

**FILED: March 06, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

TIMOTHY LEON PAINTER, II,  
Defendant-Appellant.

Clatsop County Circuit Court  
101001

A146873

Cindee S. Matyas, Judge.

Submitted on November 27, 2012.

Peter Gartlan, Chief Defender, and Susan Fair Drake, Senior Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Pamela J. Walsh, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Haselton, Chief Judge, and Sercombe, Judge.

HASELTON, C. J.

Conviction for second-degree assault reversed and remanded; remanded for resentencing; otherwise affirmed.

1 HASELTON, C. J.

2 Defendant, who was convicted of assault in the second degree, ORS  
3 163.175,<sup>1</sup> appeals, assigning error to the trial court's admission of statements that he made  
4 in recorded telephone conversations from jail after his arrest.<sup>2</sup> Defendant contends that  
5 the content of those statements was inadmissible in that it did not pertain to any  
6 "noncharacter" purpose. *See* OEC 404(3). We agree and, further, determine that the  
7 error was not harmless. Accordingly, we reverse and remand.

8 The circumstances material to our review of the asserted evidentiary error  
9 are not in dispute. Defendant was charged with a variety of offenses, including second-  
10 degree assault, arising from an encounter with police on January 3, 2010. The gravamen  
11 of the second-degree assault charge was that defendant had knowingly caused physical  
12 injury to Warrenton Police Officer Richard Kraynak by ramming his car into Kraynak's

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<sup>1</sup> ORS 163.175, as pertinent here, provides:

"(1) A person commits the crime of assault in the second degree if the person:

"\* \* \* \* \*

"(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon[.]"

As described below, \_\_\_ Or App at \_\_\_ (slip op at 6), defendant also was acquitted of charges of assaulting a public safety officer, ORS 163.208, and criminal mischief in the first degree, ORS 164.365. Defendant pleaded guilty to other charges and does not challenge those convictions.

<sup>2</sup> Defendant also assigns error to an aspect of the sentence imposed on the conviction for second-degree assault. Given our disposition, we do not address that matter (on which the state concedes error).

1 police cruiser as he was attempting to flee and elude police. The theory of the defense, as  
2 ultimately presented at trial, was that *Kraynak's* police car had struck *defendant's* car--or,  
3 at least, that defendant had not deliberately caused any collision.

4           Defendant was arrested immediately after the incident and lodged in the  
5 Clatsop County Jail. While incarcerated, defendant made a number of telephone calls to  
6 his mother and sister, which jail staff recorded. Those conversations are the object of our  
7 consideration. A complete reproduction of the proffered excerpts of those conversations  
8 would be of no benefit to the bench, the bar, or the public. In general, defendant (a) told  
9 his mother and sister that Kraynak (whom he characterized in obscene terms) had  
10 fabricated his account of the episode and that other officers (whom he also characterized  
11 in obscene terms) had collaborated in that fabrication, and (b) vowed and threatened to  
12 take revenge (again, in the most lurid terms) against the officers if he was convicted.

13           For example, notwithstanding his mother's admonitions during one call that  
14 the conversations were being recorded, defendant responded, "I don't give a fuck. Let  
15 them play this in my trial. They send me to prison when I'm innocent to something and  
16 they will fucking pay. \* \* \* They will fucking pay dearly." In another of the  
17 conversations, defendant, reiterating his rage for "sitting in jail facing prison time for  
18 something I didn't fucking do"--and that "[t]he police know it"--threatened to "shove  
19 [Kraynak's] badge right up his \* \* \* asshole" and to "fucking cave his fucking head in."  
20 And, in a final conversation with his mother, defendant vented his rage at police for  
21 holding him in jail while a loved one experienced a medical emergency:

1            "[DEFENDANT]: Do you have any fucking idea what I would do to  
2 every fucking motherfucking law enforcement in this county if my girl dies  
3 while I'm in here? Any fucking idea what I'll do? They'll put me on death  
4 row, I'll tell you that much.

5            "\* \* \* \* \*

6            "[DEFENDANT]: They'll put me on death row, I'll go crazy \* \* \*.

7            "\* \* \* \* \*

8            "[DEFENDANT]: I fucking hate every goddamn cop, every  
9 motherfucker with a badge.

10           "[DEFENDANT'S MOTHER]: Tim, it's not their fault, okay. It's  
11 the officer that arrested you and lied.

12           "[DEFENDANT]: It is their fault. It's all of them, it's all of them.

13           "[DEFENDANT'S MOTHER]: Tim, they weren't there.

14           "[DEFENDANT]: They're keeping me held in here based on his  
15 fucking lies. It's all of them."

16           Before trial, the state sought a ruling on the admissibility of both a CD, and  
17 a series of transcripts, of the excerpted conversations. The state argued that the content  
18 of those proffered exhibits was relevant for two distinct purposes:

19           "[The first is] statements about what he did that night, admissions as to the  
20 property crimes [to which] he has already entered guilty pleas[,] and  
21 statements about the actual collision that is the basis of Counts 1 [the  
22 second-degree assault charge] and 2 [the assault on a public safety officer  
23 charge].

24           "In other phone calls, or other portions of phone calls, he made  
25 statements that are to be threatening statements about Officer Kraynak and  
26 police officers in general--those involved in this case in general, and it's the  
27 State's position that all of these are relevant."

28           With respect to the second category--*viz.*, defendant's threatening statements, the state

1 asserted that "those are admissible as they go to [defendant's] motive and intent that  
2 night." In particular, the prosecutor asserted:

3 "[T]hey very clearly show animus on the part of [defendant] towards  
4 Officer Kraynak specifically and police officers in general. I think one of  
5 the State's [exhibits] references 'All'--expletives--'with a badge.' And so I  
6 think they are relevant to show that animus, that intent.

7 "The fact that these are statements that happen after the crimes I  
8 don't think is relevant to its admissibility. Certainly, it's something  
9 [defendant] can argue--[defendant] can argue as to how much weight they  
10 should be [given by] the jury, but I don't think it bears on the admissibility  
11 of the evidence because it still shows the animus of [defendant] towards the  
12 victim of this crime."

13 Defense counsel responded first with a generic hearsay objection (which  
14 defendant does not renew on appeal) and then focused on defendant's principal argument,  
15 *viz.*, that the obscene, threatening statements were inadmissible "character evidence":

16 "So my concern is that these calls and all the rest of the calls that  
17 [make] up the subject matter are not the pattern [of] hatred of law  
18 enforcement but that he feels that he's being framed by the local law  
19 enforcement officers[.] \* \* \*

20 "\* \* \* There's a lot of foul language and it's really--it's called  
21 relevant, but it's really character evidence masked as relevant information.

22 "\* \* \* \* \*

23 "In this case all these statements are in frustration about a  
24 prosecution; he doesn't feel this should be going forward; and it's after the  
25 incident.

26 "So the State is arguing that he's predisposed to hating cops because  
27 he's saying after the incident, while he's in custody feeling that he's being  
28 framed, that he hates all the cops and he says, 'All the cops here.'"

29 The trial court, without expressing its reasoning, ruled that the CD and transcripts were  
30 admissible.

1           The case proceeded to trial on three charges--*viz.*, second-degree assault,  
2 assaulting a public safety officer,<sup>3</sup> and criminal mischief in the first degree.<sup>4</sup> The state, in  
3 its case-in-chief, submitted, without further argument or objection, the CD recording and  
4 transcribed excerpts of the recorded conversations, and the CD was played to the jury.<sup>5</sup>

5           Ultimately, the dispute at trial focused on whether defendant had rammed  
6 Kraynak's police cruiser--or whether Kraynak had struck defendant's car--and, if the  
7 former, whether defendant had acted with a culpable mental state. Kraynak and  
8 defendant rendered irreconcilable accounts, and defendant also presented the testimony  
9 of an accident reconstruction expert, who concluded that the damage to the vehicles "is  
10 not consistent with a deliberate attempt to ram the police vehicle and cause damage to  
11 that vehicle and potential injury to the occupant." In addition, defendant testified that he  
12 did not recognize Kraynak's vehicle to be a police car until after the collision, and

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<sup>3</sup> ORS 163.208(1), as pertinent here, provides:

"A person commits the crime of assaulting a public safety officer if the person intentionally or knowingly causes physical injury to the other person, knowing the other person to be a peace officer, \* \* \* and while the other person is acting in the course of official duty."

<sup>4</sup> ORS 164.365(1), as pertinent here, provides:

"A person commits the crime of criminal mischief in the first degree who, with intent to damage property, and having no right to do so nor reasonable ground to believe that the person has such right:

"(a) Damages or destroys property of another[.]"

<sup>5</sup> Defendant subsequently testified about the recorded conversations, acknowledged that he "lik[ed] to talk a lot of crap \* \* \* when I get mad," and denied that he ever intended to follow through on the threats.

1 adduced other evidence circumstantially corroborating that perception.<sup>6</sup>

2           In rebuttal closing argument, the prosecutor--who had not referred to the  
3 conversations during his initial closing--highlighted them as evincing defendant's  
4 culpable mental state at the time of the January 3 incident:

5           "[With respect to] the threats that you heard made against Officer  
6 Kraynak, the threatening language made against [everyone] with a badge,  
7 and how he hates every person with a badge. The reason the State offered  
8 those, Ladies and Gentlemen, is not to say that [defendant] is a bad guy. \* \*  
9 \*

10           "So we're not offering those to paint him in a bad light, [but] we're  
11 offering them because they give you insight into his mind close in time to  
12 when this happened. You'll see the dates on those, they range from \* \* \*  
13 three days after the incident to about two weeks after the incident. I think  
14 that gives you a very, very clear insight into [defendant's] mind, what he  
15 was thinking about at the time of this incident \* \* \*."

16 The jury convicted defendant of second-degree assault but acquitted him of assaulting a  
17 public safety officer and second-degree criminal mischief.

18           On appeal, defendant, invoking OEC 404(3),<sup>7</sup> reiterates that the trial court  
19 erred in admitting defendant's threatening statements in the recorded telephone  
20 conversations. Defendant further asserts that, given the centrality of his mental state and

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<sup>6</sup> For example, the collision occurred at approximately 3:30 a.m., and Kraynak did not activate his vehicle's red and blue lights until after the collision. Instead, Kraynak had activated only the vehicle's white overhead lights.

<sup>7</sup> OEC 404(3) provides:

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

1 the prosecutor's emphasis in closing on the threatening statements as evincing a culpable  
2 mental state, the admission of those statements cannot be deemed harmless.

3           The state remonstrates that "[t]he statements had a tendency to show that  
4 defendant knowingly rammed his car into the police cruiser on the night of the crime. At  
5 a minimum, the statements slightly increased the probability that defendant acted with the  
6 requisite mental state." Moreover, in the state's view, any error as to the admission of  
7 those statements was harmless because (however vehemently expressed) they conformed  
8 with defendant's position that he had been falsely accused.

9           The question of admissibility warrants only brief discussion. We agree  
10 with defendant that the trial court erred.<sup>8</sup> Contrary to the state's assertion, the only  
11 reasonable reading of defendant's threatening statements, individually and collectively, is  
12 that they evince, and were exclusively the product of, defendant's anger as a result of his  
13 arrest and subsequent events. Defendant repeatedly and, in context, consistently related  
14 his threats against Kraynak and the police generally to his perception that Kraynak had  
15 fabricated his account and his frustration at being unjustly accused: "They send me to  
16 prison when I'm innocent to something and they will fucking pay"; "I fucking hate every

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<sup>8</sup> To be sure, defendant could have preserved the asserted error with greater particularity before the trial court. For example, defendant did not specifically distinguish among various conversations or, for the most part, among portions of those conversations. However, the trial court was fairly alerted to defendant's fundamental contention that, within any given conversation and across the conversations collectively, the threatening statements should be excised as inadmissible "character evidence." *See generally Peeples v. Lampert*, 345 Or 209, 219-23, 191 P3d 637 (2008) (generally describing rationales for preservation requirement).



1 goddamn cop, every motherfucker with a badge. \* \* \* They're keeping me held in here  
2 based on his fucking lies. It's all of them."<sup>9</sup>

3 Or, stated conversely, nothing in defendant's threatening statements can  
4 plausibly be understood to evince a hostility against the police that antedated the January  
5 3 incident and, thus, was probative of his state of mind as of the time of the collision.  
6 That is, nothing in the statements even (in the state's phrasing) "slightly increased the  
7 probability that defendant acted with the requisite mental state." *Accord State v. Klamert*,  
8 253 Or 485, 488, 455 P2d 607 (1969) (holding that threatening statement the defendant  
9 made expressing animus against police several weeks before he shot a police officer was  
10 admissible in prosecution for that shooting). Accordingly, the threatening statements  
11 were inadmissible.<sup>10</sup>

12 The more challenging inquiry is whether, in the totality of the  
13 circumstances of this case, that error requires reversal of defendant's conviction for  
14 second-degree assault. In *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003), the court  
15 described the standard, under Article VII (Amended), section 3, of the Oregon  
16 Constitution<sup>11</sup> for reversing on the basis of evidentiary error:

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<sup>9</sup> Defendant also expressed threats based on his perceptions that Kraynak had stolen some of his personal property in the wake of the January 3 incident.

<sup>10</sup> We do not imply that subsequent statements are categorically inadmissible to prove a prior mental state. Rather, the dispositive consideration here is that defendant's threatening statements were unambiguous and exclusively referred to events occurring after the alleged criminal conduct.

<sup>11</sup> Article VII (Amended), section 3, provides, in part: "If the supreme court shall be

1 "Oregon's constitutional test for affirmance despite error consists of a single  
2 inquiry: Is there little likelihood that the particular error affected the  
3 verdict? The correct focus of the inquiry regarding affirmance despite error  
4 is on the possible influence of the error on the verdict rendered, not whether  
5 this court, sitting as a factfinder, would regard the evidence of guilt as  
6 substantial and compelling."

7 Again, the primary prejudice that defendant posits is that, in a case that  
8 turned on credibility--and, perhaps, circumstantial inferences as to mental state--the  
9 threatening statements could have been decisive. As a practical matter on this record,  
10 that proposition is hardly self-evident for at least two reasons.

11 The first, and more substantial, is the jury's disposition itself. As noted,  
12 three charges were submitted for the jury's consideration--second-degree assault (for  
13 "knowingly" causing physical injury to another (Kraynak) by means of a car); assaulting  
14 a public safety officer (for "knowingly" causing physical injury to Kraynak, "*a person*  
15 *defendant knew to be a peace officer*," while Kraynak was acting as an officer); and first-  
16 degree criminal mischief (for "*intentionally*" causing property damage to Kraynak's  
17 police car). Again, the jury convicted on the first charge, but acquitted on the other two.  
18 The most (at least abstractly) plausible explanation of that verdict is that, (a) while jurors  
19 ultimately believed that defendant was culpably responsible for the injury-producing  
20 collision, (b) they accepted defendant's testimony that he did not know that the occupant  
21 of the other vehicle was a peace officer--or, at least, jurors concluded that the state had

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of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial[.]"

1 failed to prove that element of the peace officer assault charge, and (c) the jury also  
2 determined that the state had failed to prove that defendant acted "intentionally" for  
3 purposes of the criminal mischief charge.

4           If jurors had, in fact, relied on the improperly admitted statements as  
5 pertaining to defendant's purported contemporaneous mental state, or if jurors had been  
6 inflamed by the content of those statements, one might reasonably have expected that  
7 dynamic to have been manifested by way of convictions on either, or both, the peace  
8 officer assault charge and the criminal mischief charge (*i.e.*, defendant intentionally  
9 rammed Kraynak's car because he knew it was a police car, and he hated the police). But  
10 that did not occur. Instead, jurors convicted only on the one charge that required neither  
11 knowledge that the victim was a peace officer nor an intentional mental state.

12           A second circumstance also at least plausibly contradicts an inference that  
13 the erroneously admitted evidence may have materially skewed the jury's consideration  
14 and, particularly, its assessment of defendant's credibility: Jurors were aware that  
15 defendant had 17 prior felony convictions, including five convictions arising from  
16 separate episodes in which he had attempted to elude police officers.<sup>12</sup> Further, the court  
17 instructed jurors that they could consider those convictions for "their bearing, if any, on  
18 defendant's credibility." Given the number and diversity of defendant's properly admitted  
19 and properly considered felony convictions, the ultimate prejudicial impact of the

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<sup>12</sup> Defendant, as a preemptive matter, acknowledged those convictions during his testimony on direct examination.

1 erroneously admitted statements is, at least with respect to the jury's credibility  
2 assessment, questionable.

3           Nevertheless, we conclude that reversal is required. That is so because the  
4 erroneously admitted statements were both "qualitatively different than the evidence that  
5 the jury heard," *Davis*, 336 Or at 34, and were presented to the jury as bearing directly on  
6 the central issues in the case, *viz.*, defendant's contemporaneous mental state and his  
7 general credibility. *Compare Davis*, 336 Or at 32 (noting that erroneous admission of  
8 evidence would be harmless "if the particular issue to which the error pertains has no  
9 relationship to the jury's determination of its verdict"), *with State v. Perkins*, 221 Or App  
10 136, 145, 188 P3d 482 (2008) (concluding that erroneous admission in DUII prosecution  
11 of coffee cup containing an alcoholic beverage, which was found in the defendant's  
12 pickup, was reversible error in that that evidence "went directly to the heart of [the  
13 state's] factual theory of the case" and, thus, was not harmless (internal quotation marks  
14 omitted; brackets in *Perkins*)). Indeed, as noted, \_\_\_ Or App at \_\_\_ (slip op at 6-7), the  
15 prosecutor highlighted the threatening statements in the state's rebuttal closing argument  
16 as being pivotal to the jury's assessment of defendant's contemporaneous mental state.  
17 *See Perkins*, 221 Or App at 145 (noting prosecutor's reference to the erroneously  
18 admitted evidence in closing argument).

19           To be sure, as noted, some aspects of the jury's verdict might belie ultimate  
20 prejudice. However, jury verdicts are inscrutable--and, in all events, the jury here *did*  
21 convict defendant of second-degree assault, with its requisite "knowing" culpable mental

1 state. Given the manner in which the case was framed and the content of the erroneously  
2 admitted threatening statements, which served only to impugn defendant's character, we  
3 cannot say that there was "little likelihood" that that evidence affected the jury's verdict in  
4 that potentially dispositive regard.

5 Conviction for second-degree assault reversed and remanded; remanded for  
6 resentencing; otherwise affirmed.