



# COURT OF APPEALS

## Media Release

---

**COPIES:**

Copies of the slip opinions may be obtained from the Appellate Records Section, (503) 986-5555.  
The full text of the opinions can be found at <http://www.publications.ojd.state.or.us>.

**CONTACT:**

Julie E. Smith  
(503) 986-5634

---

December 09, 2015

The Court of Appeals issued these opinions:

Rafael Gonzalez Gutierrez v. Mark Nooth  
(A151182 - Malheur County Circuit Court)

Billy Lee Oatney, Jr. v. Jeff Premo  
(A147931 - Marion County Circuit Court)

Kristine M. Phillips v. Department of Public Safety Standards and Training  
(A150444 - Department of Public Safety Standards and Training)

State of Oregon v. R. E. G.  
(A151899 - Polk County Circuit Court)

Patricia N. Gibson v. Sharon Bankofier  
(A153425 - Multnomah County Circuit Court)

State of Oregon v. Gregory Leon Hightower  
(A154220 - Multnomah County Circuit Court)

State of Oregon v. William Rick Delong  
(A146907 - Douglas County Circuit Court)

Sohail Masood v. Safeco Insurance Company of Oregon  
(A149925 - Clackamas County Circuit Court)

State of Oregon v. Vincent Michael Lowell  
(A151865 - Marion County Circuit Court)

State of Oregon v. Daniel Steven Zolotoff  
(A153858 - Marion County Circuit Court)

Federal Express Corporation v. Juan M. Estrada  
(A153964 - Workers' Compensation Board)

Jason F. Asbill v. Rick Angelozzi  
(A155154 - Jefferson County Circuit Court)

State of Oregon v. Henry John Kuester  
(A155543 - Douglas County Circuit Court)

State of Oregon v. Cody James Kasper  
(A156184 - Lincoln County Circuit Court)  
Department of Human Services v. J. M.  
(A157618 - Washington County Circuit Court)  
State of Oregon v. Martin Rios Martinez  
(A152946 - Malheur County Circuit Court)

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

State of Oregon v. Shaun Laroy Johnson  
(A151101 - Multnomah County Circuit Court)  
State of Oregon v. Becci Sasser  
(A155984 - Wallowa County Circuit Court)  
State of Oregon v. Victor Hugo Gonzalez  
(A156385 - Deschutes County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

State of Oregon v. John Henry Blackburn  
(A154913 - Tillamook County Circuit Court)  
State of Oregon v. Bryan Kelly Brambora, Sr.  
(A155506 - Multnomah County Circuit Court)  
State of Oregon v. Shane Edward Britton  
(A156251 - Umatilla County Circuit Court)  
State of Oregon v. Victor Magana Duenaz  
(A156347 - Malheur County Circuit Court)  
State of Oregon v. Elizabeth Anne Bray  
(A156399 - Klamath County Circuit Court)  
State of Oregon v. Miguel Angel Juarez-Santoyo  
(A156443 - Washington County Circuit Court)  
State of Oregon v. Lisa Lynn Patton  
(A156517 - Josephine County Circuit Court)  
State of Oregon v. Mark Lewis Breon  
(A156522 - Lincoln County Circuit Court)  
Bank of America, N. A. v. Kimberly K. Buchanan  
(A156688 - Lane County Circuit Court)  
State of Oregon v. Joseph Allen Randolph  
(A156721 - Yamhill County Circuit Court)  
State of Oregon v. Peter Antonio King, III  
(A156726 - Marion County Circuit Court)  
State of Oregon v. Michael Farnham  
(A156801 - Marion County Circuit Court)  
State of Oregon v. Barbara Ann Franks  
(A156804 - Marion County Circuit Court)  
State of Oregon v. Simon Morales-Gapi  
(A156824 - Washington County Circuit Court)

State of Oregon v. John Wayne Wilkerson  
(A156827 - Marion County Circuit Court)  
State of Oregon v. Justine Coel Dollarhide  
(A156952 - Multnomah County Circuit Court)  
Nicholas Dubenko v. Department of Transportation  
(A157347 - Department of Transportation)  
State of Oregon v. Melvin Lewis Gilliam  
(A157762 - Lane County Circuit Court)  
Jerry C. Reeves v. James Langrill  
(A158357 - Clackamas County Circuit Court)  
Brian Lee Morgan v. Carla A. Sammons  
(A158734 - Multnomah County Circuit Court)  
Renee Andre Stephens v. Driver and Motor Vehicle Services Division  
(A159155 - Department of Motor Vehicles)

\* \* \* \* \*

**Rafael Gonzalez Gutierrez v. Mark Nooth**

(Armstrong, P. J.)

Petitioner was convicted of one count of attempted first-degree rape, three counts of first-degree sexual abuse, and two counts of attempted aggravated murder. He sought post-conviction relief, contending that his trial counsel had provided him with constitutionally inadequate representation by failing to move to suppress evidence that he asserts that the state obtained in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. The post-conviction court denied relief. Petitioner contends on appeal that the post-conviction court erred. Held: The state did not violate petitioner's right to counsel under the Fifth or Sixth Amendments when an informant and an undercover officer elicited incriminating statements from petitioner. Hence, a motion under the Fifth and Sixth Amendments to suppress petitioner's statements in the underlying criminal case would have been denied, and, consequently, petitioner suffered no prejudice from his trial counsel's failure to file such a motion. Affirmed.

**Billy Lee Oatney, Jr. v. Jeff Premo**

(Sercombe, J.)

In 1998, a jury found petitioner guilty of eight counts of aggravated murder for killing an acquaintance. The same jury determined that petitioner should be sentenced to death, and the trial court imposed that sentence. On direct review, the Supreme Court affirmed. In 2004, petitioner filed this action against defendant superintendent, seeking post-conviction relief on numerous grounds, including that his trial counsel provided inadequate and ineffective assistance of counsel under Article I, section 11, of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution during petitioner's trial by failing to seek suppression of statements and testimony derived from a statement that petitioner made in exchange for a promise of immunity. The post-conviction court rejected petitioner's claims and entered a judgment denying relief. Petitioner appeals. Held: Petitioner's trial counsel performed inadequately in failing to move to suppress statements and testimony of petitioner's coconspirator, Willford Johnston, because Johnston's statements were used in violation of a promise of immunity that the district attorney made to petitioner in exchange for information about the murder. The district attorney promised that petitioner's statement and evidence derived from it would not be used against petitioner, and Johnston's statements and testimony were derived from petitioner's statement. Trial counsel's failure to move for suppression of Johnston's statements

and testimony prejudiced petitioner because that evidence was the only direct evidence that petitioner participated in the sexual assault and murder. Accordingly, the Court of Appeals reversed the judgment of the post-conviction court and remanded for entry of a judgment ordering further proceedings in the criminal trial court. Reversed and remanded.

**Kristine M. Phillips v. Department of Public Safety Standards and Training**  
(Sercombe, P. J.)

Petitioner seeks judicial review of a final order of the Department of Public Safety Standards and Training (DPSST) that revoked her certifications as a corrections officer on the ground that she failed to meet minimum moral fitness standards. Petitioner had been involved in two incidents at work and was discharged as a result. Petitioner's union grieved the discharge and that grievance was heard by an arbitrator. The arbitrator concluded that one of the incidents at issue did not violate the section of the code of conduct alleged and that petitioner should not have been discharged for the other incident. Petitioner contends that the arbitration decision in the employment case concluded that the underlying facts did not support the allegations of misconduct and, therefore, under OAR 259-008-0070(9)(c)(E)(iii), that part of the DPSST case should have been administratively closed. Held: Under OAR 259-008-0070(9)(c)(E), in DPSST cases where an officer is alleged to have engaged in misconduct and where there has also been an arbitrator's opinion relating to the officer's employment, if the arbitrator's opinion in the employment case finds that the underlying facts do not support the "allegation(s) of misconduct," then the DPSST case must be administratively closed. The term "allegation(s) of misconduct" in OAR 259-008-0070(9)(c)(E) refers to the allegations in the misconduct case that is being presented to the board in the DPSST case. Here, the arbitrator's decision in the employment case does not address whether petitioner's conduct meets all of the categories of misconduct alleged by DPSST. Accordingly, DPSST did not violate OAR 259-008-0070(9)(c)(E)(iii) when it included both incidents as the factual bases for its allegations of misconduct in the certification case. Affirmed.

**State of Oregon v. R. E. G.**  
(Sercombe, P. J.)

Appellant appeals an order committing him to the custody of the Department of Human Services (DHS) as a person with an intellectual disability, which caused him to be dangerous to others and unable to provide for basic personal needs as necessary for his health, safety, and habitation. Appellant contends that the state failed to conduct an adequate diagnostic evaluation during the precommitment investigation. Because of that, appellant argues that the trial court erred in issuing a citation requiring him to appear for a commitment hearing and in committing him without an adequate record. The state responds that a diagnostic evaluation is not required under ORS 427.235(3), which provides that a diagnostic evaluation shall be part of a further investigation to be completed "if warranted," and that, even if a diagnostic evaluation was required, evaluations performed to determine whether appellant was fit to proceed in a criminal proceeding were a sufficient substitute for the diagnostic evaluation. Held: The phrase "if warranted" in ORS 427.235(3) means that further investigation, including a diagnostic evaluation, is required whenever the precommitment investigation continues beyond an initial interview with an alleged intellectually disabled person. The statute does not contemplate that a person may be committed without a diagnostic evaluation. The evaluations of appellant's fitness to proceed in a criminal case were not a sufficient substitute for a diagnostic evaluation, because they failed to meet requirements imposed by the civil commitment statutes and DHS rules. The diagnostic evaluation is a significant procedural safeguard in the civil commitment process, and appellant was prejudiced by the failure to conduct such an evaluation. Accordingly, the trial court erred in issuing a citation to appellant and committing appellant based on a precommitment investigation that did not include an adequate diagnostic evaluation. Reversed and remanded.

**Patricia N. Gibson v. Sharon Bankofier**  
(Sercombe, P. J.)

This case arose out of a real estate deal in which Gibson, an 81-year-old woman and the trustee of her family trust, sold a parcel of real property owned by the trust and used the proceeds to purchase interests in four tenant in common (TIC) properties. Over the next several years, three of those four investments failed and Gibson's cognitive abilities declined to the point that she was no longer able to manage her affairs. Plaintiff, who is Gibson's daughter and successor trustee, brought this action against parties who helped facilitate the purchase of the four TICs. The trial court dismissed several parties, leaving Bankofier, who was Gibson's real estate agent, and the Oregon Realty Company (ORC), who employed Bankofier, as the only defendants for the purposes of this appeal. As to those defendants, plaintiff alleged that the trust's economic losses were recoverable on two bases: (1) that Bankofier's involvement in the real estate deal constituted financial abuse of a vulnerable person under ORS 124.100(2) and ORS 124.110(1)(a), and (2) that defendants were negligent and had a special relationship with Gibson. The trial court granted those defendants' motion for summary judgment and dismissed plaintiff's case in its entirety. Plaintiff appeals. Held: Summary judgment in favor of defendants was proper. Plaintiff's statutory claim failed because, according to ORS 124.110(1)(a), financial abuse occurs when "a person wrongfully takes or appropriates money or property from a vulnerable person" and plaintiff failed to produce evidence from which a reasonable juror could conclude that either defendant acted wrongfully when they facilitated Gibson's purchase of the four TICs. Plaintiff's negligence claim fails because Bankofier's duties as Gibson's real estate agent were limited to those listed in ORS 696.810, and plaintiff produced no evidence that Bankofier breached any of those duties. Furthermore, even assuming that Bankofier acted as Gibson's investment manager, there is no evidence that she breached any duty associated with that position. Because there was no evidence from which a rational juror could find that Bankofier was negligent, ORC cannot be held vicariously liable. Affirmed.

**State of Oregon v. Gregory Leon Hightower**  
(Sercombe, P. J.)

Defendant appeals a judgment of conviction for one count of encouraging child sexual abuse in the first degree, one count of sexual abuse in the second degree, four counts of promoting prostitution, and one count of compelling prostitution. Defendant argues that the trial court erred in denying his midtrial request to represent himself, because it failed to articulate a legally permissible reason for doing so. Held: The trial court implicitly found that granting defendant's midtrial self-representation request would disrupt the orderly conduct of the trial. The record supported the trial court's implicit finding because defendant had persistently engaged in disruptive behavior throughout the trial, made the request late in the proceedings, and intended to put on irrelevant evidence if the request was granted. Accordingly, the trial court did not abuse its discretion in denying defendant's self-representation request. Affirmed.

**State of Oregon v. William Rick DeLong**  
(Nakamoto, J.)

This criminal appeal concerns defendant's motion to suppress physical evidence and incriminating statements and is before the Court of Appeals on remand from the Oregon Supreme Court, *State v. DeLong*, 357 Or 365, 350 P3d 433 (2015). After handcuffing defendant during a traffic stop, a deputy sheriff asked defendant whether there was anything in his car that the police "should be concerned about" but failed to advise defendant of his Miranda rights, in violation of Article I, section 12, of the Oregon Constitution. Defendant responded by saying "no" and then invited the deputies to search the vehicle. A deputy searched the car, found a fanny pack, and opened it, revealing drugs and drug paraphernalia. When confronted with the contraband and after receiving belated Miranda warnings, defendant made admissions. The issues on

remand are (1) whether the warrantless search of the fanny pack exceeded the scope of defendant's invitation to search, as defendant contends, and (2) whether the statements that defendant made to the deputy after receiving belated Miranda warnings were admissible, given the Supreme Court's conclusion that those statements did not unlawfully derive from the Article I, section 12, violation. Held: The trial court erred in admitting the physical evidence found in the fanny pack, because the deputy's search exceeded the scope of defendant's consent to search his car. The trial court erred in admitting defendant's subsequent statements, because the Miranda warnings that the deputy eventually administered did not attenuate the taint of the preceding unlawful search. Reversed and remanded.

**Sohail Masood v. Safeco Insurance Company of Oregon**  
(Nakamoto, J.)

This is a complex civil case that arose following a fire that destroyed plaintiff's multi-million dollar home and its contents. Plaintiff sued his insurer, Safeco, for failing to pay him the "extended dwelling coverage" under his insurance policy based on an oral settlement agreement (the fire-loss claim), and for failing to pay on a claim for a theft that plaintiff alleged had occurred after the fire (the theft-loss claim). Plaintiff also sued Overland Solutions, Inc., a company that prepared a replacement-cost estimate of plaintiff's home for Safeco before the fire. He claimed that Overland negligently prepared the estimate, which left his house underinsured. Safeco brought a counterclaim against plaintiff, alleging that plaintiff had willfully misrepresented the quality and value of three built-in components in his home, which voided the insurance policy. The trial court granted summary judgment to Overland. At trial, the jury rendered a verdict for plaintiff on his fire-loss claim and awarded damages, but found in favor of Safeco on plaintiff's theft-loss claim. The jury also determined that plaintiff had willfully made misrepresentations concerning the three house components and that Safeco had relied on those misrepresentations. After receiving the verdict, the trial court concluded that, for public policy reasons, plaintiff "shall take no damages" for his fire-loss claim, and that Safeco was entitled to damages in the amount of the payments Safeco had made to plaintiff under the policy. On appeal, plaintiff raises multiple assignments of error concerning the court's summary judgment ruling, rulings during trial, and refusal to enter judgment in accordance with the verdict, and Safeco raises cross-assignments of error. Held: (1) The trial court erred in denying plaintiff's motion for directed verdict on Safeco's counterclaim because there is no evidence in the record that Safeco reasonably relied on the misrepresentations that the jury found plaintiff had made to Safeco. (2) The trial court erred in concluding that the settlement for plaintiff's fire-loss claim was void as against public policy, and it should have entered judgment on the jury's award of damages. (3) The trial court did not err in admitting evidence of a United Kingdom court's findings that plaintiff had forged documents in that case, nor in excluding plaintiff's evidence offered to rebut those findings. (4) The trial court did not err in granting summary judgment to Overland because plaintiff's claim was barred by the economic loss doctrine. Judgment on Safeco's counterclaim for breach of contract against plaintiff reversed; judgment on plaintiff's claim for breach of contract for his fire loss against Safeco vacated and remanded with instructions to enter judgment for plaintiff in the amount of the jury's award to plaintiff, and otherwise affirmed; cross-appeal dismissed as moot.

**State of Oregon v. Vincent Michael Lowell**  
(Nakamoto, J.)

Defendant appeals his conviction of one count of delivery of marijuana for consideration. He assigns error to the trial court's denial of his motion to suppress physical evidence, incriminating oral statements, and text messages, obtained in defendant's hospital room and in conjunction with a consent search of defendant's backpack, which revealed marijuana and related paraphernalia. On appeal, defendant argues that the police seized him by compelling him to seek medical treatment at the hospital after he crashed his bicycle and, in doing so, violated his right to be free from unreasonable seizures under Article I, section 9, of the Oregon

Constitution and the Fourth Amendment to the United States Constitution. Based on that premise, defendant argues that all evidence obtained after the bicycle crash was unlawfully obtained and therefore should have been suppressed. Held: (1) The trial court did not err in denying defendant's motion to suppress the physical evidence from his backpack or his incriminating statements to the police, because, regardless of whether defendant was unlawfully seized initially, the police did not exploit that seizure to later obtain that evidence; (2) The trial court erred in denying defendant's motion to suppress the text messages discovered on defendant's phone, because, in light of the United States Supreme Court's decision in *Riley v. California*, \_\_\_ US \_\_\_, 134 S Ct 2473, 189 L Ed 2d 430 (2014), the text messages were not admissible pursuant to the "search incident to arrest" exception to the warrant requirement under the Fourth Amendment. Reversed and remanded.

**State of Oregon v. Daniel Steven Zolotoff**  
(Hadlock, J.)

This criminal case is on review to the Court of Appeals for the second time. In defendant's first appeal, the Court of Appeals reversed and remanded defendant's case for resentencing and instructed the trial court to merge two of defendant's convictions. Otherwise, the court affirmed defendant's four convictions for various crimes. On remand, the trial court held a resentencing hearing, during which defendant asked to have the total length of his sentence reduced. The trial court took the position that the case had been remanded solely so that the court could merge two of defendant's convictions and that it lacked the authority to make any further changes to his sentence. The court then merged the two sentences and resentenced defendant to a new term of incarceration that was the same as his original term of incarceration. Defendant did not object or otherwise inform the trial court that he believed that the court was required to consider his request for a reduced sentence. Nevertheless, defendant filed a second appeal on that ground. Held: The trial court plainly erred when it resentenced defendant based on an erroneous legal conclusion: that it lacked authority to reduce defendant's sentence. A trial court has broad authority to adjust a defendant's sentences after a felony case is remanded for resentencing. Furthermore, if a defendant wishes to attempt to persuade the trial court to change its previous sentencing determinations, that court must give the defendant the opportunity to offer evidence and argument on that score. Remanded for resentencing; otherwise affirmed.

**Federal Express Corporation v. Juan M. Estrada**  
(Hadlock, J.)

Employer petitions for review of a Workers' Compensation Board order in which the board determined (1) that claimant established good cause under ORS 656.265(4) to report a workplace injury more than 90 days after the injury occurred and (2) that claimant met his burden to prove that his injury was a material contributing cause of his disability and was, therefore, compensable. Employer assigns error only to the board's notice determination under ORS 656.265(4), arguing that the board's order was not supported by substantial evidence and reason because the board failed to reconcile its ultimate finding that claimant did not know he was injured with its other findings that claimant knew the exact date and time he suffered a testicular pull, his symptoms progressed for months, and claimant associated those symptoms with the work incident. Held: The board's findings about the work incident and the sensations that claimant experienced appear to be inconsistent with the board's ultimate finding that claimant did not know that he had been injured. Because the order includes inconsistent factual findings and does not explain how those findings logically lead to its conclusion under ORS 656.265(4), the order lacks substantial reason. Reversed and remanded.

**Jason F. Asbill v. Rick Angelozzi**  
(Hadlock, J.)

Petitioner appeals a judgment denying his petition for post-conviction relief, raising five assignments of error. The Court of Appeals writes to address only petitioner's fifth assignment of error, in which petitioner challenges the form of judgment that the post-conviction court entered. Specifically, petitioner asserted that the post-conviction court failed to enter judgment in the form required by ORS 138.640(1), as construed by the Supreme Court in *Datt v. Hill*, 347 Or 672, 227 P3d 714 (2010), because, although the judgment refers, in handwriting, to findings that the post-conviction court made "on the record," the court made those findings orally, rather than spelling them out in the judgment document. Held: The Datt requirement that a judgment denying post-conviction relief "make the legal bases for denial of relief apparent," *id.* at 685, can be met by oral findings that the post-conviction court makes on the record and incorporates into the judgment by reference. Therefore, the court rejected the petitioner's fifth assignment of error, which was premised solely on his contrary contention that oral findings on the record cannot suffice. Affirmed.

**State of Oregon v. Henry John Kuester**  
(Hadlock, J.)

Defendant was convicted of multiple crimes, including unlawful use of a weapon (UW) with a firearm, ORS 166.220 and ORS 161.610, and pointing a firearm at another, ORS 166.190. On appeal, defendant raises two unpreserved assignments of error, claiming both establish "plain error." First, defendant assigns error to the trial court's failure to merge the guilty verdicts for UW with a firearm and pointing a firearm, asserting that the elements of UW with a firearm are plainly subsumed within the elements of pointing a firearm at another. Second, defendant challenges the sentence that the trial court imposed on the conviction for UW with a firearm, arguing that it is impermissibly indeterminate in length because the term will fluctuate based on any good-time credit defendant may receive. Held: It is not obvious that the elements of UW with a firearm are subsumed within the elements of pointing a firearm at another and, therefore, defendant failed to establish that the trial court plainly erred by not merging those verdicts. However, the trial court plainly erred by imposing a sentence that includes an indefinite term of post-prison supervision and, because correcting the error may significantly affect the terms of defendant's sentence, discretion is exercised to correct the error. Remanded for resentencing; otherwise affirmed.

**State of Oregon v. Cody James Kasper**  
(Hadlock, J.)

Defendant challenges two portions of his parole-revocation judgment: the requirement he pay attorney fees and the trial court's decision to deny him credit for time served when it sentenced him to jail. First, defendant argues that the court erred by including in the judgment the term requiring defendant to pay \$210 in attorney fees as part of his sentence on revocation when the court had not indicated, at the probation-revocation hearing, that defendant's sentence would include that requirement. The state concedes that the imposition of the attorney fees without defendant's presence was error. Second, defendant argues that the court's denial of credit for time served against the jail sentence means that he is required to serve a longer term of incarceration than would a nonindigent defendant because he could not post bail, thereby violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Held: The trial court erred by including a term in defendant's judgment that the court had not announced in defendant's presence. However, because defendant was serving a separate parole sanction in another case at the time of the probation-revocation hearing and, therefore, would not have been able to obtain release even if he could have posted bail, defendant failed to establish, as a factual matter, that he was required to serve more time than a nonindigent defendant would have served under the circumstances. Portion of judgment requiring defendant to pay \$210 in attorney fees reversed; otherwise affirmed.



**Department of Human Services v. J. M.**  
(Egan, J.)

Father and mother appeal a corrected permanency judgment that changed the permanency plan for parents' child, C, from reunification to adoption. Before the hearing to change the plan, parents moved to dismiss jurisdiction and terminate wardship. At the hearing, the juvenile court denied parents' motion to dismiss and changed the plan to adoption based on factual findings related to two jurisdictional allegations: first, that C sustained an unexplained physical injury while in parents' care and, second, that parents' lack of parenting skills made them unable to provide minimally adequate care for C. Parents assign error to the court's denial of their motion to dismiss, arguing that, with respect to the unexplained injury, the evidence is not legally sufficient because the fact that parents have not provided an explanation of C's injury that conforms to medical evidence is not, in itself, evidence of a present risk of harm and, with respect to parents' parenting skills, evidence that parents had ameliorated the risks posed by their lack of parenting skills was sufficient to compel the juvenile court to dismiss jurisdiction on that condition. Parents also argue that the evidence was legally insufficient to change the plan from reunification to adoption. The Department of Human Services responds that the evidence was legally sufficient. Held: The juvenile court did not err in denying parents' motion to dismiss because the evidence before the court--including evidence regarding parents' failure to substantially benefit from the services they engaged in; parents' mental health conditions; father's failure to follow through with services related to his condition; mother's poor prognosis; and C's special needs and parents' failure to engage in services related to those needs during the time that they were aware of those needs--was legally sufficient. Additionally, the evidence was legally sufficient for the juvenile court to change the plan to adoption. Affirmed.

**State of Oregon v. Martin Rios Martinez**  
(Garrett, J.)

Defendant appeals his convictions for unlawful manufacture of methamphetamine, ORS 475.886; unlawful possession of methamphetamine, ORS 475.894; two counts of unlawful delivery of methamphetamine, ORS 475.890; three counts of being a felon in possession of a firearm, ORS 166.270; and two counts of endangering the welfare of a minor, ORS 163.575. At trial, over defendant's general hearsay objections, the court admitted into evidence several exhibits, each reproducing numerous text messages that linked defendant to drug activity. Defendant objected to the exhibits as a whole without making particularized objections to the text messages within them. On appeal, defendant contends that the trial court erred in admitting the text message evidence. Held: The trial court did not err. It is a well-established rule that "when evidence is offered as a whole and an objection is made to the evidence as a whole and is overruled, the trial court will ordinarily not be reversed on appeal if any portion of the offered evidence was properly admissible." *State v. Brown*, 310 Or 347, 359, 800 P2d 259 (1990) (quoting *Sproul v. Fossi*, 274 Or 749, 755, 548 P2d 970 (1976)). Some of the text messages admitted into evidence against defendant were properly admissible under the "adoptive admission" rule set out in OEC 801(4)(b)(B). Thus, defendant's categorical challenge to admissibility fails. Affirmed.

**[End of Document]**