



COURT OF APPEALS

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The Court of Appeals issued these opinions:

State of Oregon v. Manuel Alfonzo De Leon Say
(A174179 - Washington County Circuit Court)

Kenneth Donahue, Jr. v. Ronald D. Nagel
(A172763 - Benton County Circuit Court)

State of Oregon v. Stephen Douglas Renard
(A174174 - Lane County Circuit Court)

County of Linn v. State of Oregon
(A173658 - Linn County Circuit Court)

State of Oregon v. Karen Eve Donaldson
(A174173 - Coos County Circuit Court)

State of Oregon v. Mark Timothy Murphy
(A173010 - Klamath County Circuit Court)

Katarina Rose Henretty v. Malcolm D. Lewis
(A175040 - Lane County Circuit Court)

Rory Bialostosky v. Teri Cummings
(A172134 - Clackamas County Circuit Court)

Susan Monica v. Paula Myers
(A172244 - Washington County Circuit Court)

State of Oregon v. Scott Wayne Smith
(A170791 - Multnomah County Circuit Court)

State of Oregon v. Kenneth Sheridan Wagner
(A173918 - Lincoln County Circuit Court)

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

State of Oregon v. M. A. W.-S.
(A172208 - Washington County Circuit Court)

State of Oregon v. Benito Juarez-Hernandez
(A174351 - Washington County Circuit Court)

RAM Investments, LLC v. West Union Development, LLC
(A174427 - Washington County Circuit Court)
State of Oregon v. Tyler Douglas Minton
(A174483 - Umatilla County Circuit Court)
State of Oregon v. Jeremy Edward Lisle
(A174530 - Washington County Circuit Court)
State of Oregon v. Julio Gonzalez
(A174555 - Washington County Circuit Court)

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State of Oregon v. Manuel Alfonso De Leon Say
(Lagesen, C. J.)

Defendant was convicted by jury of four counts of first-degree sexual abuse, ORS 163.427, and two counts of first-degree unlawful sexual penetration, ORS 163.411. On appeal, defendant assigns error to the trial court's admission of evidence of uncharged acts of sexual abuse of the victim by defendant. He argues that the trial court's ruling was based on an erroneous understanding of the nature of the sexual-predisposition evidence allowed under *State v. McKay*, 309 Or 305, 787 P2d 479 (1990). Defendant also assigns error to the trial court's denial of his motion for judgment of acquittal on one of the counts of unlawful sexual penetration. Held: First, *McKay* rejected the notion that sexual predisposition evidence is propensity evidence and held that evidence of a defendant's uncharged sexual misconduct toward the victim is admissible in a sexual abuse case for certain purposes. *McKay* has not been overruled and therefore the trial court did not err in admitting the evidence. Second, there was sufficient evidence for the count of unlawful sexual penetration to be considered by the factfinder, so the trial court did not err in denying the motion for a judgment of acquittal. Affirmed.

Kenneth Donahue, Jr. v. Ronald D. Nagel
(Egan, J.)

Plaintiffs appeal from a general judgment for defendants on plaintiffs' claims of trespass, nuisance, and ejectment, among other claims, and defendants' counterclaim for breach of a settlement agreement, challenging, among other issues, the trial court's determination that a provision of the settlement agreement requiring plaintiffs to execute an easement was not void under the statute of frauds. Held: The provision of the settlement agreement relating to the creation of an easement was within the statute of frauds. Because it was not subscribed to by plaintiffs, as the party to be obligated, it was void. The Court of Appeals therefore remanded the case for the trial court to consider whether the easement provision is severable from the remainder of the settlement agreement. General and supplemental judgments vacated and remanded.

State of Oregon v. Stephen Douglas Renard
(Egan, J.)

Defendant appeals from convictions for assault in the fourth degree constituting domestic violence, ORS 163.160 (Count 1), and harassment constituting domestic violence, ORS 166.065 (Count 2), based on conduct against the same victim during the same criminal episode. He assigns error to the trial court's admission of

an officer's testimony that bruises on the victim's arm were consistent with fingermark bruising. He also contends that the trial court erred in failing to merge the two guilty verdicts, which the state concedes. Held: The Court of Appeals held that the officer's testimony that bruises on the victim's arm were consistent with fingermark bruising was properly admitted as expert opinion. The court accepted the state's concession that the guilty verdict on defendant's harassment constituting domestic violence conviction must merge with the guilty verdict on defendant's conviction for assault in the fourth degree constituting domestic violence. Reversed and remanded for merger of guilty verdicts on Counts 1 and 2; remanded for resentencing; otherwise affirmed.

County of Linn v. State of Oregon

(Tookey, P. J.)

In this case involving a claim for breach of a purported statutory contract, specifically ORS 530.050, defendants appeal a judgment entered in favor of plaintiffs. On appeal, defendants contend that the trial court erred when it denied their motion to dismiss. In their motion to dismiss, defendants contended that ORS 530.050 did not create a contractual obligation on the part of defendants to manage certain forestlands so as to maximize revenue generated from those forestlands. Held: The relevant language in ORS 530.050 was originally enacted in 1941 by Oregon Laws 1941, chapter 236, section 5. The Court of Appeals concluded that the standard of "clear and unmistakable intent" was not met with regard to whether the 1941 Legislative Assembly intended defendants' obligation regarding forest management under Oregon Laws 1941, chapter 236, section 5, to be a term in a statutory contract between plaintiffs and defendants. Reversed and remanded on appeal; cross-appeal dismissed as moot.

State of Oregon v. Karen Eve Donaldson

(Tookey, P. J.)

Defendant appeals a judgment of conviction for failure to yield to an emergency vehicle, ORS 811.145. That conviction arose from defendant's failure to timely yield to an officer attempting to stop her for violating the posted speed limit. Defendant argues that the trial court erred by convicting her of that offense, because the officer intended to stop her and never intended to pass her, and the requirement under ORS 811.145 that motorists yield to an approaching emergency vehicle applies to motorists whom the emergency vehicle intends to pass but does not apply to motorists whom the emergency vehicle intends to stop. Held: The Court of Appeal construed ORS 811.145 and concluded that, regardless of an emergency vehicle operator's intention to either pass or not pass, when an emergency vehicle is approaching, ORS 811.145 requires motorists to perform all of the actions listed in paragraphs (1)(a) to (c), including yielding, immediately driving to the right-hand edge of the road, and stopping and remaining in such position until the emergency vehicle has passed or, for example, goes elsewhere; thus, failing to do any one of those actions alone would be sufficient to constitute a "failure to yield" under ORS 811.145. Affirmed.

State of Oregon v. Mark Timothy Murphy

(Aoyagi, J.)

Defendant was convicted of first-degree invasion of personal privacy, ORS 163.701, based on an incident involving his 15-year-old stepdaughter, D. The key issue at trial was whether defendant had knowingly videorecorded D in the shower or whether he did so accidentally. There was no physical evidence, other than the video, so it was a credibility contest. In that context, a Department of Human Services caseworker testified that she had investigated the incident and, after interviewing the children and adults, concluded the

investigation with a determination of "founded for sexual abuse" against defendant. On appeal, defendant contends that the trial court erred in failing to strike the caseworker's "founded" testimony as impermissible vouching. Defendant acknowledges that he did not preserve the claim of error and requests discretionary plain-error review. Held: The trial court plainly erred in not striking the testimony, because, on this record, the caseworker was unambiguously vouching for D's credibility, which is impermissible. However, there is little likelihood that the error affected the outcome, because the trial court sitting as factfinder made clear that it was relying on its own credibility assessments in finding defendant guilty. Primarily for that reason, the Court of Appeals declined to exercise its discretion. Affirmed.

Katarina Rose Henretty v. Malcolm D. Lewis

(Aoyagi, J.)

Mother appeals a judgment awarding custody of the parties' young son, J, to father. She contends that the trial court erred in making its best-interests determination under ORS 107.137, because it failed to designate a primary caregiver, such that neither party was given the benefit of the statutory preference for the primary caregiver under ORS 107.137(1)(e). Mother further contends that, on this record, she should have been designated as the primary caregiver and given the preference. Held: The trial court erred in failing to designate a primary caregiver for purposes of ORS 107.137(1)(e). Further, on this record, the only finding possible is that mother is J's primary caregiver within the meaning of ORS 107.137(1)(e). On remand, the trial court is to reconsider its custody determination, taking into account the primary-caregiver preference under ORS 107.137(1)(e). Vacated and remanded.

Rory Bialostosky v. Teri Cummings

(Pagán, P. J.)

In this civil case, plaintiff appeals the trial court's denial of partial summary judgment in his favor and entry of summary judgment in favor of defendant. After plaintiff filed suit to obtain public records from defendant, an elected council member of West Linn, the trial court concluded that, as a matter of law, individual local elected officials, like a city councilor, were not subject to the public records law. Held: Following the traditional statutory construction framework, the Court of Appeals analyzed the text, context, and legislative history behind the relevant statutes. In this case, all three analyses support a construction that individual local elected officials are included within the public records law. The trial court erred by entering summary judgment for defendant and denying plaintiff's motion for summary judgment. Reversed and remanded.

Susan Monica v. Paula Myers

(Pagán, J.)

In this appeal from denial of post-conviction relief, petitioner claims she received ineffective assistance of counsel during her criminal trial on two counts of murder, among other charges. Specifically, she claims that trial counsel was ineffective for failing to advance certain arguments related to a motion to suppress evidence discovered during the execution of a search warrant, failing to impeach a state's witness, failing to object to witness vouching, and failing to rebut certain evidence related to an alleged murder weapon. The post-conviction court denied her claims after concluding that the attorney performance was not unreasonable and not prejudicial. Held: Trial counsel reasonably chose to focus on whether a search warrant should have been issued at all, rather than whether the search warrant was too broad, and because officers found a human leg in plain view while searching the property, a different argument would have been unlikely to affect the outcome of the trial. Trial counsel's performance during the trial was reasonable and, in any event, even

if it was deficient, petitioner's claims were related to issues unlikely to affect the outcome of the trial. The trial court did not err by concluding the trial counsel's performance was reasonable and that petitioner did not suffer prejudice as a result of attorney performance. Affirmed.

State of Oregon v. Scott Wayne Smith
(Joyce, J.)

Defendant appeals from a judgment of conviction for second-degree intimidation. On appeal, he argues that the trial court erred in denying his demurrer, in which he asserted that the second-degree intimidation statute, ORS 166.155(1)(c)(A), violated Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution. Held: The Court of Appeals analyzed defendant's state constitutional challenge under the legal framework set forth in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982). In concluding ORS 166.155(1)(c)(A) was a category two law under *Robertson*, the court held that the statute was not overbroad, and thus was facially constitutional. In addition, the court concluded that ORS 166.155(1)(c)(A) was not an impermissible content-based restriction under the First Amendment. Accordingly, the trial court did not err in denying defendant's demurrer under both state and federal constitutional grounds. Affirmed.

State of Oregon v. Kenneth Sheridan Wagner
(Joyce, J.)

Defendant appeals from a judgment of conviction for multiple offenses, including second-degree assault, strangulation, fourth-degree assault, and menacing. In his first through fourth assignments of error, he challenges the trial court's ruling that a detective had the requisite expertise to testify about physical aspects of strangulation and cycles of domestic violence. In his fifth assignment of error, defendant challenges the trial court's denial of his motion for judgment of acquittal on second-degree assault, arguing that no rational trier of fact could conclude that a pillow constitutes a dangerous weapon. In his sixth assignment of error, defendant challenges the trial court's instruction to the jury that it could reach nonunanimous verdicts. In his seventh assignment of error, defendant argues that the trial court committed plain error in imposing a sentence on his second-degree assault conviction that exceeds the statutory maximum sentence. Held: First, the Court of Appeals concluded that the detective was qualified to offer expert testimony under OEC 702 in this case. Second, the court held that the trial court did not err in denying defendant's motion for judgment of acquittal, concluding that the evidence would permit a rational trier of fact to find that the pillow was a dangerous weapon. Third, the court rejected defendant's sixth assignment of error because the jury returned unanimous guilty verdicts on all counts. Lastly, the court accepted the state's concession that the trial court plainly erred in imposing a sentence on defendant's second-degree assault conviction that exceeded the statutory maximum sentence. Remanded for resentencing; otherwise affirmed.

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