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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LAKE COUNTY

STATE OF OREGON, Plaintiff, -VS- JOHN DOE, Defendant	CASE No. 030067CR MEMORANDUM OF LAW

MEMORANDUM OF LAW REGARDING CROSS-EXAMINATION OF DEFENDANT IN SEX CRIMES CASE WITH PRIOR SPECIFIC BAD ACTS OF ALLEGED SEXUAL MISCONDUCT

The prosecutor is prohibited from introducing evidence of other crimes or bad acts by the accused unless the evidence is introduced for some relevant purpose other than to suggest that, because the accused is a person of criminal character, he or she is more likely to have committed the charged crime. *State v. Pinnell*, 311 Or 98, 103 (1991)(citing OEC 404(2) and (3); McCormick on Evidence 557-58, § 190 (3d ed 1984)). That general rule is often described as "the propensity rule," or the rule that generally prohibits the "use of character as circumstantial evidence, or as it is sometimes called, character to prove conduct." *State v. Pinnell*, 311 Or at 104 (citing Wright & Graham, 22 Federal Practice and Procedure 342 § 5232).

The propensity rule's general prohibition of bad character evidence, codified in OEC 404(2) and OEC 404(3), is a specific application of OEC 403. The theory is that the risk that the jury will convict for crimes other than those charged, or because the accused deserves punishment for his past misdeeds, outweighs the probative value of the inference that "he's done it before, he's done or will do it again." *State v. Pinnell*, 311 Or at 106 (citing Weinstein & Berger, Weinstein's Evidence Manual 7-6, ¶ 7.01[01] (Student ed 1987)). It is also feared that the jury will give more weight to the evidence than it deserves in assessing guilt of the crime charged. *State v. Pinnell*, 311 Or at 106 (citing Louisell & Mueller, 2 Federal Evidence 128-29, § 136).

The following cases deal specifically with prior bad act evidence of a sexual nature. These cases illustrate that evidence is not only inadmissible in the State's case-in-chief, but also generally inadmissible for impeachment purposes during the defense case or the State's rebuttal.

In *State v. Ewing*, 174 Or, 487, 149 P2d 765 (1944), the Supreme Court held that when Defendant puts his character clearly and expressly in issue, evidence of bad character is admissible. In *Ewing*, the Defendant, charged with sodomy, denied all charges. On direct examination he testified: "I don't know any reason why I should be doing any such a thing," and later, during cross-examination, he said: "* * * [M]y makeup is such a nature that I would not attempt such a thing or think about doing such a thing." The prosecution was permitted over objection to offer in rebuttal testimony of four witnesses concerning specific acts of sexual misconduct with others. The Supreme Court held that the defendant's testimony did not put his character in issue, but, even if it had, the prosecution was not entitled to prove specific acts of sexual misconduct with others. The court stated:

> "To admit evidence of bad character against an accused it is necessary that he shall already have put his character clearly and expressly in issue. Underhill, Crim. Ev., 4th ed., § 167, p. 293; *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676. An answer by a defendant on cross-examination to the

> effect, in substance, that he is not that kind of man does not put his character clearly and expressly in issue, but if character had been put in issue, the prosecution would not have been entitled to prove other specific misconduct by the defendant with other persons in this type of case. * * * Again, it is provided that a witness may be impeached by certain specified methods, 'but not by evidence of particular wrongful acts,' except that former conviction of crime may be shown. O. C. L. A. § 4-711 [now ORS 45.600]. Concerning that statute, this court has said that it
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> "' * * * states the law plainly and does not permit evidence of 'particular wrongful acts,' except it may be shown that the witness has been convicted of a crime. If other particular wrongful acts on the part of a witness, although the witness may be a defendant in the case, are permitted to be shown, then it would necessitate the investigation of the matters with which the witness is accused and introduces collateral cases. A defendant witness cannot be cross-examined at large to other offenses: *State v. Deal*, 52 Or. 568 (98 Pac. 165); *State v. Holbrook,* 98 Or. 43, 45, 63 (188 Pac. 947, 192 Pac. 640, 193 Pac. 434).' *State v. Motley*, 127 Or. 415, 272 P. 561. And see *State v. White*, 48 Or. 416, 87 P. 137; *Redsecker v. Wade*, 69 Or. 153, 134 P. 5, 138 P. 485, Ann. Cas. 1916A. 269.
> "* * * * *
>
> "The cross-examination to which we have referred was improper either for the purpose of showing bad character, or for the purpose of disproving defendant's statement that he would 'never think of such things.' When the state went beyond cross-examination and in rebuttal introduced evidence of four witnesses concerning specific acts of misconduct, more serious error was committed." *State v. Ewing, supra* at 503-504.

In *State v. Davis*, 54 Or App 133 (1981) the court reversed the defendant's conviction for First Degree Rape because of error committed by admitting testimony concerning prior sexual contact between the defendant and young girls other than the alleged victim and the admission of a photograph taken by the defendant of his daughter posing in the nude. In *State v. Davis, supra*, the State had contended that the defendant had opened the door to admission of the disputed testimony by placing his character in issue by giving testimony on direct examination regarding his skills as a father in the following interchanges and also by his testimony on cross-examination that when he told several girls that he wanted them to be his girlfriends he was "joking around", and by offering testimony of two defense witnesses to the effect that they had never seen

inappropriate sexual contact between defendant and other girls the same age as the victim:

> "Q. [Defense attorney] Did you live with your daughter alone after your first divorce?
>
> "A. [Defendant] No.
>
> "Q. So this was the first time you has been living alone with your daughter, was after your second divorce?
>
> "A. Yes.
>
> "Q. How did you guys get along?
>
> "A. I thought we got along beautiful.
>
> "Q. Okay.
>
> "Do you enjoy - you people seem to enjoy each other's company
>
> "A. I thought so.
>
> "Q. Did you consider yourself a - what kind of a father did you consider yourself? A strict one, a lenient one or what?
>
> "A. It depends on what come up.
>
> "Q. I see. It was kind of a not very good question to ask you. It gives you a chance to say good things about yourself.
>
> What do you mean by that, though.
>
> "A. Well, it depended on what we was trying to do. I tried most of the time to enjoy my daughter, to be with her and try to understand what was happening.
>
> "Q. Okay.
>
> "Were there ever any times when you felt badly about your fathering or parenting skills like you had made some mistake or something? For example, over discipline.
>
> "A. I think everybody does some time or another.
>
> "Q. So you don't think you are the perfect parent necessarily, right?
>
> "A. No.

"Q. Now, do you remember how your daughter did in school?"

In *State v. Davis, supra* p. 140-141 the Court held that:

"Here, defendant's direct testimony that he had a good relationship with his daughter and was a good father did not "clearly and expressly" put his character in issue in any way relevant to his possible guilt or innocence of the crime charged. It did not "open the door" to impeachment evidence of bad character. Similarly, his testimony on cross-examination that he was joking when he asked the victim and others to be his girlfriends did not place his character in issue, but if it did, it did not open the door for impeachment evidence of bad character by evidence of specific acts of sexual misconduct. ORS 45.600; 3 *State v. Ewing, supra,* 174 Or at 504. While the state may introduce evidence of a defendant's bad character if the defendant in his case-in-chief opens the door by offering evidence of his good character, as we stated in *State v. Jackson*, 31 Or App 645, 649, 571 P2d 523 (1977), rev den 281 Or 323 (1978), the state "* * * may not open its own door."

Finally, the state contends that by eliciting from two defense witnesses testimony that they had observed defendant playing or wrestling with his daughter, the victim and other young girls, but had seen no inappropriate contact between them, defendant had clearly and expressly placed his character in issue. The testimony elicited from these witnesses is like that in *State v. Henley*, 27 Or App 607, 557 P2d 33 (1976), rev den 277 Or 237 (1977), where the defendant was charged with rape of a ten-year-old girl. His wife, as a defense witness, testified on direct examination that to her knowledge the defendant showed no signs of sexual deviation. The prosecution on her cross-examination asked whether she had knowledge of a specific instance in which a complaint had been made against her husband regarding a six-year-old neighbor girl. This court held that the cross-examination was improper. We stated:

> "Furthermore, even if defendant's character had been placed in issue, the cross-examination was not proper. Just as defendant may not introduce evidence of specific praiseworthy acts. *McCormick, supra* at 455. § 191. the prosecution may not prove defendant' bad character through evidence of specific acts. See, *State v. Curtis, supra; State v. Ewing, supra*, 174 Or at 503, *McCormick. supra* at 459, § 192; 1 Wigmore on Evidence 643. § 193 (3rd ed 1940). A witness to reputation for good character may be asked about awareness of other crimes which the defendant may have committed, and whether the defendant's reputation would be affected thereby. *State v. Shull*, 131 Or 224, 282 P 237, 71 ALR 1498 (1929), at the cross-examination herein was not for that purpose or in that form. The prosecutor's questions were calculated to elicit evidence of a prior reported sexual misdeed, or at least to imply that such involvement had occurred. Such questions

> were improper and should not have been allowed." (Footnote omitted.) *State v. Davis, supra* at 140-141.

"While evidence of other crimes or sexual acts with others than the victim may tend to prove that the defendant has a lustful disposition and is, therefore, more likely to have committed the crime in question, such evidence is, with limited exceptions, inadmissible." *State v. Pace*, 187 Or 498, 502, 212 P2d 755 (1949); *State v. Urlacher*, 42 Or App 141, 144, 600 P2d 445 (1979). In cases involving sex crimes, the inflammatory nature of the crime itself renders the potential for prejudice high, and the exclusionary rule is strictly applied. *Youngblood v. Sullivan*, 52 Or App 173, 176-177, 628 P2d 400, rev den 291 Or 368 (1981); *State v. Sicks*, 33 Or App 435, 438, 576 P2d 834 (1978)." *State v. Davis, supra* at 136.

In *State v. Henley*, 27 Or App 607, 557 P2d 33 (1977), the appellate court reversed the defendant's conviction for rape on the basis that the court had erred by allowing the prosecution to offer evidence that the defendant had been accused of molesting a six-year-old in some manner. The defendant had called his wife as a defense witness and she had testified on direct examination that she had a normal sexual relationship with her husband. The following question was then asked and answered by the defendant's wife:

> "Q. To your knowledge does he show any sexual deviation?
>
> "A. No."
>
> *State v. Henley, supra* at 609.

In *State v. Henley*, the court noted that:

> "Generally, evidence of other crimes committed by a defendant is inadmissible to show that he is the type of person who may be expected to commit the charged offense. *State v. Manrique*, 271 Or 201, 531 P2d 239 (1975). The State contends that this general rule is inapplicable here because the defendant placed his character in issue by his wife's testimony that to her knowledge he shows no sexual deviation. Therefore, the state argues, evidence of other sexual offenses was admissible to prove that defendant has a deviant sexual character.

> "The prosecution may introduce evidence of defendant's bad character as circumstantial evidence of guilt only if the defendant first opens the door by placing his character "clearly and expressly in issue." *State v. Ewing*, 174 Or 487, 503, 149 P2d 765 (1944); See McCormick on Evidence 455, § 191 (2nd ed 1972). It is well settled in Oregon that a defendant's character may be proved only by evidence of his general reputation in the community. *State v. Curtis*, 20 Or App 35, 530 P2d 520, rev den (1975)."
>
> "At best, the testimony of defendant's wife may be viewed as an expression of her personal opinion regarding defendant's sexual character or as a statement that defendant has not engaged in deviant conduct in the context of the marital relationship. Either way, the testimony was irrelevant and incompetent as character evidence, and therefore objectionable. Such evidence is insufficient to "clearly and expressly" put defendant's character into issue.
> "Furthermore, even if defendant's character had been placed in issue, the cross-examination was not proper. Just as defendant may not introduce evidence of specific praiseworthy acts, *McCormick, supra* at 455, § 191, the prosecution may not prove defendant's bad character through evidence of specific acts. * * * " *State v. Henley, supra*, 610-611.
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> In *State v. Henley*, the court concluded its opinion with the following holding:
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> "* * * the tactic of allowing an inadmissible tidbit, into evidence without objection in the hope of driving a bulldozer through a supposedly open door, is not a practice to be encouraged." *State v. Henley, supra,* at 612.

State v. Jackson, 31 Or App 645, 571 P2d 523 (1977) stands for the proposition that the state may not "open the door" during cross-examination of a defendant to allow in, in its rebuttal case, otherwise inadmissible evidence.

> "The state contends that the rebuttal was permissible because the defendant's direct testimony brought his drug dealing into issue. If not, it relies secondarily on defendant's denial on cross-examination that he had ever sold any heroin. The state, however, may not open its own door. *State v. Johnson,* 277 Or 45, 559 P2d 496 (1977). We therefore look solely to defendant's direct testimony". *State v. Jackson, supra* at 649.

Notwithstanding amendments to the evidence code by SB 936, the courts have continued to exclude prior bad acts of sexual conduct by applying the traditional analysis. See, *State v. Dibala*, 161 Or App 99 (1999)(in prosecution for sex abuse, no error to exclude evidence of prior act of sex abuse 10 years earlier because physical elements of the two acts were not sufficiently similar; there were differences in both

nature and place of prior conduct as compared to charged conduct); *State v. Sheets*, 160 Or App 326 (1999)(trial court erred in admitting evidence that defendant had previously sexually abused an 11-year-old girl, in prosecution involving 5-year-old girl victim, because evidence did not meet *Johns* criteria); *State v. Dunn,* 160 Or App 422 (1999)(rejecting State's argument that the 1997 adoption of OEC 404(4) had changed the traditional analysis for admissibility of prior bad acts).

The defense recognizes that OEC 404(4) suggests the application of OEC 403 to prior bad act evidence offered against an accused is limited "to the extent required by the United States Constitution or the Oregon Constitution." Id. Assuming, *arguendo*, that OEC404(4) is so construed, the defense contends that the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article I, Sections 10 and 11 of the Oregon Constitution, require the court to balance prejudice against probative value in order to assure a fair trial by a jury not subjected to highly inflammatory evidence of little probative value. See also Kirkpatrick, Oregon Evidence Article IV-91-95 (4th ed.), for a more lengthy analysis of this rule of evidence. The defense has found no reported case holding that such balancing is not constitutionally required under OEC 404(4). *Cf., State v. Grey*, 174 Or App 235, 250-51 (2001)(admitting prior act evidence without Rule 403 balancing because defendant did not argue that any of the constitutional limitations contained in OEC404(4) applied).

Oregon Rule of Evidence 403 provides that:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

Evidence is prejudicial under OEC 403 if it tempts the jury to decide the case on an improper basis. *State v. Mayfield*, 302 Or 631, 644 (1987). Where the state seeks to introduce uncharged misconduct, it must convince the court that the evidence not only is

logically relevant but also that its probative value is not substantially outweighed by any attendant danger of unfair prejudice. *State v. Mayfield*, 302 Or at 645.

In *State v. Mayfield*, 302 Or 631, 645 (1987), *State v. Johns*, 301 Or 535, 557-59 (1986), and *State v. Pinnell*, 311 Or 98, 113 (1991), the Oregon Supreme Court formulated a series of steps that a trial court should follow when making a determination under OEC 403:

1. First, the trial judge should assess the proponent's need for the uncharged misconduct evidence. In other words, the judge should analyze the quantum of probative value of the evidence and consider the weight or strength of the evidence and whether there is less inflammatory evidence to prove the same issue.

2. Second, the court should determine how clearly the proponent has proven that the uncharged act occurred and that defendant was the person who committed it.

3. Third, the court should analyze the probative value of the evidence, that is, the extent to which the prior crime or conduct evidence helps prove the defendant committed the crime at issue.

4. In the fourth step, the trial judge must determine how prejudicial the evidence is, and to what extent the evidence may distract the jury from the central question of whether the defendant committed the charged crime. This is done through a process of balancing the prosecution's need for the evidence against the countervailing factors (danger of unfair prejudice, confusion of issues or misleading the jury, or considerations of undue delay or presentation of cumulative evidence).

5. The final step is for the judge to make his or her ruling to admit all the proponent's evidence, to exclude all the proponent's evidence or to admit only part of the evidence."

301 Or at 557-59; 302 Or at 645; 311 Or at 113.

Dated: __ October 2003.

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