

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

Plaintiff,

vs.

ALAN SWINNEY,

Defendant.

) Case No.: 20CR50067

)
) DEFENDANT'S MOTION TO
) DISMISS FOR IMPROPER
) EVIDENCE PRESENTED TO
) GRAND JURY

)
) UTCR 4.050: 1 hour.
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)

Comes now Defendant, Alan Swinney, by and through counsel, Joseph Westover, moves this court for an order of dismissal on all counts. Pursuant to UTCR 4.050, Defendant requests an evidentiary hearing and court reporting services, and estimates the time necessary for the hearing will not exceed 1 hour.

This motion is, in the opinion of counsel, well founded in law and was neither made nor filed for the purpose of delay, and is supported by the memorandum of law below. Defendant relies upon the contents of this motion as well as any additional authorities that produced at the hearing on this motion, all pleadings, records, and files in this case, and any oral or documentary evidence as may be produced at the hearing on this motion.

FACTS

On September 3, 2020, and September 8, 2020, five individuals testified in the above captioned case. They alleged crimes committed by Defendant on two separate days, August 15, 2020, and August 22, 2020. At no point were the grand jurors cautioned as to how the evidence

1 regarding day 1 was relevant to day 2, nor were they cautioned that they could not use the
2 allegations from day 2 in considering whether to true bill the allegations from day 1.

3 **SUMMARY OF ARGUMENT**

4 The rules of evidence, except for certain specifically delineated exceptions, apply to
5 grand jury proceedings. None of those exceptions apply to the evidence defendant challenges
6 herein, which is largely evidence of “other crimes, wrongs or acts.”

7 There is perhaps nothing more prejudicial to a criminal defendant than the unqualified
8 presentation of other acts evidence to a finder of fact. Both the failure to properly consider the
9 actual relevance of other acts evidence and the failure to properly admonish the grand jurors as to
10 the permissible (and more importantly, impermissible) uses of certain pieces of evidence
11 implicates due process. Violations, therefore, raise constitutional concerns.

12 It is presumptively prejudicial to submit other acts evidence to a finder of fact absent
13 cautionary instructions as to how the evidence may, and may not, be used. Here, the state
14 admitted multiple instances of other acts evidence to the grand jury. As such, the current
15 indictment may not be sustained at this time.

16 A court has the legal authority, on its own motion, to dismiss a prosecution in the
17 interests of justice. Given the substantive and procedural constitutional rights of defendant that
18 have been infringed, and given that defendant has no other remedy, the court should exercise its
19 discretion and dismiss the indictment in the interest of justice.

20 **MEMORANDUM OF LAW**

21 **I. WITH REGARD TO OTHER ACTS EVIDENCE, THE OREGON EVIDENCE** 22 **CODE APPLIES TO GRAND JURY PROCEEDINGS WITH FULL FORCE**

23 The Oregon Evidence Code (OEC) self-defines its own applicability. OEC 101(4)
24 describes situations where the evidence code, except as it relates to privileges, does not apply.
25 Particular to grand juries, OEC does not apply “except as required by ORS 132.320.” OEC

1 101(4)(b). That statute begins, “[e]xcept as provided in subsections (2) to (13) of this section, in
2 the investigation of a charge for the purpose of indictment, the grand jury shall receive no other
3 evidence than such as might be given on the trial of the person charged with the crime in
4 question.”¹ ORS 132.320(1). This information is reiterated on page 29 of the Multnomah County
5 District Attorney’s Policy Manual.² At no point do subsections (2) through (13) of ORS 132.320
6 provide exceptions to the rules governing the admissibility or permissible uses of other acts
7 evidence. *See* OEC 404(3)–(4); OEC 403. Said another way, OEC 404 and 403 apply with full
8 force to grand jury proceedings.

9 In 1961, the Oregon Supreme Court described ORS 132.320(1) as “admonitory in
10 character only, not mandatory, advising the grand jury to disregard incompetent evidence in
11 returning an indictment and to consider evidence only of such character that it may be used in the
12 trial to support a conviction of the accused.” *State v. McDonald*, 231 Or 24, 34, 361 P3d 1001
13 (1961), *superseded by statute as noted in State v. Stout*, 305 Or 34, 41, 749 P2d 1174 (1988). In
14 *McDonald*, the state’s original indictment followed the introduction of hearsay evidence to the
15 grand jury. *Stout*, 305 Or at 36. The state dismissed that indictment and returned to the same
16 grand jury, this time securing an indictment without presenting hearsay evidence. *Id.* The
17 defendant objected, arguing to no ultimate avail (the “admonitory” conclusion) that the initial
18 grand jury proceeding tainted the subsequent hearing. *Id.* In *Stout*, which also involved an
19 objection to hearsay evidence presented to the grand jury, the Oregon Supreme Court specifically
20 and officially rejected the *McDonald* court’s language that compliance with ORS 132.320 is
21 “admonitory in character only, not mandatory.” *Id.* at 42.

22
23
24
25 ¹ Defendant notes this creates broader protections at grand jury than those merely suggested by
the evidentiary code. For example, in some circumstances the rules of evidence would allow
certain testimony, but the Oregon or federal constitution would prohibit.

² Available at <https://www.mcda.us/index.php/documents/mcda-policy-manual.pdf/>.

1 That conclusion came on the heels of an acknowledgment and disagreement of
2 *McDonald* in the 1981 legislative commentary to OEC 101, which, with regard to OEC 101(b),
3 reads:

4 “This paragraph is intended to deal with what evidence can be admitted in grand
5 jury proceedings, not with what amount of admitted evidence is necessary to
6 support and indictment. ORS 132.320 states that a grand jury may receive only
7 evidence that would be admissible at trial except for certain experts’ reports and
8 affidavits from unavailable witnesses. The Oregon Supreme Court has held that
9 the statute is admonitory only, and the fact that a grand jury may have been
prejudiced by hearsay evidence is not allowed under the statute is not grounds for
dismissing or quashing an indictment. *State v. McDonald*, 231 Or 24, 361 P2d
1001 (1961). *The legislative assembly disapproves this case law. It intends that
the statute mean what it says.*

10 Legislative Commentary to OEC 101, *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence*
11 § 101.02 (7th ed 2020). As noted above, *McDonald* is no longer good law, and the last word on
12 the subject is that the statute means what it says.

13 **II. IMPROPERLY ADMITTED OTHER ACTS EVIDENCE IMPLICATES DUE**
14 **PROCESS AND PREJUDICES A DEFENDANT**

15 Although the scheme delineating the admissibility of other-acts evidence are statutory,
16 constitutional implications are necessarily embedded.

17 **A. Improper administration of OEC 404 evidence and OEC 403 balancing**
18 **implicate due process**

19 The Oregon Evidence Code provides, “[a]ll relevant evidence is admissible, except as
20 otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and
21 Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not
22 admissible.” OEC 402. Evidence that is not relevant is not “evidence than such as might be given
23 on the trial.” *See* ORS 132.320(1). Even then, not all relevant evidence is categorically
24 admissible. “Although relevant, evidence may be excluded if its probative value is substantially
25 outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

1 by considerations of undue delay or needless presentation of cumulative evidence.” OEC 403.
2 The due process clause of the Fourteenth Amendment “requires the application of OEC 403.”
3 *State v. Baughman*, 361 Or 386, 402, 393 P3d 1132 (2017) (citing *State v. Williams*, 357 Or 1,
4 18, 346 P3d 455 (2015)).

5 OEC 404 provides:

6 “Evidence of other crimes, wrongs or acts is not admissible to prove the character
7 of a person in order to show that the person acted in conformity therewith. It may,
8 however, be admissible for other purposes, such as proof of motive, opportunity,
intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

9 OEC 404(3). “In criminal cases, evidence of other crimes, wrongs or acts by the defendant is
10 admissible if relevant except as otherwise provided by” a number of other evidentiary provisions,
11 and the constitutions of the United States and Oregon. OEC 404(4). These two rules intertwine in
12 criminal matters.

13 “* * * OEC 404(4) supersedes the first sentence of OEC 404(3) * * * . However,
14 OEC 404(4) does not supersede the second sentence of OEC 404(3) * * * . If
15 other acts evidence is not proffered to prove a defendant’s character, but instead is
16 offered for a nonpropensity purpose, then analysis under OEC 404(4) is
unnecessary; the evidence ‘may be admissible’ under the second sentence of OEC
404(3).”

17 *Baughman*, 361 Or at 403–04. When evidence that could be characterized as an “other crime,
18 wrong, or act” is proffered, courts must engage in a two-step analysis.

19 “[A] trial court should determine whether the proffered evidence is relevant for
20 one or more nonpropensity purposes, under OEC 404(3). If it is, then the court
21 should determine, at step two, whether the probative value of that evidence is
22 substantially outweighed by the danger of unfair prejudice under OEC 403. If the
23 trial court determines that the evidence is relevant for a nonpropensity purpose
24 under OEC 404(3) and admissible under OEC 403, then it need not determine
25 whether the evidence also is admissible under OEC 404(4) and OEC 403.
However, if a trial court determines that proffered evidence is not relevant for a
nonpropensity purpose, then it must determine whether that evidence nevertheless
is otherwise relevant under OEC 404(4) and, at step two, whether the probative
value of the evidence is substantially outweighed by the danger of unfair
prejudice, under OEC 403.

1 “A trial court’s decision, at step one, about whether other acts evidence is relevant
2 for a nonpropensity purpose, will have a significant effect on whether the trial
3 court admits that evidence at step two. At one end of the spectrum, other acts
4 evidence that is relevant for a nonpropensity purpose under OEC 404(3) generally
5 will be admissible under OEC 403 as long as the particular facts of the case do not
6 demonstrate a risk of unfair prejudice that substantially outweighs the probative
7 value of the evidence. At the other end of the spectrum, when evidence is relevant
8 only to prove a defendant’s character, more significant *due process* concerns are
9 implicated, and, generally, the danger of unfair prejudice will substantially
10 outweigh the probative value of the evidence.”

11 *Id.* at 404–05 (citations omitted); *see also Williams*, 357 Or at 19–20. Without any guidance on
12 such evidence, it is presumed a finder of fact would use the information for propensity purposes.

13 A criminal defendant is prejudiced when other acts evidence is presented to the jury
14 without proper instruction. In *Delgado-Juarez v. Cain*, defense counsel’s failure to request a
15 limiting instruction constituted ineffective assistance of counsel because without instruction
16 “there was more than a mere possibility that jurors would consider the fact that petitioner was
17 alleged to have sexually assaulted multiple child victims as propensity evidence and would factor
18 that propensity into their verdicts.” 307 Or App 83, 103, 475 P3d 883 (2020). *Delgado-Juarez*
19 stands for the principal that without some form of instruction as to the permissible uses of other
20 acts evidence, a defendant’s trial is presumptively unfair because there is too great a chance that
21 the jury considered the evidence for propensity. This prejudice occurs even where other acts are
22 properly joined pursuant to ORS 132.560(3) as separate charges. *Id.* at 102; *see also State v.*
23 *Cardona*, 295 Or App 56, 433 P3d 423 (2018) (An offense committed on day two is not
24 admissible on a nonpropensity theory of motive with regard to offenses committed on day one,
25 and a failure to so instruct the jury prejudiced defendant). Prejudice is therefore exacerbated in
circumstances where the other acts evidence is not the basis of any charge.

Presenting other acts evidence (in any form) to a grand jury without cautioning the grand
jurors about what they can (and cannot) use the evidence for denies a defendant the due process
of the law.

* * *

1 **B. Evidence of defendant's other acts presented to the grand jury prejudiced**
2 **defendant**

3 Based on the above, other acts evidence is prejudicial to defendant if (1) the finder of fact
4 is erroneously instructed as to the non-propensity relevance of each individual piece of other acts
5 evidence, or (2) the finder of fact is not instructed as to the permissible uses of the evidence at
6 all, because without instruction it is presumed the finder of fact makes propensity inferences as
7 to the other acts evidence. The former is not at issue, because no instruction was given to the
8 grand jury about the permissive uses of the evidence. However, without any instruction
9 whatsoever, it cannot be said the danger the grand jurors relied on the other acts evidence for
10 propensity is tolerable.

11 **III. DISMISSAL IN THE INTEREST OF JUSTICE**

12 Oregon law provides a trial court discretion, upon its own motion, "in the furtherance of
13 justice, [to] order the proceedings to be dismissed." ORS 135.755. While this discretion is broad,
14 *State v. Martindale*, 30 Or App 1127, 1130, 569 P2d 659 (1977), it is not unlimited, *State v.*
15 *Stough*, 148 Or App 353, 355–56, 939 P2d 652 (1997) ("The decision to dismiss all or part of an
16 accusatory instrument generally involves consideration of the defendant's substantive and
17 procedural rights in the case and the public's interest in having the law enforced."). For example,
18 a trial court abuses its discretion by dismissing a case simply because it perceives the
19 government's case to be weak. *State v. Hadsell*, 129 Or App 171, 175–76, 878 P2d 444 (1994).
20 Dismissal under the statute ought to be "reserved for severe situations because the dismissal of a
21 charging instrument frustrates the public interest in having the prosecution of crimes occur in
22 order to promote the protection of the public and the rehabilitation of offenders. *Id.* at 174.

23 In *Stough*, the defendant was indicted with possession of .03 grams of heroin, and at a
24 pretrial release hearing, the trial court dismissed the charge *sua sponte*. 148 Or App at 355. The
25 facts of the case, and the appellate court's reasoning for reversing, are pertinent here.

 "According to the information elicited at the release hearing, defendant was with
a group of men in the Old Town section of Portland on November 7, 1990, when

1 the police approached them. While the rest of the men ran away, defendant
2 remained. During the contact with the police, he dropped a piece of cellophane
3 that contained heroin. Defendant was arrested and released after executing a
4 release agreement. On January 7, 1991, he was indicted and a warrant issued for
5 his arrest. Before the warrant was executed, defendant left the state for Alaska,
6 where he lived for five years. At the hearing, defendant's criminal history, his
7 medical condition, whether he had waived extradition, and the reasons for which
8 he had gone to Alaska were all in dispute. The court could have believed that
9 defendant was in poor health, had paid \$3,200 to an attorney in Alaska to
10 represent him in the Alaska extradition proceeding and needed to return to Alaska
11 for medical treatment."

12 *Id.* In reversing, the court of appeals noted:

13 "No constitutional right of defendant's is contended to have been violated. The
14 reasons for which the trial court dismissed the charge are not attributable to the
15 prosecution, and they have nothing to do with defendant's procedural or
16 substantive rights regarding the indictment. The state submits that the court
17 injected its political philosophy into the case and dismissed the case based on
18 perceived societal wrongs to Vietnam veterans. The state also argues that the
19 circuit court is not authorized to act as a policy maker on matters of that nature.
20 We agree with the state's position that the trial court's concerns do not 'justify
21 frustrating the public's right to have the charge against defendant prosecuted.'
22 *State v. Shepherd*, 21 Or.App. 52, 55, 533 P2d 353, *rev. den.* (1975). We conclude
23 that the trial court abused its discretion under the authority granted to it by ORS
24 135.755 when it dismissed the indictment."

25 *Id.* at 356; *see also State v. Swett*, 158 Or App 28, 32-33, 972 P2d 909, *rev den*, 328 Or 595, 987
P2d 515 (1999).

The uncautioned presentation of other acts evidence to the grand jury violated
defendant's constitutional right to due process, is entirely attributable to the prosecution, and has
everything to do with defendant's procedural and substantive rights. This prosecution therefore
rests on a foundation built on a violation of one of the most fundamental substantive rights a
criminal defendant has, but the procedure is tainted as well. Grand jury proceedings are closed-
door affairs, affording only some defendants the right to offer testimony, but no opportunity to
object during—or even be witness to—the testimony of other witnesses. A court exercising its
discretion to dismiss in the interest of justice is the only remedy available to defendant, and the

1 only way by which the district attorney can be reminded the grand jury process is meant as the
2 first of many checks by the citizenry to keep criminal prosecutions honest.

3 While the interests of the public in prosecuting criminal cases is strong, it cannot be so
4 strong as to allow pervasive constitutional violations at the first step. Analogy should be taken
5 from the exclusionary rules associated with the Fourth Amendment to the United States
6 Constitution and Article I, § 9, of the Oregon Constitution. While the motivating principal
7 behind each respective exclusionary rule differs—deterrence vs. restoration of status quo ante—
8 the result is the same: the public’s interest in prosecution is per se dwarfed by (even
9 unintentional) governmental misconduct. The unqualified presentation of other acts evidence
10 cannot be taken back, and necessarily taints the entire action. The defendant cannot be put in the
11 position he was in but for the violation short of a hard reset. Justice demands dismissal here.

12 **CONCLUSION**

13 In light of the above, defendant respectfully requests this court dismiss the case in the
14 interest of justice.

15
16 Dated: August 30, 2021

17
18
19 /s/ Joseph Westover
20 Joseph Westover, OSB 141427
21 jwestover@multnomahdefenders.org
22 Attorney for Defendant
23
24
25

1 **CERTIFICATE OF SERVICE**

2

3 I hereby certify that I served the foregoing

4 **DEFENDANT'S MOTION TO DISMISS FOR IMPROPER EVIDENCE**

5 **PRESENTED TO GRAND JURY**

6 on:

7

8 Deputy District Attorney Nathan Vasquez
nathan.vasquez@mcda.us

9 and

10 Deputy District Attorney Reid Schweitzer
reid.schweitzer@mcda.us

11

12 by the e-mailing a full, true, and correct copy thereof to the individual(s) at the e-mail
13 address(es) shown above and via the Oregon File & Serve system on the date set forth below.

14 Dated: August 30, 2021.

15

16 /s/ Joseph Westover
Joseph Westover, OSB 141427
jwestover@multnomahdefenders.org
Attorney for Defendant

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