

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

STEVEN LAMAR ROBERTS,
Defendant-Appellant.

Multnomah County Circuit Court
130733183; A157462

Alicia A. Fuchs, Judge.

Submitted March 29, 2016.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Erica Herb, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Paul L. Smith, Deputy Solicitor General, and David B. Thompson, Assistant Attorney General, filed the brief for respondent.

Before Tookey, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

DEHOOG, J.

Vacated and remanded.

DEHOOG, J.

Defendant appeals a judgment of conviction for one count each of first-degree rape, ORS 163.375, first-degree sodomy, ORS 163.405, and incest, ORS 163.525. We write only to address defendant's first and second assignments of error, in which defendant asserts that the trial court erred in admitting, over his OEC 403 objection, evidence of two prior uncharged acts of sexual violence against the victim. Defendant contends that the trial court abused its discretion in admitting that evidence, because its probative value was substantially outweighed by the danger of unfair prejudice that the evidence presented. As we explain below, we are unable to discern the basis on which the trial court admitted the challenged evidence and, therefore, cannot evaluate whether it was error to admit that evidence over defendant's OEC 403 objection. Accordingly, we vacate defendant's convictions and remand for the trial court to provide an explanation.¹

The state prosecuted defendant for raping, sodomizing, sexually abusing, and engaging in incest with his disabled, adult daughter. Each of the rape, sodomy, and sexual abuse charges alleged that defendant had subjected the victim to "forcible compulsion," an element common to those offenses as charged. *See* ORS 163.375(1)(a) (first-degree rape);² ORS 163.405(1)(a) (first-degree sodomy);³ ORS 163.427(1)(a)(B) (first-degree sexual abuse).⁴ The state's case relied upon a description of events that the victim had given others shortly after calling 9-1-1 to report the alleged incident. As relevant to the issues on appeal, the victim

¹ That disposition obviates the need to address defendant's third assignment of error, which challenges his sentences on two of the vacated counts. We reject defendant's final assignment of error without discussion.

² Under ORS 163.375(1)(a), "[a] person who has sexual intercourse with another person commits the crime of rape in the first degree if *** [t]he victim is subjected to forcible compulsion by the person."

³ Under ORS 163.405(1)(a), "[a] person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if *** [t]he victim is subjected to forcible compulsion by the actor."

⁴ Under ORS 163.427(1)(a)(B), "[a] person commits the crime of sexual abuse in the first degree when that person *** [s]ubjects another person to sexual contact and *** [t]he victim is subjected to forcible compulsion by the actor."

told a sexual assault examiner and an investigating officer that defendant had grabbed her, pushed her onto his bed, pulled down her pants, and put his penis into her vagina. She described defendant as having put his weight on her belly, held back her arm, and choked her; she said that she had tried to fight defendant off, but that she had not been strong enough. Consistent with that description, the victim subsequently testified before a grand jury that defendant had forced her to have sexual intercourse with him against her will. The victim further told the grand jury that, during the incident, she had cried and asked defendant to stop, but that he had continued to force himself on her.

By trial, however, the victim's description of events had changed. The victim testified at trial that she and defendant had engaged in consensual sexual intercourse while she was under the influence of alcohol and various medications. Having anticipated that the victim might change her testimony,⁵ the state moved *in limine* for a ruling allowing the state to introduce evidence that, in its view, would refute the victim's characterization of defendant's conduct as consensual, rather than forcible. Specifically, the state sought to introduce evidence that, on two earlier occasions, defendant had subjected the victim to sexual violence. On the first occasion, which occurred approximately 13 years before the charged events, defendant "rammed" a 40-ounce bottle inside the victim's vagina so forcefully that she began to hemorrhage; on the second occasion, at around the same time, defendant burned the victim with a cigarette "on top of" her vagina. Among other things, the state argued, that evidence was relevant and admissible under OEC 404(3) to prove that the victim had not consented to defendant's conduct during the charged incident.⁶

⁵ The victim testified before the grand jury twice. The first time she denied that defendant had forced himself on her and said that the sexual conduct had been consensual; at trial, she likewise denied that defendant's conduct had been forcible. Before the second grand jury, however, she testified consistently with her initial report to the police, leading to the charges for which defendant ultimately was prosecuted.

⁶ The state's written motion argued that the evidence was admissible on numerous grounds. Those grounds included that it was probative of the following: defendant's "intent, absence of mistake or accident, and motive"; defendant's history of engaging in "ongoing sexual and physical abuse" of the victim; the sexual nature of defendant's behavior and "his knowledge and intent to force"

Notably, the state did not clearly or consistently explain *how* that evidence of defendant’s earlier conduct tended to show that he had, in the charged incident, used or threatened force against the victim, or, as both parties characterize that element, that the sexual conduct had not been consensual.⁷ That is, even though the ultimate focus of the state’s argument appears to have been on the issue of consent, the state’s reasoning as to how the prior abuse was probative of that issue was, at best, vague. Broadly speaking, however, the state’s position at trial was that, because of the victim’s relationship and sexual history with defendant, her belief that the charged events had been “consensual” was neither credible nor probative.

At a pretrial hearing on the state’s motion, the victim testified regarding her relationship with defendant and the specific prior bad acts. During that offer of proof, the victim explained that her father had “been in and out of [her] life” for her entire life of 37 years. She acknowledged that she suffered memory problems due to a stroke, that she had struggled with alcohol and opioid addiction for much of her life, and that she often confused the past and the present. The victim further testified that defendant had physically assaulted her in the past, and said that she had reported those assaults. She also testified that, over the preceding 15 years, she and defendant had engaged in sexual intercourse an unknown number of times—but “less than 20”—most often while both defendant and she had been intoxicated. According to the victim, defendant considered her to be “his girlfriend” and did not believe that she was his biological daughter; he therefore considered it “okay to have sexual things going on.”

the victim to engage in sexual behavior to which she did not consent; and the nature of defendant’s relationship with the victim, namely, that “he controls her, instills fear in her, and sexually abuses her.” The conclusion of the state’s written motion added that the evidence “explain[ed] the bias that motivate[d]” the victim’s recantation. Finally, at the pretrial hearing, the state added the argument that the evidence was probative of the victim’s state of mind and her understanding of consensual versus nonconsensual conduct.

⁷ The prosecution expressly disavowed any argument that the evidence was relevant and admissible under OEC 404(3) or OEC 404(4) to prove that defendant had the propensity to engage in forcible sexual conduct and so was likely to have done so in the charged incident. Cf. *State v. Williams*, 357 Or 1, 15, 346 P3d 455 (2015) (OEC 404(4) renders propensity evidence admissible in some cases); *State v. Baughman*, 361 Or 386, 391, 393 P3d 1132 (2017) (discussing *Williams*).

That sexual contact had, however, occasionally been physically violent. Two of the violent occasions were those that the state sought to present at trial. The victim described the incident involving a 40-ounce bottle as follows:

“[VICTIM]: *** [T]here was a sexual [assault] with *** a 40 bottle.

“[PROSECUTOR]: And what *** did you report to the police that he did with the 40 bottle?

“[VICTIM]: Put it in my vagina and rammed it and it made me bleed and hemorrhage[.]”

Later in her testimony, the victim again mentioned the 40-ounce bottle before answering the prosecutor’s questions about the cigarette incident:

“[PROSECUTOR]: *** [I]n those times when he’s intoxicated and he’s choking, slapping or hitting, was there also sexual intercourse *** or other forms of sexual acts in those incidents?

“[VICTIM]: Besides that bottle—that’s the only thing that I can remember, that bottle.

“[PROSECUTOR]: Do you recall any [incidents] with cigarettes or lit cigarettes?

“[VICTIM]: Yeah, I know about my body right here, yep. I know I got burnt. He burnt with a lit cigarette.

“[PROSECUTOR]: So you remember that incident, too?

“[VICTIM]: Yeah, ’cause you just brought it up to my attention. Yeah.”

The victim did not characterize defendant’s sexual relationship with her consistently. For example, at one point she testified, “I didn’t feel comfortable with that at all, but he did not once force me to do anything. But I was under pressure because I’ve always been scared of him *** [b]ecause of the abuse.” At another point she said, “[T]here [were] times *** when I did enjoy having intercourse with my dad *** because I was under the influence of alcohol. *** And it made me feel a little tougher to just deal with things[.]” As for the charged incident, the victim described it at the pretrial hearing as a time when the intercourse

had been, in her words, “consensual,” because she had been “drinking [her] alcohol at the time” and “was under [her] medications.”

Based on that testimony, the prosecutor argued that the incidents involving the 40-ounce bottle and the cigarette burn were relevant, as follows:

“I would submit: here is a woman who’s been significantly abused by the defendant, despite all of her assertions today about the incident at bar. *I think her state of mind as to what she perceives is consensual and not consensual is certainly an issue for the jury.*

“And I think somebody off the street who has a sexual encounter with another person, who claims that it was a forcible compulsion, then recants, then says it is [forcible], then recants [again—]

*“I think *** that person’s state of mind and their ability to say what is compulsion or not is certainly a relevant issue for the defense.* And I would submit that, for no other way to characterize it, she’s a broken person.

“And she’s a broken person due in large part to [defendant] and the testimony you just heard. She’s been penetrated with a 40-ounce bottle. She’s had a lit cigarette applied to her vagina. She’s been strangled, slapped, beaten on numerous occasions. ***

*“And so I would submit that she be allowed to testify, within the context of her, what is consensual and what is not because just because what she deems or calls consensual does not necessarily meet the legal definition of consensual ***.”*

(Emphases added.) The prosecution further argued:

“If a parent sexually abuses their child for 10 years ***, but all of a sudden there’s an incident *** when the person was an adult, and they report a rape and they have this strong bond relationship *** with *** their abuser, the context by which that *** one incident occurred and *what the victim perceives as consensual or not consensual was occurring to them, is wholly relevant for *** the jury to hear, for the sole purpose of, does she even know what ‘consensual’ is? Can she even say that?*

“For her, ‘consensual’ is *** on a sliding scale[.]”

(Emphasis added.)

Defendant objected to the prior bad acts evidence, arguing that it was irrelevant propensity evidence and unduly prejudicial. *See* OEC 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]”). Defendant argued that, to the extent that the evidence was relevant for any nonpropensity purpose, its probative value was very limited. On balance, defendant argued, the evidence was unduly prejudicial, because the earlier conduct was “very different” from the “vaginal penetration” alleged in this case, and because the evidence of that conduct “could be considered by the jury to be more violent and more disturbing.” The state, in turn, reiterated its argument that the evidence was highly probative of whether defendant had subjected the victim to forcible compulsion and that, in light of that probative value, the evidence was not unduly prejudicial.

The trial court ruled that the state’s prior acts evidence was admissible, but did not expressly adopt a specific theory of relevance or conduct balancing under OEC 403. *See State v. Mayfield*, 302 Or 631, 645, 733 P2d 438 (1987) (describing required analysis under OEC 403).⁸ That is, the trial court did not specifically discuss how the prior bad acts evidence was relevant, or to what extent the evidence might be unfairly prejudicial under OEC 403.

At trial, the victim testified about the bottle and cigarette incidents in the course of describing her lifelong abuse by defendant. At the close of evidence, the trial court issued a limiting instruction regarding the jury’s permissible use of the challenged evidence. The court instructed the jury:

“You have heard testimony of prior uncharged sexual acts allegedly committed by [defendant] against [the victim]. Before you give any weight to such evidence, you must

⁸ We have described the Supreme Court’s analysis under *Mayfield* as comprising “four steps: (1) analyze the quantum of probative value of the evidence and consider the weight or strength of the evidence; (2) determine how prejudicial the evidence is, to what extent the evidence may distract the jury from the central question whether the defendant committed the charged crime; (3) balance the prosecution’s need for the evidence against the prejudicial danger of unfair prejudice; and (4) make a ruling to admit some, all, or none of the proponent’s evidence.” *State v. Garcia-Rocio*, 286 Or App 136, 142, 399 P3d 1009 (2017) (citing *Mayfield*, 302 Or at 645 (internal quotation marks omitted)).

first decide whether such *** [incidents] occurred. If, and only if, you find such [incidents] occurred, you may only consider such evidence for the following purposes: *Evaluating [the victim's] testimony and evaluating [her] state of mind [at] the time of the incident.*

“Under no circumstances should you use the allegations of prior sexual acts, even if believed, to draw the inference that [defendant] had a propensity to commit sexual acts of this sort against [the victim]. Nor should you use them to draw the inference that, because [defendant] committed the prior acts, he may have committed the acts charged in this case.”

(Emphasis added.) The jury convicted defendant of one count each of first-degree rape, first-degree sodomy, and incest, but acquitted him of sexual abuse and a second sodomy charge.

On appeal, defendant does not renew his relevance argument, but assigns error to the ruling admitting the evidence of his prior conduct over his OEC 403 objection. Under OEC 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” We review a trial court’s ruling admitting evidence under OEC 403 for an abuse of discretion. *State v. Andrews*, 262 Or App 161, 167, 324 P3d 534, *rev den*, 355 Or 703 (2014). “[I]n the context of evidentiary rulings, ‘discretion’ *** refers to the authority of a trial court to choose among several legally correct outcomes.” *State v. Rogers*, 330 Or 282, 312, 4 P3d 1261 (2000). A trial court abuses its discretion when its decision falls outside the “range of permissible outcomes.” *State ex rel Stewart v. City of Salem*, 268 Or App 491, 497-98, 343 P3d 264, *rev den*, 357 Or 595 (2015).

The trial court’s assessment of defendant’s OEC 403 objection necessarily required it to determine the purpose for which the state’s prior bad acts evidence was relevant. See *State v. Brown*, 272 Or App 424, 431-32, 355 P3d 216, *rev den*, 358 Or 145 (2015) (in applying *Mayfield* analysis, a court must consider, first, why the evidence was relevant; second, the putative value of the evidence; and, third, how substantial the risk of unfair prejudice is). As noted, the prosecution presented the trial court with a litany of

reasons why it believed the evidence was relevant. Although the state appears to have abandoned many of those arguments on appeal, neither the state's briefing nor our review of the record has enabled us to discern the purpose for which the trial court admitted that evidence.⁹ Significantly, the state does not explain how its view of the evidence on appeal sheds any light on the trial court's view of the evidence's probative value. For its part, the trial court provided few clues as to how it found the evidence relevant. The best indication, however, came at the conclusion of the pretrial hearing. After the court gave the parties final opportunities to restate their positions, the court and the state engaged in the following exchange:

“[PROSECUTOR]: So, *for those purposes*, Your Honor, we would ask that the Court allow [the victim] to testify to her experience with the defendant *for her state of mind and what it means for her to be consensual*.

“THE COURT: Okay. And I will—so I will allow that. It seems to me that on some level because of her testimony and, as we've seen, *** it seems like there are memory issues and there'll probably be some other issues *** surrounding that as we go forward with the trial.

“And my guess is that we'll be in chambers occasionally to deal with that, because I feel like it *** could go a lot of different ways. But with that said, we'll deal with it as it comes up as best we can.”¹⁰

(Emphases added.) Though far from clear, that exchange suggests that, despite the state's various other written and oral arguments regarding admissibility, the state ultimately

⁹ We note in particular that, in the trial court, the state appeared to argue that the prior acts evidence was relevant, in part, because it showed that defendant had previously subjected the victim to forcible sexual violence, *i.e.*, sexual conduct to which she did not consent; on appeal, the state argues that the prior acts evidence was relevant because the victim *did* consent to the earlier abuse, stating that the victim's “apparent acceptance of the bottle and cigarette incidents as consensual sexual activity would be highly probative of [her] unique views of what constitutes consensual sex[.]” That disparity underscores our own uncertainty as to what the trial court thought that evidence proved.

¹⁰ Despite the trial court's prediction that there would be a need during trial to address the victim's memory and “other issues,” the record does not reflect any further consideration or explanation of the court's rationale for admitting the evidence.

relied on a more focused argument, namely, that the earlier acts of sexual abuse were *somehow* probative of the victim's understanding of what it means to "consent" to sexual conduct. And the trial court's response—"Okay. And I will—so I will allow that"—following as it did on the heels of that argument, at least suggests that the court implicitly accepted the state's position that the evidence was relevant to prove that the victim had not consented to sexual intercourse.¹¹

Even accepting, however, that the trial court viewed the evidence as somehow relevant to the issue of consent, we remain unable to evaluate whether the court properly admitted the evidence under OEC 403. That is, without understanding *how* the trial court thought that the prior bad acts were probative, we cannot assess whether the trial court abused its discretion in concluding that their probative value was not substantially outweighed by the potential for unfair prejudice. As we note above, 288 Or App at 151 n 8, the first step under *Mayfield* is to "analyze the quantum of probative value of the evidence and consider the weight or strength of the evidence." 302 Or at 645. That step contemplates a concrete analysis—the assessment of the "quantum of probative value" and the "weight or strength of the evidence" requires a court to consider *how* the evidence tends to make something more or less likely to be true, and not merely identify the issue to which the evidence relates. See [*State v. Baughman*](#), 361 Or 386, 411, 393 P3d 1132 (2017) (OEC 403 analysis considers whether the "cognizable probative value" of proffered evidence is substantially outweighed by danger of prejudice). Here, it is not sufficient for purposes of our review to know that the trial court concluded that the challenged evidence was relevant to the issue of consent, if, in fact, that was the court's conclusion. Instead, the court was required to assess the manner and extent to which the evidence tended to prove something about consent by, for example, suggesting that the victim considered anything

¹¹ That suggestion is echoed by part of the court's jury instruction that it was to consider the prior acts evidence "for the following purposes: Evaluating [the victim's] testimony and *evaluating [her] state of mind [at] the time of the incident.*" (Emphasis added.) We do not, however, know what the trial court intended when it instructed the jury that it could use the evidence in "evaluating the victim's testimony," and whether, by giving that instruction, the court was indicating that the evidence was relevant to issues other than consent.

less than torture to be “consensual.”¹² Only then could it proceed to balance that probative value (and the state’s corresponding need for the evidence to prove that point) against the potential for that evidence to unfairly prejudice defendant, as required under OEC 403. And, only then could we evaluate whether the court erred in that assessment.

Thus, despite defendant’s apparent concession on appeal that the evidence was relevant, this case presents a rare instance in which we must remand the matter to the trial court so that it can explain which, if any, of the state’s relevance arguments it accepts and how it views the evidence to be probative of any particular point. Without that understanding, we are unable to evaluate whether the trial court abused its discretion in determining that the evidence was not unduly prejudicial in light of that probative value. Accordingly, we vacate defendant’s convictions and remand so that the trial court can provide that explanation.¹³

Vacated and remanded.

¹² We note that we provide this example only for illustration purposes, and we express no view as to whether the record would support that reading of the evidence or whether it would be appropriate, following an OEC 403 analysis, to admit the evidence for that purpose.

¹³ On remand, we leave it to the trial court to determine what, if any, additional process is appropriate after it provides the required explanation. See *Baughman*, 361 Or at 410-11 (in remand for correct analysis under OEC 404 and OEC 403, “leav[ing] it to the trial court to determine the nature of the proceedings that are necessary or appropriate on remand”).