



COURT OF APPEALS

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The Court of Appeals issued these opinions:

State of Oregon v. Jacobi Broshawn Thornsberry
(A167617 - Lane County Circuit Court)

State of Oregon v. Casey James Schumacher
(A170013 - Washington County Circuit Court)

Serena Markstrom v. Guard Publishing Company
(A171966 - Lane County Circuit Court)

State of Oregon v. J. D.
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State of Oregon v. Hussein Ibrahim Hassan
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State of Oregon v. Joshua Fitzgerald
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United Academics of Oregon State University v. Oregon State University
(A174198 - Employment Relations Board)

State of Oregon v. Michael Dean Hackett
(A170402 - Coos County Circuit Court)

Bo and Lia Holdings LLC v. 2021 Morrison LLC
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State of Oregon v. Tyler James Bates
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Matthew Daniel Ingle v. Dolores Matteucci
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State of Oregon v. Toan Phuc Huynh
(A173016 - Marion County Circuit Court)

Department of Human Services v. C. C.
(A174678 - Douglas County Circuit Court)

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

Wells Fargo Bank, N. A. v. Sara Michelotti
(A168953 - Hood River County Circuit Court)
Donald Lee Mandell v. Brad Cain
(A171428 - Malheur County Circuit Court)
Anthony Howard Barnes and Meghan Elizabeth Brennan
(A172757 - Multnomah County Circuit Court)
State of Oregon v. Arnildo Joseph Uppiano
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(A174902 - Jefferson County Circuit Court)
State of Oregon v. R. A.
(A175129 - Multnomah County Circuit Court)
Department of Human Services v. M. S. G.
(A175580 - Umatilla County Circuit Court)
Department of Human Services v. R. O.
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The Court of Appeals affirmed these cases without opinion:

State of Oregon v. Shantel Lynn Witt
(A170386 - Deschutes County Circuit Court)
State of Oregon v. Craig Michael Randleman
(A170891 - Deschutes County Circuit Court)
State of Oregon v. Maria Andreea Eklund
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Daniel Loren Jenkins v. Board of Parole and Post-Prison Supervision
(A171837 - Board of Parole and Post-Prison Supervision)
State of Oregon v. Gerardo Montano-Servin
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State of Oregon v. Gary Lee Spain
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State of Oregon v. Ebyn Kash Jackson
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Hamid Michael Hejazi v. Clifton Harrold
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State of Oregon v. S. B.
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Michael A. Brennan v. Richard D. Snyder
(A175200 - Lincoln County Circuit Court)

Department of Human Services v. M. S.
(A175742 - Multnomah County Circuit Court)

Hamid Michael Hejazi v. Lane County Health Authority
(A175954 - Lane County Circuit Court)

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State of Oregon v. Jacobi Broshawn Thornsberry

(Armstrong, P. J.)

For one of defendant's two first-degree rape convictions, the trial court imposed a 300-month prison term under ORS 137.690, which provides for that imprisonment term if a defendant has a prior conviction, which includes a conviction in the same sentencing proceeding if the conviction is for a separate criminal episode. The trial court made the finding that the criminal episodes were separate and imposed the 300-month prison sentence. On appeal, defendant argues that the jury, rather than the trial court, was required to make the finding that the two rape convictions arose out of separate criminal episodes before the trial court could impose the 300-month prison sentence. Held: Under *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), defendant had the constitutional right to have a jury make the finding that the second rape conviction arose from a criminal episode that was separate from the criminal episode that gave rise to the first rape conviction. Further, the trial court's error was not harmless. Remanded for resentencing; otherwise affirmed.

State of Oregon v. Casey James Schumacher

(Armstrong, P. J.)

In this criminal appeal, defendant assigns error to the trial court's denial of his motion for a mistrial, contending that the court erred in denying the motion because the arresting officer's testimony referred to defendant's invocation of his constitutional right to counsel and, therefore, prejudiced defendant's ability to have a fair trial. He argues that, from the officer's testimony, the jury was likely to infer that defendant had exercised his right to counsel because he was guilty of the charged offense. Held: Because the trial court did not act to cure the improper reference to defendant's invocation of his right to counsel, and no other evidence negated the inference of guilt, the denial of defendant's motion for mistrial was error. Reversed and remanded.

Serena Markstrom v. Guard Publishing Company

(Armstrong, P. J.)

Plaintiff was discharged from her employment as a reporter with defendant and brought a civil action alleging gender discrimination, ORS 659A.030(1)(a) and (b), and violation of Oregon's family-leave law, ORS 659A.150 to 659A.186. The trial court found that plaintiff had destroyed evidence before she had initiated the litigation and dismissed plaintiff's claims as a sanction for spoliation of evidence, believing that it had authority to impose that sanction under ORS 1.010 and ORCP 46 D. Plaintiff appeals, challenging the trial court's authority to impose the sanction. Held: The trial court lacked authority, under either ORS 1.010 or ORCP 46 D, to dismiss plaintiff's claims based on plaintiff's destruction of evidence before the litigation had been initiated. Reversed and remanded.

State of Oregon v. J. D.

(Armstrong, P. J.)

Appellant appeals a judgment of the trial court civilly committing him to the custody of the Oregon Health Authority for up to 180 days based on the court's determination that he has a mental disorder that makes him dangerous to himself and to others. Appellant does not dispute that he has a mental disorder but contends that the evidence is insufficient to demonstrate that, because of his mental disorder, he presents a danger to himself or others that permits commitment under ORS 426.130(1)(a)(C) and (2). Appellant also challenges the trial court's determination, under ORS 426.130(1)(a)(A), that it was unlikely that he was willing and able to participate in treatment voluntarily. Held: The evidence was sufficient to allow the trial court to find, by clear

and convincing evidence, that it was highly probable, at the time of the hearing, that appellant posed a danger to others; thus, the Court of Appeals did not need to address appellant's contention that the trial court erred in determining that he was also a danger to himself. The Court of Appeals also held that the evidence was sufficient to allow the trial court to find, by a preponderance of the evidence, that, if released, appellant would not be willing or able to engage in treatment voluntarily. Affirmed.

State of Oregon v. Hussein Ibrahim Hassan

(Lagesen, P. J.)

Defendant was found guilty of two counts of first-degree sexual abuse committed against C, a child under the age of 14. On appeal, defendant argues that the trial court erred by instructing the jury that it could return nonunanimous verdicts and by excluding evidence relevant to C's possible motive to fabricate the allegations against him. Held: On the first count, defendant was found guilty by a nonunanimous jury, so the judgment was reversed and remanded as to that count in light of *Ramos v. Louisiana*, 590 US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020). On the second count, the jury was unanimous, so any error in instructing the jury regarding unanimity or in receiving that verdict was harmless beyond a reasonable doubt and was not a basis for reversal. However, because the court erred in excluding evidence of C's possible motive to fabricate the abuse allegations, the judgment was reversed as to that count as well. Reversed and remanded.

State of Oregon v. Joshua Fitzgerald

(Lagesen, P. J.)

Defendant appeals a judgment of conviction by a jury for second-degree burglary, ORS 164.215, and unauthorized use of a vehicle, ORS 164.135. The jury was not polled, so it is not known whether the verdicts were unanimous. On appeal, defendant contends that the trial court (1) erred by denying his motion for judgment of acquittal on the second-degree burglary count because, he argues, the facts do not satisfy the essential elements of the crime beyond a reasonable doubt; (2) erred by not ruling on what defendant characterizes as a "request to fire his attorney"; and (3) plainly erred by instructing the jury that it could convict him by nonunanimous verdicts. Held: The court did not err in denying defendant's motion for judgment of acquittal. Under the circumstances of this case, defendant did not adequately preserve his contention that the trial court erred in not ruling on defendant's request to fire his attorney. While the jury instruction did constitute plain error, the Court of Appeals declined to exercise its discretion to correct that error because the jury was not polled and, therefore, it was unknown whether the error was prejudicial. Affirmed.

United Academics of Oregon State University v. Oregon State University

(Lagesen, P. J.)

Petitioner seeks judicial review of a final order of the Employment Relations Board (ERB), which determined that petitioner attempted to influence faculty members' decisions regarding union representation in violation of ORS 243.670(2)(a) and ORS 243.672(1)(i). Petitioner argues that its conduct does not fall within the category of conduct precluded by ORS 243.670(2)(a), and that the ERB does not support its findings with substantial reason. In the alternative, petitioner and its amici argue that petitioner's conduct is shielded from liability by an exception provided in ORS 243.670(3). Held: The ERB's interpretation of ORS 243.670(2)(a)

was not erroneous and its inferences, based on stipulated historical facts, were reasoned and reasonable. Petitioner's conduct did not fall within the narrow exception provided by ORS 243.670(3). Affirmed.

State of Oregon v. Michael Dean Hackett

(Tookey, J.)

Defendant appeals a judgment convicting him of, among other offenses, second-degree animal abuse (Count 6). He contends that the trial court erred by (1) denying his motion for judgment of acquittal (MJOA) on Count 6, because the evidence was insufficient to show that the victim, a dog named Bosco, experienced a sufficient duration of pain; and (2) imposing fines "due in 30 days"--in addition to a term of incarceration--without determining his ability to pay. Held: Based on the testimony adduced at defendant's trial, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Bosco suffered pain that was more than "fleeting" or "momentary"; therefore, the trial court did not err in denying defendant's MJOA on Count 6. Additionally, the state conceded, and the Court of Appeals agreed, that the trial court erred in imposing defendant's fines "due in 30 days" without determining defendant's ability to pay. Reversed and remanded for entry of judgment omitting the "due in 30 days" requirement; otherwise affirmed.

Bo and Lia Holdings LLC v. 2021 Morrison LLC

(Tookey, P. J.)

Plaintiffs appeal a judgment granting summary judgment to defendants and denying plaintiffs' cross-motion for summary judgment. The trial court determined that one of defendants had a prescriptive easement over the east-facing portion of a wall owned by one of plaintiffs, which defendants and their predecessors had used for advertising purposes. On appeal, plaintiffs argue that the trial court erred when it determined that defendants' predecessors' use of the wall for advertising was not permissive or consensual, pointing to an agreement between one of plaintiffs' predecessors and one of defendants. Held: The Court of Appeals concluded that the trial court did not err in granting summary judgment to defendants and denying plaintiffs' cross-motion for summary judgment. The summary judgment record reflected no disputed issue of material fact: For nearly two decades prior to this litigation, defendants and their predecessors used the wall for advertising. The use of the wall for advertising was open, notorious, adverse, continuous, and uninterrupted. The agreement pointed to by plaintiffs did not reflect permission to use the wall for advertising, and defendants were entitled to a judgment as a matter of law. Affirmed.

State of Oregon v. M. L.

(Tookey, J.)

Appellant seeks reversal of a judgment involuntarily committing him to the Oregon Health Authority for up to 180 days and an order prohibiting him from purchasing or possessing firearms. On appeal, he argues that the evidence was legally insufficient to prove that he suffered from a mental disorder that makes him a "danger to self." ORS 426.005(1)(f)(A). Held: The Court of Appeals concluded that the evidence in this case does not reflect the kind of particularized, near-term threat that is required to justify appellant's involuntary commitment on the ground that he is a danger to himself. Thus, the evidence was legally insufficient to support the trial court's determination that appellant was a danger to self within the meaning of ORS 426.005(1)(f)(A). Reversed.

State of Oregon v. Tyler James Bates

(DeHoog, J.)

Defendant, who pleaded guilty to private indecency and was sentenced to probation, argues that the trial court erred in imposing a special condition of probation in the judgment that it had not announced in open

court at sentencing. The state argues that the appeal is moot because, following a probation hearing, the trial court entered a judgment finding defendant in violation and continuing him on probation. Held: The trial court erred when it included probationary terms in the judgment that it had not announced in open court at sentencing. In concluding that defendant's appeal is not moot, the Court of Appeals overruled *State v. Nguyen*, 298 Or App 139, 455 P3d 390 (2019). Nguyen is "plainly wrong" insofar as it suggests that the existence of an unappealed probation violation judgment is, in and of itself, determinative of mootness or that the party asserting mootness need not make any further showing. Remanded for resentencing; otherwise affirmed.

Matthew Daniel Ingle v. Dolores Matteucci
(Aoyagi, J.)

On appeal from a judgment denying post-conviction relief, petitioner argues that the post-conviction court erred in dismissing his petition as untimely. Petitioner acknowledges that he filed his petition over eight years after the two-year statute of limitations in ORS 138.510(3) would normally start running. He contends that there is a triable issue as to whether the escape clause applies, however, because his personal mental health circumstances were such that he could not reasonably have raised his post-conviction claim during the limitations period. In support of that argument, petitioner contends that the Supreme Court implicitly overruled *Fisher v. Belleque*, 237 Or App 405, 240 P3d 745, rev den, 349 Or 601 (2011), in *Gutale v. State*, 364 Or 502, 519, 435 P3d 728 (2019). Held: The post-conviction court did not err in dismissing the petition as untimely. Under *Fisher*, the court correctly declined to consider petitioner's personal characteristics in determining whether there was a triable issue. *Gutale* did not implicitly overrule *Fisher*. Affirmed.

State of Oregon v. Toan Phuc Huynh
(Aoyagi, J.)

Defendant was convicted of robbery, assault, and interfering with a peace officer. The jury found him guilty of all three charges by unanimous verdicts, found four enhancement facts by unanimous votes, and found one enhancement fact by nonunanimous vote. The trial court imposed departure sentences on the robbery and assault convictions, relying on three enhancement facts. On appeal, defendant challenges both his convictions and his sentences as unconstitutional under *Ramos v. Louisiana*, 590 US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020). Held: Under *Ramos*, the trial court erred when it instructed the jury that it could return nonunanimous verdicts and findings. That instructional error was harmless as to the unanimous guilty verdicts and the unanimous enhancement facts. However, as the state concedes, defendant is entitled to resentencing for two reasons: (1) one of the enhancement facts on which the trial court relied to impose departure sentences was the one found by nonunanimous vote, and (2) another enhancement fact on which the trial court relied was one that was not tried or found by the jury. Remanded for resentencing; otherwise affirmed.

Department of Human Services v. C. C.
(Hadlock, J. pro tempore)

In this juvenile dependency case, father failed to appear at a scheduled hearing at which he had been ordered to personally appear. The juvenile court rescheduled the hearing, but father again did not appear. In his absence, the court entered a dependency judgment making father's child, A, a ward of the court. The court denied father's motion to set aside the dependency judgment. On appeal, father contends that he did not receive the statutorily required notice of the rescheduled hearing, and, therefore, the juvenile court lacked authority to enter the dependency judgment. Accordingly, father contends that the court abused its discretion when it denied his motion to set aside that judgment. Held: The plain text of ORS 419B.815(7), a statute addressing dependency proceedings, allows a juvenile court to adjudicate a dependency petition at any time

after a parent fails to appear at a hearing for which they had statutorily required notice. In this case, father received the required notice for the initial hearing and the statute did not require any additional notice for the rescheduled hearing. Therefore, the court did not abuse its discretion by denying father's motion. Affirmed.

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