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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

MOTION IN LIMINE REGARDING UNCHARGED ACTS OF ALLEGED SEXUAL ABUSE

COMES NOW the Defendant, JOHN DOE, by and through his undersigned attorney, and hereby moves the Court for an Order instructing the District Attorney, his representatives, and his witnesses to refrain absolutely from making any reference whatsoever in person, by counsel or through witnesses or exhibits, to testimony or any other evidence concerning the following matters:

1. That Mr. DOE allegedly committed acts of sex abuse against a former patient, now deceased;

2. That Mr. DOE allegedly committed acts of sex abuse against other former patients who have not been identified or disclosed to the defense; and

3. Statements of opinion consisting of conclusory characterizations of Mr. DOE as a "sexual predator," "sexual deviant," "sex offender," or similar derogatory characterizations of a sexual nature.

Defendant so moves upon the grounds and for the reasons that this evidence is inadmissible (1) because it is too unreliable to meet the threshold for admissibility, in violation of OEC 402 or the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (2) because it is inadmissible hearsay, OEC 802, or its introduction would violate the Confrontation Clauses of Article I, Section 11 of the Oregon Constitution, or the Sixth and Fourteenth Amendments to the United States Constitution; (3) because it is not relevant to the charges of the indictment, OEC 402 & 404(3); (4) because it is improper character evidence, not admissible, if at all, until Defendant places his character at issue, OEC 404; (5) because it is improper opinion evidence, OEC 701; or alternatively (6) that the prejudicial effect of such evidence outweighs any probative value, and said evidence would tend to confuse the issues and mislead the jury, and that ordinary objection in the course of trial, even if sustained with corrective instructions to the jury, would not remove the unduly prejudicial impact of this evidence, in violation of OEC 403 or the Fourteenth Amendment to the United States Constitution.

This motion is made in good faith and not for the purpose of delay. It is supported by the points and authorities that follow, and such other points and authorities as may be developed at oral argument on this motion. The defense specifically reserves the right to request an evidentiary hearing should one be needed to resolve this motion pretrial.

MOVED this__ day of August, 2003.

TERRI WOOD OSB #88332
Attorney for Defendant

POINTS AND AUTHORITIES

I. Factual Basis

[Deleted]

II. OEC 401 & 402, Relevancy.

"Relevant evidence" means evidence having any tendency to make 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. OEC 401.

Relevancy concerns the relationship between the facts in evidence and the conclusions to be drawn from them. See, Kirkpatrick, Oregon Evidence, 98-99 (3d edition). To be relevant, however, the evidence must support a factual inference that the jury is permitted to make. See, e.g., *State v. Hite,* 131 Or App 59, 61-62 (1994)(In child sex abuse prosecution, evidence of nude photographs of adult women found in defendant's possession was inadmissible because irrelevant).

Additionally, to be "relevant," the evidence must be reliable. *See, State v. Brown,* 297 Or 404 (1984); *Steve v. O'Key*, 321 Or 285 (1995)

Evidence offered for the purpose of assisting a court to make a determination on a question of admissibility is not subject to the rules of evidence. Kirkpatrick, *id.,* at 98.

III. OEC 404, Improper Character Evidence.

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).

"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).

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).

One court graphically described the danger of unfair prejudice of "other crimes" evidence: "A drop of ink cannot be removed from a glass of milk." *State v. Pinnell*, 311 Or at 106 (quoting *Government of Virgin Islands v. Toto*, 529 F2d 278, 283 (1979)).

Unrelated misconduct evidence has been described as "the most prejudicial evidence imaginable against an accused." *State v. Pinnell*, 311 Or at 106 n 14 (quoting *People v. Smallwood*, 42 Cal 3d 415, 228 Cal Rptr 913, 922, 722 P2d 197, 205 (1986)). In the same vein, Justice Cardozo stated that uncharged misconduct evidence can be a "peril to the innocent." *State v. Pinnell*, 311 Or at 106 (quoting *People v. Zackowitz*, 254 NY 192, 172 NE 466, 468 (1930)).

Another reason for the "propensity rule" in criminal cases is that it is viewed as unfair to require an accused to be prepared not only to defend against the immediate charge, but also to defend or explain away unrelated acts from the past. *State v. Pinnell*, 311 Or at 106 (citing Louisell & Mueller, 2 Federal Evidence 130-31, § 136).

Finally, courts are concerned with confusion of issues and undue consumption of time through what may be, in effect, a trial within a trial to ascertain the relationship between the purported other crime and the defendant. *State v. Pinnell*, 311 Or at 106 (citing Wright & Graham, *supra*, at 437; Imwinkelried, Uncharged Misconduct Evidence 4, § 8.01).

A. Prior Bad Acts to Prove Intent.

OEC 404(3) recognizes that other bad acts may be relevant in a given case to help prove other issues such as knowledge, intent or lack of mistake. The Oregon Supreme Court has adopted a six-part test to determine the admissibility of other misconduct evidence offered to show a defendant's intent or knowledge:

> (1) Does the present charged act require proof of intent?
> (2) Did the prior act require intent?
> (3) Was the victim in the prior act the same victim or in the same class as the victim in the present case?
> (4) Was the type of prior act the same or similar to the acts involved in the charged crime?
> (5) Were the physical elements of the prior act and the present act similar?
> (6) If these criteria are met, is the probative value of the prior act evidence substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, undue delay or presentation of cumulative evidence? *State v. Johns,* 301 Or. 535, 555-56, 725 P.2d 312 (1986).

In *State v. Dibala*, 161 Or App 99, 104 (1999), the Court found the *Johns* test was applicable to sex abuse charges, even though the mental state alleged was "knowingly" rather than "intentionally." Different criteria than *Johns'* six-part test may apply when the proponent of the evidence offers it for a different 404(3) purpose, such as *modus operandi* to establish identity. See, e.g., *State v. Johnson*, 313 Or 189, 197-201 (1992)(evidence offered to prove modus operandi must demonstrate (1) "a very high degree of similarity between the prior and charged misconduct" and (2) "a distinctive nature of the methodology."). It is unresolved whether prior bad acts evidence can ever be admitted where the defense is that the charged crime never occurred. Kirkpatrick, Oregon Evidence Article IV-70-71 (4th ed.); *see, State v. Leach*, 169 Or App 530, 534-35 (2000);

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).

B. Preliminary Showing that Defendant Committed Prior Bad Act.

Evidence of an alleged prior bad act offered under 404(3) against the defendant is not admissible unless the prosecution can first establish by a preponderance of the evidence that the defendant committed the act. The issue is for the trial court under Rule 104(1). *State v. Kim*, 111 Or App 1, 5, *rev. den.*, 314 Or 176 (1992). To admit evidence of alleged prior misconduct by the defendant without such a showing could be highly prejudicial. Kirkpatrick, Oregon Evidence 141 (3d ed.).

V. OEC 403, Prejudicial Effect Outweighs Probative Value.

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, commonly although not always, an emotional one. *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; *State v. Smith*, 310 Or 1, 28-29 (1990)(applying OEC 403 to prior bad acts evidence during the penalty phase).

"Prior crimes evidence is prejudicial if it invites the jury to resolve the case on the improper basis that the defendant is a bad person." *State v. Johns,* 310 Or 535, 558 (1986). " 'Unfair prejudice' describes a situation in which the preferences of the trier of fact are affected by reasons essentially unrelated to the persuasive power of the evidence to establish the fact of consequence," *State v. O'Key*, 321 Or 285, 321 (1995).

A. The 403 Balancing Test.

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).

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.

V. OEC 701, Lay Opinion.

OEC 701 provides: "If the witness is not testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are: (1) Rationally based on the perception of the witness; and (2) Helpful to a clear understanding of testimony of the witness or the determination of a fact in issue." The rule precludes opinions based upon conjecture or speculation. Kirkpatrick, Oregon Evidence, 404 (3d ed.).

The requirement that lay opinion be rationally based on the perception of the witness means more than establishing personal knowledge; rather, it means that the opinion or inference must be one that a person normally could form from the facts of which the witness has personal knowledge. *See United States v. Cox,* 633 F2d 871, 875-76 (9th Cir. 1980)(defendant told witness that he had "friend" who would blow up car for $50; error to admit opinion of witness that defendant was himself the "friend").

This determination is made by the trial court under OEC 104(1). The court may need to examine the nature and duration of a witness's perception to determine whether the opinion or inference is reasonably supported by the facts known to the witness, rather than based on bias for or against the defendant.

A witness may testify as to the emotions manifested by another and observed by him, such as the defendant appeared to the witness to be upset or worried, calm or excited. *See,*

e.g., State v. Broadhurst, 184 Or 178, 249 (1948); *State v. Pickett*, 37 Or App 239 (1978). A witness may not generally testify as to the intent of another. *See, e.g., State v. Parks,* 71 Or App 630(1984)(witness cannot testify that defendant's shooting of another was accidental versus intentional); *State v. Wille*, 317 Or 487, 500-501 (1992)(expert may not give opinion that killing was intentional).

Although a witness may testify by way of opinion as to the character of a person, a witness may not testify as to the character of the accused unless character is an essential element of a charge, claim or defense, or unless the accused has offered evidence of his character. OEC 404(1) & (2)(a); cf., 404(2)(d), limiting character for violent behavior to civil suits.

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