IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
BRETT LINDSEY ROBINSON,
Defendant-Appellant.

Washington County Circuit Court
C141909CR; A160084

Rick Knapp, Judge.

Submitted on August 23, 2017.

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

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Peenesh Shah, Assistant Attorney General, filed the brief for respondent.

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

LAGESEN, P. J.

Reversed and remanded.

LAGESEN, P. J.

While employed at a county jail, defendant had sex with an inmate six times. For that conduct, defendant was charged with six counts of first-degree custodial sexual misconduct, ORS 163.452, and six counts of first-degree official misconduct, ORS 162.415. She conditionally pleaded guilty to all counts, reserving the right to appeal nine pretrial rulings by the trial court, including (1) the court's ruling that she could not present an insanity defense because she had not given timely notice of her intent to do so, and had not demonstrated "just cause" for her failure to do so; (2) the court's denial of her motion to suppress statements that defendant made during an interrogation about her conduct; and (3) the court's ruling excluding the expert testimony that defendant wished to offer to prove that she was not acting voluntarily when she engaged in the conduct underlying the charges. On appeal, defendant assigns error to each of those rulings. We reject, without written discussion, defendant's challenges to the court's denial of defendant's motion to suppress and its exclusion of the expert testimony as to the voluntariness of defendant's conduct, but conclude that the trial court erred when it ruled that defendant would not be permitted to present an insanity defense. We therefore reverse and remand.

The facts pertinent to the issue on appeal are procedural and not in dispute. Defendant was arraigned on August 29, 2014, and pleaded not guilty to the charges against her at that time. At a pretrial conference in October 2014, the court scheduled trial for January 2015. In January, defendant moved to continue the trial date on the grounds that she needed to conduct further investigation and that the report on her psychological evaluation was not yet complete, and defendant anticipated there would be additional plea negotiations once it was. The trial court allowed the motion and reset the trial date until April 28, 2015.

At the end of March, defense counsel contacted the prosecutor to let him know that the evaluator had not completed his report. At the same time, defense counsel told the prosecutor that there was a possibility of an insanity defense. On April 8, 20 days before the scheduled trial date,

defendant's psychological evaluator completed his report and provided it to defense counsel the next day. One day after receiving the report, defendant filed notice under ORS 161.309[1] of her intent to present evidence of insanity under ORS 161.295.[2]

After receiving the notice, the state moved to prohibit defendant from presenting evidence of insanity. The state contended that defendant had not demonstrated just cause for waiting until 18 days before trial to file notice under ORS 161.309, which, in the state's view, the statute required defendant to do. The state argued that defendant must have been aware of the possibility of raising an insanity defense before the expert finished his report and, therefore, could have filed notice under ORS 161.309 much earlier. The state urged the trial court to infer that defendant purposely had waited to file the notice in order to delay trial. The state further contended that defendant's failure to file the notice earlier meant that trial would have to be delayed so that the state could prepare to meet defendant's insanity defense. Consequently, the state requested that defendant be precluded from presenting evidence of insanity, to avoid

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[1] ORS 161.309 provides, in relevant part:

"(1) The defendant may not introduce evidence on the issue of insanity under ORS 161.295, unless the defendant:

"(a) Gives notice of intent to do so in the manner provided in subsection (3) of this section; and

"(b) Files with the court a report of a psychiatric or psychological evaluation, conducted by a certified evaluator, in the manner provided in subsection (4) of this section.

"(2) The defendant may not introduce in the case in chief expert testimony regarding partial responsibility or diminished capacity under ORS 161.300 unless the defendant gives notice of intent to do so in the manner provided in subsection (3) of this section.

"(3) A defendant who is required under subsection (1) or (2) of this section to give notice shall file a written notice of purpose at the time the defendant pleads not guilty. The defendant may file the notice at any time after the plea but before trial when just cause for failure to file the notice at the time of making the plea is shown. If the defendant fails to file notice, the defendant may not introduce evidence for the establishment of a defense under ORS 161.295 or 161.300 unless the court, in its discretion, permits the evidence to be introduced where just cause for failure to file the notice is shown."

ORS 161.309 has been amended by Oregon Laws 2017, chapter 48, section 1. The amendment is not effective until January 1, 2018.

[2] ORS 161.295 has been amended by Oregon Laws 2017, chapter 634, section 3. The amendment is not effective until January 1, 2018.

delay, because defendant acted unreasonably by waiting as long as she did to give notice of her intent to present evidence of insanity.

Defendant opposed the motion. Noting that the terms of the statute required the filing of the notice at the time of her plea, she argued that the circumstances demonstrated that she was not in a position to file the notice at that time, a point that the state did not dispute. Beyond that, defendant contended that she acted diligently to file the notice of her intent to raise the defense once she had the information needed to make that decision. Defense counsel told the court he first became aware of the possibility of an insanity defense during conversations with the expert in March, and noted that he had called the prosecutor to alert him of the possibility. Counsel explained that he was "reluctant to go out on a limb" by filing the notice of intent to present the insanity defense before reviewing the expert's report.

The court granted the state's motion. It reasoned that if a defendant does not file written notice of intent to present an insanity defense at the time the defendant enters her plea, then ORS 161.309 requires the defendant to demonstrate a "good reason" for filing the notice at whatever time the defendant does file the notice. The court explained that the statute requires the filing of the notice at the earliest possible time unless the defendant demonstrates good cause for filing the notice at a later time. Observing that defense counsel had become aware of the possibility of the defense in the middle of March, the court concluded that the question under the statute was "why wasn't written notice given at that point?" Because defendant did not do so and, in the court's view, had not demonstrated good cause for waiting as long as she did to file the notice, the court ruled that the notice was untimely and that defendant would be precluded from presenting an insanity defense.

On appeal, defendant assigns error to that ruling. Defendant contends, among other things, that the trial court's decision was based on an erroneous interpretation of the statute. In particular, defendant asserts that the trial court erred in interpreting the statute to require defendant to file the notice as soon as defendant became aware of the

possibility of the insanity defense, or demonstrate "just cause" for not doing so. Defendant points out that the statute authorizes a defendant to file the notice "at any time before trial," if the defendant demonstrates "just cause" for not filing the notice at the time of the plea. In other words, according to defendant:

> "The statute is phrased so that the default position is to permit the defendant to present an insanity defense so long as the defendant files the notice before trial: '*The defendant may file the notice at any time after the plea but before trial* when just cause for failure to file the notice at the time of making the plea is shown.' ORS 161.309(4) (emphasis added). The statute does not require defendant to account for the entire period of delay. Rather, she must show just cause for filing the notice at some point after the time of the not-guilty plea."

(Emphasis by defendant.) Because "[a]ll acknowledged that filing a notice at the time of the not-guilty plea would not have been possible," and because defendant filed the notice before trial, defendant contends that she satisfied the requirements of ORS 161.309, and that the trial court erred in concluding otherwise.

In response, the state argues that the trial court's ruling was based on a correct understanding of the statute. The state reads the statute to require a defendant to demonstrate just cause for filing the notice on whatever date the notice is filed, if the notice is filed after the defendant enters a plea. According to the state, "timeliness of defendant's notice must turn on when the likelihood of raising an insanity defense became apparent to defendant ***." Because defendant "certainly" was aware of that likelihood no later than mid-March of 2015, defendant's notice was not timely because defendant did not file it then. Further, the state argues that the trial court was within its discretion to conclude that defendant had not adequately accounted for the delay between March and April, and that defendant should be precluded from presenting the insanity defense for that reason. The parties' competing arguments present a question of statutory construction, and we review the trial court's resolution of that question for legal error. *State v. James*, 266 Or App 660, 665, 338 P3d 782 (2014). Our

objective in interpreting ORS 161.309 is "to determine the meaning of the statute that the legislature that enacted it most likely intended." *Chase and Chase*, 354 Or 776, 780, 323 P3d 266 (2014). To do so, we "examine its text, in context, and, where appropriate, legislative history and relevant canons of construction." *Id*. Context includes other statutes enacted simultaneously and prior versions of the same statute. *State v. McDowell*, 352 Or 27, 30-31, 279 P3d 198 (2012).

As an initial matter, although the state does not dispute that defendant preserved the issues she raises on appeal, we note that defendant's argument on appeal about the operation of ORS 161.309 differs somewhat from the arguments she made to the trial court. Below, defendant argued that, after the initial deadline was not met, the question was whether she demonstrated just cause to admit the evidence, whereas the state focused on just cause for not filing the notice sooner. On appeal, we now understand defendant to argue that the question under the statute is whether defendant has demonstrated just cause for not filing the notice at the time of entering her plea, and that the statute permits the filing of the notice at any time before trial if a defendant makes that showing.

Under *Stull v. Hoke*, 326 Or 72, 948 P2d 722 (1997), defendant's arguments to the trial court were sufficient to preserve the broad interpretive issue of the correct meaning of ORS 161.309. *See id*. at 76-77. Additionally, the state's arguments, which focused on whether there was just cause for filing the late notice, also put the correct meaning of ORS 161.309 at issue. Finally, "[i]n construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties." *Id*. at 77. For those reasons, consistent with *Stull*, we consider defendant's new arguments about the meaning of ORS 161.309, even though, as we have acknowledged, defendant's arguments to the trial court did not give that court the opportunity to consider the precise interpretation of ORS 161.309 that defendant presses on appeal.

We turn to the primary question at hand: Did defendant's notice comport with the requirements of ORS

161.309(3) so as to entitle her to present an insanity defense at trial? That provision states:

> "A defendant who is required under subsection (1) or (2) of this section to give notice shall file a written notice of purpose at the time the defendant pleads not guilty. *The defendant may file the notice at any time after the plea but before trial when just cause for failure to file the notice at the time of making the plea is shown.* If the defendant fails to file notice, the defendant may not introduce evidence for the establishment of a defense under ORS 161.295 or 161.300 unless the court, in its discretion, permits the evidence to be introduced where just cause for failure to file the notice is shown."

(Emphasis added.) Relying on the emphasized wording, defendant argues that her notice complied with the statute because (1) there is no dispute that she could not have filed her notice at the time of making her plea and, thus, she had "just cause" for failing to file the notice at that time; and (2) under such circumstances, the statute explicitly authorizes a defendant to "file the notice *at any time after the plea but before trial*." (Emphasis added.) The state, in contrast, asserts that the statute requires a defendant to file the notice as soon as the defendant becomes aware of the likelihood of presenting an insanity defense, unless the defendant demonstrates just cause for any further delay.

The text of the statute provides strong support for defendant's interpretation. That text states that to file a notice of intent to present an insanity defense after the plea, a defendant must demonstrate just cause only "for failure to file the notice at the time of making the plea." ORS 161.309(3). Once a defendant does so, the statute, as worded, unequivocally authorizes the defendant to file the notice "at any time" before trial. *Id.* Those words signal, rather plainly, that the legislature intended that any defendant who shows just cause for not filing notice at the time of plea would be able to file notice at any later time, up to the start of trial.

In addition to what the statute affirmatively states, it is notable what the statute does not state. It does not state that a defendant who is unable to file the notice upon entry of plea must file the notice as soon as possible after that date or demonstrate just cause for not doing so. It also does

not state that a defendant who is unable to file the notice at the time of plea must demonstrate "just cause" for waiting until a particular date before trial to file the notice. To construe the statute to include those additional requirements, as the state argues we should, would require us to insert provisions into the statute that the legislature omitted. We would, in effect, be rewriting ORS 161.309(3) to state, "The defendant may file the notice at any time after the plea but before trial when just cause for failure to the file the notice *at an earlier time* is shown," substituting the phrase "at an earlier time" for the legislature's chosen phrase "at the time of making the plea." That is something that we, as a court, cannot do: "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[.]" ORS 174.010. That alone militates against adopting the state's proposed interpretation and in favor of accepting defendant's.

Context points the same direction. As mentioned, context includes prior versions of the statute. The legislature enacted ORS 161.309(3) as part of the 1971 revisions to the criminal code. Or Laws 1971, ch 743, § 41.[3] However, the provision was not new to Oregon law. Rather, it preserved the existing notice requirements under *former* ORS 135.870 (1971), *repealed by* Or Laws 1973, ch 836, § 358, a provision first enacted in 1937. *See* Or Laws 1937, ch 18; Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 41 (July 1970) (Final Draft and Report) (explaining that "[t]he language [of the provision] closely parallels existing notice requirements set out in ORS 135.870"); *State v. Schleigh*, 210 Or 155, 175,

[3] Or Laws 1971, ch 743, § 41, provides:

"**Section 41. Notice requirements.** A defendant who is required under section 39 or 40 of this Act to give notice shall file a written notice of his purpose at the time he pleads not guilty. The defendant may file such notice at any time after he pleads but before trial when just cause for failure to file the notice at the time of making his plea is made to appear to the satisfaction of the court. If the defendant fails to file any such notice, he shall not be entitled to introduce evidence for the establishment of a defense under section 36 or 37 of this Act unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file the notice is made to appear."

(Boldface in original.)

310 P2d 341 (1957) (discussing the enactment history of *former* ORS 135.870). *Former* ORS 135.870, as the Supreme Court has explained, was "modeled upon Section 235 of the Code of Criminal Procedure adopted by the American Law Institute, although the stringent requirements of the Model Code are somewhat relaxed in the Oregon statute." *State v. Wallace*, 170 Or 60, 105, 131 P2d 222 (1942). The "somewhat relaxed" part of *former* ORS 135.870 appears to be the part that authorizes a defendant who demonstrates that she could not file notice at the time of entering a plea to file that notice "at any time" after entering a plea "but before trial." *See* Or Laws 1937, ch 18. In contrast with the Oregon statute, section 235 of the Model Code required that the notice be filed no later than four days before trial: "[The defendant] shall at the time he pleads, or at any time thereafter, not later than four days before trial, file a written notice of his purpose." American Law Institute, Code of Criminal Procedure, § 235, 98 (1930).[4]

Thus, in drawing from the Model Code, the Oregon legislature chose to omit a four-day pretrial deadline in favor of permitting a defendant to file notice "at any time" before trial, if the defendant can show just cause for not filing the notice at the time of plea. That indicates two things. First, it indicates that the legislature was well aware of how to require the filing of notice at some earlier point before trial but after plea, and that it intentionally opted not to do so. Second, it suggests that the legislature's primary purpose was simply to require pretrial notice so that the state could adequately protect its interest before a jury was empanelled. To be sure, the legislature's inclusion of a requirement that a defendant demonstrate "just cause" for not filing the notice at the time of plea suggests a legislative preference that the notice be filed at that time if the defendant can do so. However, by rejecting the Model Code's four-day deadline and allowing a defendant to file notice "at

[4] Although *former* ORS 135.870 was "more relaxed" than the Model Code in that it contemplated filing of notice "at any time" before trial and did not impose a four-day deadline, it was more stringent in that it required showing "just cause" for not filing the notice at the time of plea, as does current ORS 161.309. The Model Code provision did not require a defendant to demonstrate cause for not filing notice at the time of plea. Rather, it authorized the filing of the notice at any time up to four days before trial.

any time" before trial, as long as she can show just cause for not filing the notice at the time of plea, the legislature also signaled its intent that the preference for filing at the time of plea would give way to the defendant's interest in presenting a defense, provided the state was informed of that defense before trial.

Finally, legislative history, although not particularly probative, corroborates the textual and contextual indications of the legislature's intentions. It does so in two different ways. First, it shows that the legislature's primary purpose in enacting the provision was to safeguard a defendant's right to present a defense, while simultaneously ensuring that the prosecution was not surprised *during trial*. The minutes reflect that, at one of the initial subcommittee meetings on the provision, Professor Platt "explained that [the provision] reflected existing law in Oregon and was liberal so far as the defendant's rights were concerned, yet protected the state against last minute surprises." Minutes, Criminal Law Revision Commission, Subcommittee Number 3, Oct 31, 1968, 4. In other words, the main objective of the provision was not necessarily to keep a trial schedule on track, but to balance the defendant's interest in presenting a defense with the state's interest in not being surprised midtrial by an unanticipated, technical defense. *See also* Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 40, 39 (July 1970) ("The underlying reason for the notice requirements for this section (and for § 39, also) is to avoid surprising the prosecution with a highly technical and complicated issue where experts are going to be used by the defense.").

Second, the legislative history also indicates that the legislature did not contemplate imposing a rigorous requirement that notice be filed as soon as possible before trial, notwithstanding the statutory preference that the notice be filed at the time of the plea. During the same subcommittee meeting, according to the minutes, subcommittee member Frank Knight, Benton County District Attorney, commented that "the purpose of the statute was to require the defendant to give notice at the time he entered his plea so that when the case was set for trial, all parties

could be reasonably certain that the case would go to trial on that date." Minutes, Criminal Law Revision Commission, Subcommittee Number 3, Oct 31, 1968, 4. Mr. Knight, however, was the only subcommittee member to suggest that that was the statute's purpose. And following Knight's comment, the minutes show that Judge Burns remarked that "in Multnomah County one or two days notice afforded the court sufficient time to have the defendant examined by a psychiatrist. In some areas where psychiatrists were not readily available, *** it could be a problem but in the larger counties it was not." *Id.*

In sum, the foregoing textual, contextual, and historical considerations persuade us that ORS 161.309 means exactly what its words say: a criminal defendant who shows just cause for not filing a notice of intent to present an insanity defense at the time of plea is entitled to file the notice "at any time" before trial. If a defendant's particular timing does not give the state adequate time to prepare to meet the defense, then the proper course is to continue the trial to permit the state more time to prepare, not to preclude the defendant from presenting the defense.

In reaching this conclusion, we are mindful of the realities of current criminal practice, and of the practical effect of this decision. Although the notice provisions of ORS 161.309 may have been consonant with Oregon criminal practice 80 years ago when the 1937 legislature adopted them, or 46 years ago when the 1971 legislature decided to continue them, they are not today. On the one hand, as the trial court and parties below all recognized, in many cases, it is not realistic to expect notice to be filed at arraignment. The majority of criminal defendants in Oregon courts are represented by indigent defense services providers. The arraignment is typically when counsel is appointed, and often the first opportunity for attorney-client consultation. Consequently, counsel frequently may lack a good faith basis to file such a notice at arraignment, and "just cause" for not filing notice at the time of plea might well be found in most cases. On the other hand, by authorizing a defendant to file the notice at any time before trial, the statute creates an incentive for defense counsel to wait until the eve of

trial to file the notice,[5] in order to protect the defendant from the psychological examination to which the state is entitled upon the filing of the notice. But this leaves the state with a difficult decision—whether to call off a trial for which witnesses have been subpoenaed and jurors summoned in order to conduct an examination under ORS 161.315, or proceed to trial without the evidence to which it is entitled. None of this is conducive to the fair and efficient administration of justice.

The situation would not be difficult for the legislature to remedy. As just one example, the American Law Institute—the source of the original notice provision adopted by the Oregon legislature—has included in its Model Penal Code a notice provision that would address these concerns. *See* American Law Institute, Model Penal Code § 4.03(2) (1985).[6] There almost certainly are many other ways to balance a defendant's interests against the state's, and to provide a fair process for both. However, whether and how to amend the notice provisions of ORS 161.309 to address the realities of modern criminal practice is a job that is reserved to the legislature. As ORS 174.010 makes clear, it is not part of "the office of the judge." *See State v. Shifflett*, 285 Or App 654, 665-66, 398 P3d 383 (2017) ("it is not for the courts to alter the plain text of a statute in light of *** advances" over time).

In sum, for the foregoing reasons, the trial court erred when it ruled that defendant was precluded from presenting an insanity defense because she did not show that she filed her notice at the earliest possible time after

[5] In particular, although one or two days' notice may have been sufficient *circa* 1971 (we have no reason to question Judge Burns's assessment), it often may not be sufficient today.

[6] Model Penal Code § 4.03(2) states:

> "Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the Court may for good cause permit, files a written notice of his purpose to rely on such defense."

The commentary explains that, because the Model Penal Code contemplates "extensive pretrial examinations" of a defendant raising a defense of a mental disease or defect, "it is obviously important that defendant's intent to raise it be indicated well before trial." American Law Institute, Commentary to Model Penal Code § 4.03, 228 (1985).

entering her plea. It is undisputed on this record that defendant could not have filed her notice at the time of plea and, thus, had "just cause" for her failure to do so. Under the plain terms of ORS 161.309, then, defendant was entitled to file notice of her intent to present an insanity defense "at any time" before trial. Because she did so, she is entitled to present an insanity defense at trial, should she choose to go to trial on remand.

Reversed and remanded.