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1. Scientific Evidence OEC 104 (1)

State v. O'key, 321 Or 285, 899 P2d 663 (1995) adopted the federal Daubert v. Merrill Dow Pharmaceuticals Inc., 510 US 594 (1993) standard for Oregon. Pre Daubert cases using the modified Frye standard in testimony on battered child syndrome allowed only so far as criteria for scientific evidence State v. Brown, 297 Or 404 (1984). Must be assessed under Rule 401, 403, 702. See State v Butterfield , 128 Or App 1, 874 P2d 1339 (1994).

An adequate basis for scientific evidence must be laid. A state witness, a psychologist testified that delayed reporting is a preponderant feature in child sexual abuse disclosures. The court found that a detailed evidentiary foundation is required before such evidence may be admitted. State v Marrington, 335 Or 555, 73 P3rd 911 (2003).

FOR THE COUNTY OF WASHINGTON

STATE OF OREGON,)
)
Plaintiff) No.
)
vs.)
)
Defendant)

REQUEST FOR DAUBERT HEARING
OEC 104 (1)

Defendant by and through his attorney, John J. Tyner III, hereby asks the Court to refuse to admit the blood evidence under OEC 704, 702, 704, 401, 403, State v. O'key, 321 Or 285, 899 P2d 663 (1995) and Daubert v. Merrill Dow Pharmaceuticals Inc., 510 US 594 (1993).

POINTS AND AUTHORITIES

Dated this ___ day of _____ 2004

RESPECTFULLY SUBMITTED this ___ day of

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

STATE OF OREGON,)	
)	
Plaintiff)	No.
)	
vs.)	REQUEST FOR DAUBERT HEARING
)	MEMORANDUM
Defendant)	OEC 104 (1)

Issue

Whether State's blood alcohol evidence that was taken from the defendant at the hospital should be excluded from evidence because the hospital failed to follow the proper methodology in interpreting the blood evidence.

Argument

State v. O'key, 321 Or 285, 899 P2d 663 (1995) was the Horizontal Gaze Nystagamous, where the Court cited four factors to determine whether scientific evidence should be admitted:

- 1) Has the theory been tested?
- 2) Was proper methodology employed?
- 3) Is there peer review and publication?
- 4) What is the potential rate of error?

The Oregon Administrative Rules create procedures for examination of blood evidence which were not followed in this case. State v. Brown, 297 Or 404 (1984) and State

v. Sampson, 167 Or App 489 (2000) require the proponent of evidence to make a fundamental showing that scientific tests were properly administered and that the person conducting the tests was properly qualified. If the blood alcohol test does not conform to state standards, then the evidence must be excluded.

RESPECTFULLY SUBMITTED this ____ day of

2. Relevance 400 series

- 401 Relevant evidence—evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.
- 403 Exclusion of relevant evidence—on grounds of prejudice, confusion or undue delay. Note: the conduct is too remote in time Carter v. Moberly, 263 OR 193 (1972). Failure to weigh the probative value against prejudicial effect is not harmless error. State v Price, 189 Or App 387 (2003).

Rule 404– Character Evidence: Admissibility

Rule 404(3)

- 1) Truthfulness—rule 405—restricted to formal method

Specific Character Traits:

- 2) Peacefulness
- 3) Loving care of children
- 4) Concern and involvement in the welfare of small children
- 5) Over-protectiveness of children
- 6) Proper care for children under frustrating conditions

Bad acts evidence State v. Johns, 301 Or 335 (1986)

- a. Need for evidence
- b. Certainty other crimes committed
- c. Strength of evidence
- d. Inflammatory effect on jury
- e. How distracting and time consuming the evidence will be

State v. Johns, 301 Or 549 (1986), the Supreme Court determined that the law of bad acts evidence is a law of inclusion, not exclusion. Other crimes or acts evidence is only admissible if logically relevant to prove a material element of the crime charged. Therefore, acts which tend to show guilty knowledge are not relevant to prove a crime which requires no proof of intent. For example, under the law prior to Johns, possession of stolen property was deemed relevant to prove knowledge of an unrelated theft. See, State v. Lee, *supra*. In State v. Gailey, 301 Or 563 (1986), the companion case to Johns, the Court stated that in a prosecution for burglary, no logical inference can be drawn from the fact that the defendant possessed proceeds from another burglary.

The evidence must be excluded if the OEC 403 prejudicial effect outweighs the probative value. In deciding this question, the court must determine: (1) the need for the evidence; (2) the certainty that the other crime or act was committed and that Defendant was the actor; (3) the strength or weakness of the evidence; (4) its inflammatory effect on the jury; and (5) how distracting and time-consuming the proof will be. If on balance, the probative effect is outweighed by the prejudicial, the evidence should be admitted.

3. Rule 803-Hearsay

Art. 1 §11 Oregon State Constitution

Hearsay involves 6th Amendment issues

Statements are not excludable

OEC 804(3)(f). A statement not covered by other exception, but has equivocal circumstantial guarantees of trustworthiness if court determines it is relevant

More probative than other evidence a proponent can procure through reasonable efforts.

General interests of code are several

Made with notice to adversary

Competency Hearings

State v. Campbell, 705 P.2d 694 (1985)