



# COURT OF APPEALS

## Media Release

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The Court of Appeals issued these opinions:

Jordan Schnitzer and Mina Morvai Schnitzer  
(A163378 - Multnomah County Circuit Court)  
Department of Human Services v. F. Y. D., Jr.  
(A171156 - Lane County Circuit Court)  
State of Oregon v. Alexandra Chanel Barrett  
(A159139 - Multnomah County Circuit Court)  
State of Oregon v. Michael Andrew Kirkpatrick  
(A165450 - Yamhill County Circuit Court)  
State of Oregon v. Marai Boauod  
(A165054 - Beaverton Municipal Court)  
State of Oregon v. Ellen M. Guynn  
(A165616 - Yamhill County Circuit Court)  
State of Oregon v. Charles Steven McCarthy  
(A165026 - Marion County Circuit Court)  
State of Oregon v. Dennis Ray Swartz  
(A167696 - Douglas County Circuit Court)  
State of Oregon v. J. G.  
(A169916 - Lane County Circuit Court)  
State of Oregon v. J. W.  
(A170260 - Lane County Circuit Court)

The Court of Appeals issued these *per curiam* opinions:

Liberty Metal Fabricators, Inc. v. The Lynch Company, Inc.  
(A165388 - Workers' Compensation Board)  
Amanda Cooper v. Travelers Insurance Company  
(A166757 - Workers' Compensation Board)

State of Oregon v. Mickey Allen Shepherd  
(A167327 - Josephine County Circuit Court)  
State of Oregon v. James Samson Paris  
(A167459 - Deschutes County Circuit Court)  
State of Oregon v. David Ashley Moore  
(A169240 - Marion County Circuit Court)  
Department of Human Services v. V. A. R.  
(A171503 - Wallowa County Circuit Court)  
State of Oregon v. C. A. A.  
(A171994 - Douglas County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

State of Oregon v. Steven J. Frystak  
(A165147 - Marion County Circuit Court)  
State of Oregon v. Sabrina Marie Harmon  
(A165178 - Lane County Circuit Court)  
State of Oregon v. Eliseo Comacho Lopez  
(A167575 - Clackamas County Circuit Court)  
10150 SW Riverside Dr., LLC v. Kuljeet Singh  
(A168010 - Multnomah County Circuit Court)  
David Henry Drenth v. Brandon Kelly  
(A168269 - Marion County Circuit Court)  
Larry Lydell Bell Sr. v. Cheryl J. Feuerstein  
(A168572 - Multnomah County Circuit Court)  
Multnomah Neighborhood Association v. Land Conservation and Development Commission  
(A168704 - Land Conservation and Development Commission)  
State of Oregon v. Juan Alejandro Torres-Moreno  
(A168717 - Marion County Circuit Court)  
State of Oregon v. Steven Guy Tubbs  
(A168961 - Multnomah County Circuit Court)  
Steven R. Rascon v. Brad Cain  
(A169014 - Malheur County Circuit Court)  
State of Oregon v. Ramon Manuel Gonzalez  
(A169137 - Multnomah County Circuit Court)  
Kamila Kohzadi and Farhad Ansari  
(A169140 - Multnomah County Circuit Court)  
State of Oregon v. Fred Oliver Tharp  
(A169147 - Polk County Circuit Court)  
Jared Weston Walter v. State of Oregon  
(A169194 - Clackamas County Circuit Court)  
State of Oregon v. Eric Todd Harris  
(A169325 - Marion County Circuit Court)

State of Oregon v. Ramon Lee Zavala  
(A169380 - Lincoln County Circuit Court)  
State of Oregon v. C. L. L.  
(A169396 - Deschutes County Circuit Court)  
State of Oregon v. N. F. R.  
(A169542 - Lane County Circuit Court)  
Eric Michael Freeburg v. Brigitte Amsberry  
(A169576 - Umatilla County Circuit Court)  
State of Oregon v. J. W. B.  
(A169620 - Benton County Circuit Court)  
Roosevelt Lee Baker III v. Brandon Kelly  
(A170176 - Marion County Circuit Court)  
Allen Douglas Von Nevin, Jr. v. Brad Cain  
(A170198 - Malheur County Circuit Court)  
Bruce Martin Deline and Jamie Sue Deline  
(A170349 - Jackson County Circuit Court)  
U.S. Bank Trust, N.A. v. Mary P. Strong  
(A170560 - Deschutes County Circuit Court)  
State of Oregon v. C. S.  
(A170806 - Multnomah County Circuit Court)  
State of Oregon v. W. C. M.  
(A170894 - Lane County Circuit Court)  
State of Oregon v. Jason Thomas McFarland  
(A171233 - Deschutes County Circuit Court)  
Department of Human Services v. S. L.  
(A171815 - Washington County Circuit Court)  
Department of Human Services v. D. T. S.  
(A171913 - Lane County Circuit Court)  
Department of Human Services v. S. M. L.  
(A171949 - Lane County Circuit Court)

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**Jordan Schnitzer and Mina Morvai Schnitzer**

(Armstrong, P. J.)

In this supplemental dissolution proceeding, wife sought to determine the boundaries of property awarded to her in the dissolution judgment. Wife appeals from a second supplemental judgment awarding husband his attorney fees. She contends that the trial court misinterpreted and misapplied the parties' stipulated dissolution judgment, which provided that the "predominately prevailing party (as determined by the Court)" shall be entitled to attorney fees in any post-judgment dispute to enforce the judgment. Held: Under the parties' stipulated dissolution judgment, which gave the trial court discretion to determine who was the predominately prevailing party, the trial court had authority to determine who prevailed by evaluating the relief a party obtained in light of the relief requested. The trial court made that evaluation and did not abuse its discretion in determining that husband predominately prevailed. Affirmed.

**Department of Human Services v. F. Y. D., Jr.**  
(Armstrong, P. J.)

Father appeals the juvenile court's judgment establishing jurisdiction over child, arguing that, because his sister was available to care for child while father served about four to five more months of incarceration, DHS failed to present sufficient evidence of a current threat of harm to child. Held: Because father entrusted child to his sister for only the few months that he would be in prison, the juvenile court did not err in taking jurisdiction based on its finding that it was likely that father would assume his parental responsibilities when released and that that posed a risk of harm to child given father's poor judgment and decision making. Affirmed.

**State of Oregon v. Alexandra Chanel Barrett**  
(DeVore, J.)

Defendant appeals from judgments convicting her of unlawful camping on public property and interference with a peace officer, among other things. First, defendant contends that the trial court erred in denying her pretrial motion to dismiss the charges of unlawful camping under Portland City Code (PCC) 14A.50.020, arguing that the law, as applied to her, violates the Eighth Amendment to the United States Constitution. She also argues that the camping law violates her fundamental right to travel under multiple other constitutional provisions. Second, defendant asserts that the court erred in denying her motion for judgment of acquittal because ORS 203.077 and ORS 203.079, which require local governments to enact policies regarding the removal of homeless campsites, preempted the camping law. Held: The trial court did not err in denying either motion. Given the absence of a factual record needed to properly present the question, the Court of Appeals refrained from addressing whether enforcement of the camping law could violate the Eighth Amendment on an as-applied basis. Defendant's right-to-travel argument fails as either a facial or as-applied challenge. ORS 203.077 and ORS 203.079 do not preempt the camping law, as they only require cities and counties to develop and implement policies regarding the removal of homeless persons and their belongings, and they do not prescribe or limit the enactment or enforcement of criminal offenses. Affirmed.

**State of Oregon v. Michael Andrew Kirkpatrick**  
(DeVore, J.)

Defendant appeals a judgment of conviction for two counts of encouraging child sexual abuse in the first degree, ORS 163.684. Defendant argues that the trial court erroneously concluded that he was subject to a presumptive sentence under ORS 137.719 because his prior conviction for violating 18 USC section 2252(a)(1) was "comparable" under ORS 137.719(3)(b)(B) to a conviction under ORS 163.686. The state concedes the error. Held: Under *State v. Carlton*, 361 Or 29, 388 P3d 1093 (2017), a conviction for violating 18 USC section 2252(a)(1) is not comparable to a conviction under ORS 163.686. Accordingly, the trial court erred by finding that defendant was subject to a presumptive sentence under ORS 137.719. Remanded for resentencing; otherwise affirmed.

**State of Oregon v. Marai Boauod**  
(Lagesen, P. J.)

A jury convicted defendant of harassment, ORS 166.065. On appeal, defendant assigns error to the trial court's denial of his motion in limine to exclude a video--and include only the audio--of defendant being interviewed in a holding cell about the incident leading to his arrest. He argues that the court abused its discretion in determining that the probative value of defendant's gestures and expressions in the video was not substantially outweighed by the prejudicial effect of the image of defendant behind bars. Requesting plain error review, defendant also assigns error to the court's failure to sua sponte declare a mistrial or issue a

corrective instruction in response to the state's comments on the credibility of defendant and the victim during its closing argument. Defendant contends that, because the state argued that he lied, he did not receive a fair trial. Held: The trial court did not err. As for the motion in limine, the court properly balanced the competing interests under OEC 403 and did not abuse its discretion in admitting the video. As for the court's failure to sua sponte correct the state's comments on the credibility of the witnesses, it is not beyond dispute that defendant was so prejudiced as to be deprived of his right to a fair trial. Affirmed.

**State of Oregon v. Ellen M. Guynn**

(Lagesen, P. J.)

Defendant was found guilty of "following too closely," ORS 811.485(1)(a), for repeatedly following the car in front of her at a distance of only six feet while traveling at 55-to-60-miles-per-hour speeds. Under ORS 811.485(1)(a), a driver has the duty to not follow the preceding car so closely so as to create an "unreasonable risk" to others under the driving conditions present. *Garland v. Wilcox*, 220 Or 325, 336, 348 P2d 1091 (1960). On appeal, defendant contends that, when that statute is properly construed, the evidence is not sufficient to show that her conduct violated it. Held: The evidence was sufficient to support the trial court's finding that defendant's driving violated ORS 811.485(1)(a). Affirmed.

**State of Oregon v. Charles Steven McCarthy**

(James, J.)

The state appeals from a pretrial order granting, in part, defendant's motion to suppress evidence that was seized pursuant to a warrantless search of defendant's automobile. The state assigns error to that order, arguing that the search was lawful under the automobile exception to the warrant requirement. In response, defendant contends that the trial court properly granted his motion to suppress because the state failed to demonstrate an actual exigency in this specific case according to the standards articulated in *State v. Andersen*, 361 Or 187, 390 P3d 992 (2017). Specifically, the parties disagree over the significance of the Oregon Supreme Court's statement, "Nor do we foreclose a showing in an individual case that a warrant could have been drafted and obtained with sufficient speed to obviate the exigency that underlies the automobile exception." *Andersen*, 361 Or at 201. Held: Although *Andersen* contemplated the effects of technology on the assumptions underlying the automobile exception, Oregon's automobile exception does not require the state to show any particular exigency under the facts of the encounter, nor does it require the state to establish that a telephonic warrant was unavailable. Reversed and remanded.

**State of Oregon v. Dennis Ray Swartz**

(Aoyagi, J.)

Defendant was convicted of one count of interfering with a peace officer (IPO), ORS 162.247. On appeal, he argues that the trial court plainly erred in finding him guilty and convicting him, because his conduct constituted "passive resistance" under ORS 162.247(3)(b), as interpreted in *State v. McNally*, 361 Or 314, 392 P3d 721 (2017), such that the evidence was legally insufficient to support the conviction. Defendant argues that the only evidence was that, when a deputy ordered him to stop, he passively continued walking and, in the deputy's words, "ignored" the order. Held: The trial court did not plainly err. Under the standard articulated in *McNally*, it is not obvious and is reasonably in dispute that a person who continues walking after being ordered to stop may--let alone must--be engaged in "passive resistance" for purposes of ORS 162.247. Affirmed.

**State of Oregon v. J. G.**

(Aoyagi, J.)

Appellant seeks reversal of a judgment committing her to the Mental Health Division of the Oregon Health Authority for up to 180 days. She argues that the evidence was legally insufficient for the trial court to find her to be a person with a mental illness, specifically a person who, due to a mental disorder, was dangerous to others. See ORS 426.130; ORS 426.005(1)(f)(A). Held: The trial court erred in ordering commitment, because the evidence was legally insufficient to establish that appellant was dangerous to others as a result of her mental disorder. The only evidence of dangerousness to others was a single incident, which occurred in the hospital four days prior to appellant's hearing, in which appellant punched another patient once in the back. On this record, the trial court erred in treating that incident as predicative of future violence, particularly future violence in the narrow range of serious and highly probable threats of harm necessary for an involuntary commitment, rather than an isolated incident. Reversed.

**State of Oregon v. J. W.**

(Aoyagi, J.)

Appellant was committed to the Department of Human Services for a period not to exceed one year, pursuant to ORS 427.290, on the basis that, due to an intellectual disability, he was unable to provide for his personal needs and was dangerous to himself. Appellant appeals the judgment of commitment, arguing that the evidence presented at his commitment hearing was insufficient to establish that he has an intellectual disability as defined in ORS 427.005(10). The state contends that the evidence was sufficient. The parties' dispute turns entirely on whether the trial court did or did not admit the precommitment report into evidence at the hearing. Held: The trial court did admit the precommitment report into evidence. To the extent that its manner of doing so might have been subject to challenge, appellant did not preserve any claim of procedural error in that regard. The evidence therefore was sufficient to support the court's determination that appellant has an intellectual disability for purposes of ORS 427.290. Affirmed.

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