidence, proof that a witness labors under some incapacity that affects perception, memory, or ability to communicate bears on the credibility of the testimony, apart from the witness’ character for truthfulness. C. Mueller & L. Kirkpatrick, Federal Evidence 3d, “Witnesses: Rules 601-615,” §6:75, p. 504.

The fact that a defendant offers character evidence regarding the alleged victim does not open the door for the prosecution to offer character evidence regarding the defendant. Kirkpatrick, Oregon Evidence, §404.05[2][b], p. 197 (Fifth ed. 2007). *State v. Peacock*, 75 Or App 217 (1985).

2. Relevant Character Traits of Mr. DuBois

Mr. DuBois’ character for peacefulness and truthfulness is admissible as pertinent character traits offered by accused. OEC 404(2)(a). He may also offer evidence of being a gentleman or protective of women. *See also, State v.*

Enakiev, 175 Or App 589 (2001)(defendant's character for sexual propriety in sex abuse prosecution).

3. Specific acts of conduct by Richmond or DuBois

Rule 404(3), OEC, provides:

(3) 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.

Evidence may be offered under Rule 404(3) by defendants as well as by prosecutors. Kirkpatrick, §404.06[10], pp. 205-206.

The courts have recognized that specific acts of violence by the alleged victim that are known to the defendant are relevant to show his reasonable belief in the need to use self-defense. See, *Whitney-Biggs, supra*, 147 Or App at 527-528. Specific acts of Ms. Richmond's behavior towards Mr. DuBois during the relationship are relevant to explain Mr. DuBois' behavior towards Ms. Richmond on the evening in question, rather than to show Richmond's character or propensity to behave in a certain way. See, *State v. Stevens*, 328 Or 116, 126-127 (1998)(victim's testimony regarding prior acts of abuse by defendant against her relevant to explain her behavior with respect to defendant). Thus, Ms. Richmond's prior acts of violence against Mr. DuBois, as well as acts of self-endangerment, and her prior acts expressing disapproval of Mr. DuBois' conduct (e.g., screaming, throwing tantrums), should therefore be admissible to show

his state of mind during his conduct towards Ms. Richmond at the time of the alleged crimes.

The Oregon Supreme Court has recognized that prior acts of the defendant and alleged victim towards one another during their relationship is not “character evidence,” and may be admissible to show behavior towards one another, not propensity in general. *State v. McKay*, 309 Or 305, 308 (1990)(prior acts between defendant and alleged victim admissible to demonstrate defendant’s behavior towards the victim, not his propensity in general). This provides an alternate, “non-character evidence” theory for admissibility of evidence such as Ms. Richmond’s mean and spiteful behavior towards Mr. DuBois when she is intoxicated.

4. Evidence of Bias or Interest

OEC Rule 609-1 permits impeachment of the credibility of a witness by evidence that the witness engaged in conduct or made statements showing bias or interest. If the witness denies the facts claimed to show bias or interest, evidence of those specific acts may be introduced. “Bias may be evidenced by matters such as the following: (1) personal, family, romantic, sexual or business relationships; . . . (3) statements or conduct indicating positive or negative feelings of the witness towards a party; . . . (5) prior fights or quarrels.” Kirkpatrick, §609.1.03[2], p. 519. *See, e.g., Olden v. Kentucky*, 488 US 227 (1988)(violation of Confrontation Clause rights to block effort to ask witness if he had extramarital affair with alleged victim, when defense claimed victim

made up story to protect her relationship with the witness). If witness admits the facts, no extrinsic evidence may be offered. Hearsay statements by the witness are admissible to show bias under the state of mind exception, OEC 803(3).

Specific acts that tend to prove a motive to lie against the defendant are admissible. See, *State v. Cox*, 337 Or. 477 (2004)(When a party seeks to introduce other crimes or bad acts evidence to prove motive, party must satisfy three requirements: (1) evidence must be independently relevant for non-character purpose, (2) proponent of the evidence must offer sufficient proof that the uncharged misconduct was committed and that the alleged perpetrator committed it, and (3) probative value of uncharged misconduct evidence must not be substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury).

5. Extrinsic Evidence to Contradict Ms. Richmond's Testimony

The defense anticipates a need to offer extrinsic evidence to impeach Ms. Richmond's trial testimony. Impeachment by contradiction is an available trial tactic to discredit a witness' testimony in general, as well as to cast doubt on the validity of the factual statement made. See, *State v. Burdge*, 295 Or 1 (1983); *State v. Schober*, 67 Or App 385 (1984)(Statute prohibiting proof of specific instances of conduct of witness for purpose of attacking or supporting credibility by extrinsic evidence did not bar rebuttal testimony that defendant appeared to have been drinking on two previous occasions and that his drinking

appeared to affect his behavior, since it was not introduced to attack defendant's credibility by showing specific instances of his conduct, but to contradict his testimony on a specific matter, that for all practical purposes he did not drink, to which he had testified on direct examination)

In *State v. Gibson*, 338 Or. 560, 572 (2005), the Court explained:

This court consistently has held that a witness may be impeached by evidence that contradicts the witness's testimony on any independently relevant fact, although the witness cannot be impeached as to merely collateral matters. *State v. Burdge*, 295 Or. 1, 6 n. 3, 664 P.2d 1076 (1983). Defendant testified that Herlong asked to use defendant's gun on the night of the murder and that he (defendant) never had fired that gun. The state was entitled to introduce Herlong's contradictory testimony on those matters because it related to the circumstances of the crime and to whether defendant fired the shot that killed Copp.

Thus, Mr. DuBois may offer extrinsic evidence that contradicts the testimony of Ms. Richmond, or other State's witnesses, on matters related to the circumstances of the crime, as well as to prove bias if the facts are not admitted by the witness.

6. Impeachment by Intoxication

The Oregon Supreme Court has long recognized the right to cross-examine a witness concerning "the extent of her intoxication and in what way, if at all, it affected her memory [of the events in question]," *State v. McKiel*, 122 Or 504 (1927); see also, Kirkpatrick, §607.03[2], p. 470.