IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
ALEX VERLYN RICE,
Defendant-Appellant.

Benton County Circuit Court
DV1320401; A155198

Locke A. Williams, Judge.

Argued and submitted November 17, 2015.

Andrew D. Robinson, Deputy Public Defender, argued the cause for appellant. With him on the opening brief was Peter Gartlan, Chief Defender. With him on the supplemental brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Rebecca M. Auten, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Allen, Judge pro tempore.

HADLOCK, C. J.

Affirmed.

HADLOCK, C. J.

In this criminal case, defendant appeals a judgment convicting him of six crimes arising from a physical altercation with his girlfriend.[1] He argues that the trial court erred in admitting testimony from two previous girlfriends that he engaged in threatening and assaultive conduct against them. For the reasons explained below, we affirm.

We evaluate a trial court's decision to admit evidence of a defendant's "other crimes, wrongs or acts," OEC 404(3), "in light of the record made before the trial court when it made its decision."[2] *State v. Wright*, 283 Or App 160, 162,

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[1] Defendant was convicted of one count of coercion, ORS 163.275, three counts of fourth-degree assault, ORS 163.160, one count of menacing, ORS 163.190, and one count of interference with making a report, ORS 165.572. He was acquitted of one count of attempted second-degree assault, ORS 163.175; ORS 161.405.

[2] OEC 404(3) provides:

> "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."

OEC 404(4) provides:

> "In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:
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> "(a) [Certain rules of evidence] and, to the extent required by the United States Constitution or the Oregon Constitution, [OEC 403];
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> "(b) The rules of evidence relating to privilege and hearsay;
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> "(c) The Oregon Constitution; and
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> "(d) The United States Constitution."

The Supreme Court has held that, in criminal actions, OEC 404(4) "supersedes the first sentence of OEC 404(3)" by making "other acts evidence *admissible* to prove a defendant's character, subject to specified rules of evidence and the state and federal constitutions." *State v. Baughman*, 361 Or 386, 403-04, 393 P3d 1132 (2017) (explaining holding of *State v. Williams*, 357 Or 1, 346 P3d 455 (2015) (emphasis in *Baughman*)); *see id.* at 403 n 8 (cautioning that the Supreme Court "has suggested, but not yet decided, that the federal constitution may * * * prohibit the admission of other acts evidence to prove propensity" in criminal cases involving "crimes other than child sexual abuse." The second sentence of OEC 404(3), however, is unaffected: "If other acts evidence is not proffered to prove a defendant's character, but instead is offered for a nonpropensity purpose, then analysis under OEC 404(4) is unnecessary; the evidence 'may be admissible' under the second sentence of OEC 404(3)." *Id.* at 404 (quoting OEC 404(3)).

In this case, the disputed other acts evidence was not expressly offered to prove defendant's character; instead, it was offered for nonpropensity purposes listed in the second sentence of OEC 404(3). Thus, we consider the admissibility of the evidence under the second sentence of OEC 404(3). Because we conclude

387 P3d 405 (2016) (internal quotation marks and brackets omitted). In this case, the state moved before trial for a ruling on the admissibility of defendant's prior acts. The state presented a detailed account of the facts of this case and the testimony it sought to present. Because, as explained below, detailed recital of the facts is not necessary, we present only a general outline. The charged crimes took place at the victim's apartment. Defendant threatened and assaulted the victim repeatedly, prevented her from leaving her apartment, and broke her cell phone by throwing it against the wall because he was afraid that she would call the police.

The evidence of prior acts that the state sought to introduce involved S and K, two previous girlfriends of defendant. The state recounted several incidents of violence against S and K, some of which resulted in convictions and some of which did not. As explained below, the trial court allowed evidence only about the incidents that resulted in convictions. Those incidents are as follows: Defendant stayed in K's vehicle after she repeatedly told him to get out and he took K's cell phone to prevent her from calling the police; he also turned the steering wheel while K was driving, causing the car to go into the other lane of traffic. For that conduct, defendant was convicted of interfering with making a report. As to S, defendant accused her of cheating on him and punched her in the head. Defendant was convicted of assaulting S.

The state argued that the evidence of that conduct by defendant against S and K was admissible under OEC 404(3) for three reasons: to show intent under the doctrine-of-chances theory set out in *State v. Johns*, 301 Or 535, 725 P2d 312 (1986); to show intent on a theory of "hostile motive" under, among other cases, *State v. Moen*, 309 Or 45, 786 P2d 111 (1990), and *State v. Yong*, 206 Or App 522, 138 P3d 37, *rev den*, 342 Or 117 (2006); and to show "motive and plan"

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that it was admissible under the second sentence of OEC 404(3), we need not consider the state's argument that it was nevertheless admissible for propensity purposes, which the state presents as an alternative basis for affirmance. *See* Outdoor Media Dimensions Inc. v. State of Oregon, 331 Or 634, 659-60, 20 P3d 180 (2001) (setting out requirements for alternative bases for affirmance); *see also, e.g.*, State v. Jones, 285 Or App 680, 690-91, 398 P3d 376 (2017) (under similar circumstances, noting that admissibility of evidence for propensity purposes presents an alternative basis for affirmance and declining to address the issue).

for defendant's conduct under *State v. Bracken*, 174 Or App 294, 23 P3d 417, *rev den*, 333 Or 162 (2001).

At the hearing on the state's motion, defendant argued that the evidence of violence against defendant's previous girlfriends was really offered only for propensity purposes; in his view, the state's goal was "to show that since he was a bad actor with his previous girlfriends he's going to be a bad actor with this particular girlfriend." He asserted that the prior acts were not sufficiently similar to the charged conduct to satisfy the test that the Supreme Court established in *Johns*. He also argued that, although "[t]he Court does not have to go through [OEC] 403" balancing on *all* of the prior acts that the state had presented, "it should go through 403 [balancing] specifically on [acts] that are uncharged or that type of thing because you need to take a look at whether or not they can be proven."[3]

The court granted the state's motion, concluding that "[e]vidence of defendant's interference with [K] of her making a report is relevant to prove intent and hostile motive" because the incident involving K and the telephone was similar to the charged incident and "[e]vidence of defendant's assaultive behavior against [S] is relevant to prove intent" because the incident involving assault of S was similar to the charged incident. However, the court also limited the evidence of defendant's violence against S and K to descriptions of the incidents that resulted in convictions.

At trial, the state presented testimony from K and S recounting the events that led to defendant's convictions and the fact that he had been convicted. As noted above, the jury acquitted defendant of attempted second-degree assault and convicted him of the other six charges.

On appeal, defendant assigns error to the court's admission of evidence of his prior acts against S and K. He argues that the evidence of his conduct against S and K "was not relevant to defendant's mental state other than by

[3] OEC 403 provides:

> "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."

showing his propensity to commit acts of domestic violence." In defendant's view, the evidence was not admissible under the doctrine of chances because, as he argued below, his conduct against S and K was not similar enough to the charged conduct to satisfy the *Johns* test. Nor was it admissible as evidence of "hostile motive," he argues, because prior acts can show "that a hostile relationship existed between the defendant and the victim" only when "the misconduct and the charged crime involve[] the *same* victim." (Emphasis in defendant's brief.) Defendant also contends that the trial court erred in failing to conduct OEC 403 balancing on the prior acts evidence that it admitted.[4] The state responds that the evidence was admissible on both the doctrine-of-chances theory and the hostile-motive theory and that defendant's OEC 403 argument is not preserved.

As a preliminary matter, we note that is not clear from the record that the trial court admitted the evidence regarding S under the hostile-motive theory. As noted, the state argued that the evidence regarding both S and K was admissible under both the doctrine of chances and a hostile-motive theory. The record does not reveal any analysis by the trial court that would have caused it to treat the evidence regarding defendant's conduct against S differently from the evidence regarding defendant's conduct toward K. Moreover, the court instructed the jury the same way with respect to all of the evidence. However, as explained above, the court's order states that the evidence regarding K is "relevant to prove intent and hostile motive," but the evidence regarding S is "relevant to prove intent."

Nevertheless, even if the trial court did not admit the evidence regarding S under a hostile-motive theory, the parties litigated that theory in the trial court, and we

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[4] Defendant also asserts that the trial court erred in admitting the evidence of defendant's prior acts because the procedural prerequisites of *State v. Leistiko*, 352 Or 172, 282 P3d 857, *adh'd to as modified on recons*, 352 Or 622 (2012), were not met. After this case was argued, the Supreme Court clarified that those prerequisites apply only when the evidence is admitted to prove intent under a doctrine-of-chances theory of relevance. *State v. Turnidge (S059155)*, 359 Or 364, 445, 374 P3d 853 (2016), *cert den*, ___ US ___, 137 S Ct 665 (2017). Consequently, our conclusion that the evidence was admissible to show "hostile motive" answers that contention; the trial court did not err in failing to follow the procedural prerequisites of *Leistiko*.

agree with the state that its hostile-motive argument presents an appropriate alternative basis on which to affirm. *Cf.* *State v. Lovaina-Burmudez*, 257 Or App 1, 14, 303 P3d 988, *rev den*, 257 Or App 1 (2013) (discussing circumstances in which appellate court will address an alternative basis to affirm that was raised below but not decided by the trial court. As explained below, we conclude that, under existing case law, the evidence was admissible to show defendant's "hostile motive" toward the victim. Thus, even assuming, without deciding, that the trial court erred in admitting the evidence under the doctrine of chances, we affirm.

We review a trial court's decision to admit evidence of other acts under OEC 404(3) for legal error. *Wright*, 283 Or App at 168. The hostile-motive theory of admissibility is a subspecies of motive in general. *Id.* at 171 (addressing evidence of the defendant's prior threat against the victim of a domestic assault as evidence of the defendant's motive); *see also* *State v. Clarke*, 279 Or App 373, 385, 379 P3d 674 (2016) (hostile-motive evidence is evidence of motive). Motive is one of the nonpropensity purposes listed in OEC 404(3) for admission of evidence of other crimes, wrongs, or acts.

"Motive is a cause or reason that moves the will and induces action, an inducement which leads to or tempts the mind to commit an act. Motive is a relevant circumstantial fact that refers to why a defendant did what he did[.]" *State v. Hampton*, 317 Or 251, 257 n 12, 855 P2d 621 (1993) (internal quotation marks, citation, and alteration omitted). "To determine whether evidence of a prior act is relevant to show the defendant's motive to commit the charged act, we look to whether the state has showed 'some substantial connecting link between the two acts.'" *Wright*, 283 Or App at 171-72 (quoting *Turnidge*, 359 Or at 451 (some internal quotation marks omitted)).

In *Moen*, the defendant was convicted of the aggravated murder of his wife and her mother. 309 Or at 47. On direct review in the Supreme Court, he challenged the trial court's admission of evidence that, approximately three weeks before the murders, the defendant had pushed his wife and threatened to kill her, her mother, and her son, and had pointed a shotgun at his wife and her son. *Id.* at 65-66.

The Supreme Court explained its conclusion that the evidence was admissible under OEC 404(3) in two slightly different ways. First the court explained that "a defendant's prior hostile acts toward a homicide victim or toward a class of persons to which the victim belongs" is relevant "to the issue of a hostile motive, which in turn is probative of intent." *Id.* at 68.[5] "Evidence that shows a hostile relationship existed between a defendant and his victim tends to shed light on a defendant's *mens rea*." *Id.* That is, evidence that the defendant and the victim had a hostile relationship around the time of the crime suggests that the defendant committed a crime against the victim because he or she was angry with the victim. *See Clarke*, 279 Or App at 385 (evidence of the defendant's threat against the victim made a week before the murder "tended to show that defendant's animosity toward the victim was so strong that he was moved to engage in violence against [the victim]").

Second, the court relied on a statement that it had made in *Johns*, a case in which the court's reasoning was based on the doctrine of chances. The *Moen* court stated:

> "In *Johns*, this court permitted the introduction of evidence of the defendant's attempt to kill a different spouse six years earlier because the evidence tended to prove that 'when similarly agitated in a domestic setting defendant will act violently and intentionally.' 301 Or at 551. In parallel fashion, the same inferences may be drawn in this case concerning defendant's mental state during the killings from evidence that shows defendant's intentional reaction under similar circumstances."

Moen, 309 Or at 69. Unlike the court's first explanation of its conclusion that the disputed evidence was admissible,

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[5] In support of that reasoning, the court cited the following cases:

"*State v. Wong Gee*, 35 Or 276, 57 P 914 (1899) (defendant's threat to shoot third party over a gambling game in which deceased participated four days prior to homicide admissible in murder prosecution); *State v. Finch*, 54 Or 482, 488-89, 103 P 505 (1909) (defendant killed deceased because of the latter's zeal in prosecuting charges against defendant for disbarment; 'all evidence of whatsoever nature tending to throw light upon the relations existing between the accused and the deceased and the feeling between them is competent'); *State v. Klamert*, 253 Or 485, 455 P2d 607 (1969) (defendant's prior threats against 'young cops' on several occasions over one-month period preceding crime held properly admitted to prove intent in prosecution for assault with intent to kill police officer)."

the second explanation suggests a reason for why the defendant committed the crime that rests on an inference about what the defendant tends and intends to do in certain circumstances, rather than an explanation of what might have motivated his actions based only on the circumstances surrounding the charged crime.

In *Yong*, we relied on the *Moen* court's second explanation of its reasoning to hold that evidence of the defendant's prior assaults of the victim and, critically to our analysis here, a former wife, was admissible under OEC 404(3). After quoting the material from *Moen* discussed above, we held that the reasoning behind the second explanation from *Moen* "applies with equal force in this case." *Yong*, 206 Or App at 542. After noting that the defendant and the state disagreed about whether the defendant or the victim had been the aggressor in the altercation on the day in question, we explained as follows:

> "[At trial,] it was the state's theory that defendant had, in fact, been the aggressor, that he assaulted the victim as he had done in the past, and that the victim changed her story out of fear of retaliation. Here, as in *Johns* and *Moen*, the proffered evidence was admissible because it tended to prove that 'when similarly agitated in a domestic setting defendant will act violently and intentionally.' [*Moen*, 309 Or] at 69."

Yong, 206 Or App at 542.

Thus, in *Yong*, we held that evidence of a defendant's assault against a former wife was admissible under OEC 404(3) to show his "hostile motive" against a different victim because it showed that he tended to intentionally engage in violence against his domestic partners. Defendant does not argue that *Yong* was wrongly decided. Under *Yong*, the evidence of defendant's conduct against S and K was admissible to show that defendant tended to act violently against his girlfriends.[6]

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[6] We express no opinion on whether, or how, evidence that a defendant tends to act violently against his domestic partners, offered to show that he intentionally acted violently against a domestic partner on the charged occasion, can be distinguished from evidence of the defendant's character offered "in order to show that the [defendant] acted in conformity therewith." OEC 404(3). We did

To the extent that defendant contends that, even if the evidence of his conduct against S and K was relevant to show his "hostile motive" to assault the victim, the court erred in admitting it because it was not similar enough to the charged conduct under the analysis set out in *Johns*, we note that we recently held that "[e]vidence offered to prove intent by showing the defendant's motive is not subject to the *Johns* analysis." *State v. Tena*, 281 Or App 57, 70, 384 P3d 521 (2016), *rev allowed*, 360 Or 752 (2017) (explaining reasoning of *Turnidge*, 359 Or at 436). Nor does defendant suggest any other analysis of similarity that should be required before admission of evidence to show a defendant's hostile motive towards his girlfriends. In the absence of argument on that question, we decline to consider it here.

Finally, we briefly address defendant's argument that the trial court erred in failing to conduct balancing under OEC 403 before admitting the disputed evidence. Defendant contends that his argument before the trial court that the court "should go through 403 [balancing] specifically on [acts] that are uncharged or that type of thing because you need to take a look at whether or not they can be proven" amounted to a request for the court to conduct balancing before admitting any of the state's proffered evidence. We disagree. Defendant requested OEC 403 balancing on "[acts] that are uncharged or that type of thing." He did not request balancing on the evidence that the court did admit, which, as explained above, was exclusively evidence regarding incidents that resulted in convictions. Consequently, he did not preserve an argument for balancing on the evidence that was admitted. Nor was the court's failure to conduct OEC 403 balancing plainly erroneous. *See, e.g.*, *Tena*, 281 Or App at 74-75 (failure to conduct OEC 403 balancing not plainly erroneous because it is not clear that the court must conduct it in the absence of a request).

Affirmed.

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not explain the distinction in *Yong*; moreover, as noted, defendant does not ask us to overrule *Yong* in this case.