

Updates: Oregon Legislative Session & Case Law

The following provides updates from the 2016 Oregon Legislative Session as well as recent updates to case law, including the following topics. For navigational ease, click the link to jump to specific topics or continue to scroll down as needed.

Legislative Updates:

- [New Crime: HB 1567 Criminal Impersonation](#)
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2016 Legislative Session Updates

New Crime: Criminal Impersonation (HB 1567). When an individual, with the intent to injure, impersonates another person on a communication without their consent (*think fake social media accounts) intending to deceive a third person, and injury results. Injury = humiliation harassment, threat or physical harm. Class A Misdemeanor. Effective 1/2017

SB 1571: Melissa's Law. Requires law enforcement agencies to develop protocols around testing of sexual assault kits. Note that "anonymous" kits, which include victims who do not want to participate in a criminal case, may not be tested.

SB 1600: Expands the time limitations of statute of limitations for prosecutions of first degree sex crimes if there is *new* and corroborating evidence of the sex crime.



HB 4082: Fixes Promoting prostitution to include exchange for goods and services not just monetary compensation.

HB 4075: Creates a mandate for the State Police to create a tip-line for students to report bullying and threatening activity.

HB 2776: Authorizes law enforcement officers to apply for and a circuit court judge to enter an ex parte emergency protective order (EPO) when the court finds probable cause that a person is a victim of a domestic disturbance or abuse and the protective order is necessary to prevent abuse.

Additional Points to Consider:

- Do not assume that a sex case is outside the statute of limitations. If you have concerns, feel free to call our office and we can discuss the best way to proceed on that case.
- Emergency Protective Orders. How do you get one? Call the on-call DDA! They have the information and can walk you through the process. It will require you to contact at judge, much like an after-hours search warrant.

Case Law Updates

In future editions, this section will only provide relevant updates since our last quarterly newsletter. However, because this is our first issue, we have also provided relevant issues from 2014.

Assault

The circumstances around the assault are critical to document, whether you're investigating "substantial pain" or "impairment of physical condition." Information to include might be severity, length and duration of the assault. *Photographs, by themselves are insufficient.* Consider talking to additional witnesses—did the victim cry? Favor the injury? How long?

State v. Rennels, 253 Or App 580 (2012). "a bruise lasting several days—may be sufficient to infer that the victim suffered *some* pain as a consequence of the kicking incident. It is not sufficient to infer that she suffered *substantial* pain." Conviction for assault in the fourth degree reversed.

State v. Lewis, 266 Or App 523 (2014). Evidence that defendant pulled out some of the victim's hair during a fight, and a witness heard the victim say "ouch stop it" was not sufficient, in itself, to support a conviction for assault in the fourth degree.

State v. Hendricks, 273 Or App 1 (2015). Proving "impairment of physical condition" for an assault charge, the impairment must be (1) material – not merely de minimus, and (2)

how material the impairment is depends on a variety of case-specific circumstances, including type, degree and duration of impairment. Here, the court upheld the conviction of a defendant who had “smothered” the victim with a pillow for five seconds, where she could not breathe and feared for her survival.

Drug Endangered Children / Endangering the Welfare of a Minor

These cases have recently become much more difficult for us to prosecute.

State v. Gonzalez-Valenzuela, 358 Or 451 (2015) Reversing a conviction for EWAM where the defendant was in possession of heroin, methadone, and methamphetamine while in a car with her 5-year-old daughter. The court found that “a place where unlawful activity involving controlled substances is maintained or conducted,” ORS 163.575(1)(b), refers to a place where a *principal or substantial* use of the place is to facilitate unlawful drug activity. A brief, spontaneous and isolated occurrence is insufficient.

Evidence

The best child abuse investigations have two parts: 1) one investigation focuses on what happened, and 2) the other focuses on the defendant—who is he or she? Here is why we need investigators to get us as much information about a suspect’s past as possible.

- **Prior Bad Acts:** In 2015, the Oregon Supreme Court shifted the current law around prior bad acts making it much easier for prosecutors to offer prior bad acts of a Defendant, which is critical for child abuse investigations.
 - *State v. Williams*, 357 Or 1 (2015). (This case is a huge victory for child abuse prosecutors.) In short, the court held that in a criminal child abuse prosecution, “the admission of ‘other acts’ evidence to prove character and propensity on whether the risk of unfair prejudice outweighs the probative value of evidence. So long as the evidence is minimally relevant, a court may admit the evidence so long as it does not violate a constitutional principle.
 - *State v. Brumbach*, 273 Or App 552 (2015). Although the court ultimately reversed a conviction for sexual assault, it noted that evidence of a defendant’s prior sex abuse of children was admissible relevant to prove that he had a sexual interest in children. (Again, this is different from previous law.) The only reason the court reversed the conviction was because the court failed to determine whether the evidence was too prejudicial.

- **Forcible Compulsion:** It is critical to ask historical and circumstantial questions about force.
 - *State v. Digesti*, 267 Or App 516 (2015). To prove forcible compulsion, evidence that defendant used force to keep the victim from opening a door, which compelled the victim to submit to sexual touching was sufficient.
 - *State v. Kawamoto*, 273 Or App 241 (2015). Court upheld a conviction involving physical force when there was extended physical assault on the victim (over a

period of days) and the jury could infer that the penetration was ‘forcibly compelled’ when there was physical violence that preceded the actual act or threat of more to come.

- **BUT SEE** *State v. Tilly*, 269 Or App 655 (2015) Finding that the evidence was insufficient to prove forcible compulsion when the state did not prove that the defendant used greater or different force that was inherent in completing the sexual act.
- **Physically Helpless:** A victim was “physically helpless” when the victim was *asleep*. *State v. Tindall-Martin*, 265 Or App 340 (2014).

Other

- **Expert Testimony**

- *State v. Swinney*, 269 Or App 548 (2015). Trial court did not err in allowing a detective to testify that defendant’s behaviors, as described by victim, were consistent with grooming. *Note that the court focused several times on the fact the detective did NOT testify that defendant was grooming; rather, that defendant’s behavior- based on victim’s description and the detective’s experience- was consistent with grooming. A conclusion would be impermissible and a likely mistrial.
- *State v. Althof*, 273 OR App 342 (2015). Trial court did not err by allowing a detective to testify as an expert about delayed reporting, based on the detectives training and experience.

- **“Use” of a Weapon**

- *State v. Ziska/Garza*, 355 Or 799 (2014). “Use of a weapon includes both employing the weapon to cause injury or harm as well as the threatening of harm or injury. *It may feel like common sense, but it is now settled. See also *State v. Smith*, 274 Or App 562 (2015).

*The Marion County District Attorney’s Office re-created this document from Oregon Department of Justice’s Oregon Criminal Reporter, as well as case law updates provided by Assistant Attorney General Erin Greenawald.