

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

CEANDRICK McCARTHY DAVIS,
aka Dante Washington,
Defendant-Appellant.

Multnomah County Circuit Court
14CR18717; A159471

John A. Wittmayer, Judge.

Argued and submitted September 26, 2017.

Shawn Wiley, Deputy Public Defender, argued the cause for appellant. With him on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

David B. Thompson, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

PER CURIAM

Reversed and remanded.

PER CURIAM

Defendant appeals from a judgment of conviction for 10 counts of promoting prostitution, ORS 167.012, and three counts of witness tampering, ORS 162.285. At trial, over defendant's objection, the trial court admitted evidence of two recordings found on defendant's cell phone in which defendant is heard rapping about being a pimp. In admitting the evidence, the trial court did not conduct on-the-record balancing under OEC 403, although defendant specifically argued that OEC 403 required the exclusion of the evidence. On appeal, defendant assigns error to the trial court's decision to admit the evidence, arguing, among other things, that the trial court erred by admitting the evidence without conducting the required OEC 403 balancing. The parties now agree that, in light of the Supreme Court's recent decisions in *State v. Baughman*, 361 Or 386, 393 P3d 1132 (2017), and *State v. Mazziotti*, 361 Or 370, 393 P3d 235 (2017), the proper disposition of this appeal is a remand to the trial court to conduct the omitted OEC 403 balancing, and to determine whether, in view of the outcome of that balancing, "a new trial is necessary or appropriate." *Mazziotti*, 361 Or at 376.

At oral argument, the state requested that we direct that defendant be limited on remand to making the same arguments under OEC 403 that he made to the trial court at the time he sought exclusion of the evidence. In particular, the state requested that we prohibit defendant from arguing that OEC 403 requires the exclusion of some portion of the challenged evidence, and limit defendant to his previous argument that OEC 403 requires the exclusion of the entirety of the evidence. In essence, the state contends that it runs counter to principles of judicial economy and fairness to permit defendant to make new arguments that he did not make below, and that, had defendant given the trial court and the state the opportunity to address these arguments at trial, the parties may have been able to avert the need for a retrial at this late date.

The state's concern is fair and we are mindful of it. However, we decline to limit the proceedings on remand in the manner requested. OEC 403 balancing under *State*

v. Mayfield, 302 Or 631, 733 P2d 438 (1987), requires a trial court to “make a ruling to admit all the evidence, to exclude it all or to admit part of it.” *Id.* at 647. Thus, necessarily, a trial court must consider whether to take something other than an “all or nothing” approach to admitting evidence when it conducts its OEC 403 inquiry. Beyond that, *Baughman* and *Mazziotti* both contemplate that each party may seek to present new arguments on remand, and otherwise advise that the trial court is in the best position to determine the appropriate scope of the proceedings on remand. *Baughman*, 361 Or at 410-11; *Mazziotti*, 361 Or at 376.

Reversed and remanded.