

FILED: April 17, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

DENNIS RUSSELL HOOPER,
Defendant-Appellant.

Linn County Circuit Court
10040591

A147013

Louis J. Fasano, Judge pro tempore.

Argued and submitted on February 21, 2013.

Daniel C. Bennett, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services. Dennis Russell Hooper filed the supplemental brief *pro se*.

Andrew Morgan Lavin, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Sercombe, Judge, and De Muniz, Senior Judge.

ORTEGA, P. J.

Affirmed.

1 ORTEGA, P. J.

2 Following a jury trial, defendant was convicted of reckless driving, ORS
3 811.140, and reckless endangerment, ORS 163.195. He asserts that the trial court erred
4 by limiting his closing argument in a way that, in his view, "interfered with the jury's
5 obligation to determine whether the state had proved" venue beyond a reasonable doubt.¹
6 We disagree with defendant's assessment of the trial court's actions and, as explained
7 below, affirm.

8 The conduct that led to the charges in this case occurred while defendant
9 was traveling north on Interstate 5 on a trip from Medford to Portland. According to
10 Engles, who was driving from Eugene to Portland on the day in question, defendant was
11 gesturing, driving very close to Engles's rear bumper, and eventually drove onto the left
12 shoulder of the road and drove beside Engles, matching his speed. Another driver,
13 Gilbert, described the same incident. She also observed defendant driving aggressively in
14 relation to at least one other vehicle. Both Engles and Gilbert called 9-1-1 to report
15 defendant's driving. As a result of those two calls, defendant was pulled over in Linn
16 County. Ultimately, he was charged in Linn County with reckless driving and reckless
17 endangerment. The charging instrument alleged that the crimes occurred "in a vehicle in
18 transit" and that the vehicle passed through Linn County.²

¹ Defendant raises two additional assignments of error in a *pro se* supplemental brief. We reject those assignments without published discussion.

² As to the reckless endangerment charge, the charging instrument alleged that the crime occurred in Linn County and also included an alternative venue provision alleging

1 Defendant, appearing *pro se*, filed a pretrial motion pursuant to ORS
2 131.363, asking that the venue for the trial be changed from Linn to Lane County.³

3 Defendant asserted that

4 "[o]ne of the alleged victims * * * resides in Jackson County, Oregon. One
5 of the witnesses, * * * Gilbert, resides in Douglas County, Oregon. The
6 Defendant * * * resides in the State of Georgia. The Defendant will utilize
7 the nearest major airport for appearances in Court, in this case Eugene,
8 Oregon."

9 Thus, "for the convenience of one victim, one witness, and the [d]efendant and in the
10 interest of justice and expediency," defendant asserted that the trial should be held in
11 Lane County. The court denied defendant's motion, and a jury trial was held in Linn
12 County.

13 During his closing argument, defendant, still *pro se*, began to argue about
14 the proper location for trial:

15 "The State would like to have it both ways; they're not sure of where
16 the crime occurred. They're saying in transit, we started in Medford, went
17 clear to Portland. That covers a lot of area. *It would have been convenient*
18 *for the trial to be held in * * * Jackson County. Or it would be more*
19 *convenient for an airport to fly in like Lane County, but it's the State's*
20 *advantage to make it Linn County because that's where I was pulled over."*

21 (Emphasis added.) At that point, the court addressed defendant:

that the crime occurred in a vehicle in transit that had passed through Linn County.

³ ORS 131.363 provides:

"For the convenience of parties and witnesses, and in the interest of justice, the court, upon motion of the defendant, may order the place of trial to be changed to another county."

1 "Mr. Hooper, there's no issue here as to venue. And there has been
2 nothing raised today with [regard] to the proper place for trial. So leave
3 that, please."

4 Ultimately, the jury found defendant guilty on both charges, and the court entered a
5 judgment of conviction.

6 On appeal, defendant first asserts that the trial court erred when it limited
7 his closing argument. "It is well established that a trial court generally possesses broad
8 discretion to control the proceedings before it." *State v. Rogers*, 330 Or 282, 300, 4 P3d
9 1261 (2000). Accordingly, "[a]bsent abuse, the control of closing arguments is left to the
10 trial court judge, who has broad authority to control the conduct of the trial." *State v.*
11 *Goodin*, 8 Or App 15, 23-24, 492 P2d 287 (1971).

12 According to defendant, the trial court in this case abused its discretion
13 because it did not allow him to argue that the "state had failed to prove venue."
14 (Boldface omitted.) We disagree. At the time that the trial court interrupted defendant's
15 argument, he was not attempting to argue about the facts pertaining to where the crime
16 occurred. Instead, defendant was discussing where the trial was being held, the issue
17 addressed in his pretrial motion for change of venue. In particular, the court stopped
18 defendant when he was asserting to the jury that it would have been more convenient to
19 hold the trial somewhere other than Linn County (such as Jackson or Lane County).
20 Thus, in context, the trial court did not limit defendant's closing argument to prevent him
21 from arguing that the state had failed to prove a material allegation of the charges.
22 Rather, defendant was attempting to reargue the legal issue raised in the pretrial motion

1 for change of venue and resolved by the court's order denying that motion. The trial
2 court did not abuse its discretion in limiting defendant's argument on that issue.

3 Defendant also contends that, by stating in the presence of the jury that
4 there was "no issue here as to venue," the trial court "misstated the law" and "interfered
5 with the jury's obligation to determine whether the state had proved each count beyond a
6 reasonable doubt." Again, we disagree.

7 "The jury--not the court--must decide whether each factual element of a
8 crime has been proved beyond a reasonable doubt." *State v. Poole*, 175 Or App 258, 263,
9 28 P3d 643 (2001). Accordingly, the trial court may not comment on the evidence. *See*
10 *State v. Blanchard*, 165 Or App 127, 130, 995 P2d 1200, *rev den*, 331 Or 429 (2000). "A
11 court impermissibly comments on the evidence when it gives a jury instruction that tells
12 the jury how specific evidence relates to a particular legal issue." *State v. Hayward*, 327
13 Or 397, 410-11, 963 P2d 667 (1998).

14 Here, of course, the trial court's statement regarding venue was made to
15 defendant and was not directed at the jury. Furthermore, as discussed above, the
16 statement, in context, was aimed at limiting defendant's argument regarding the
17 convenience of the trial location, and not at what the state had proved or was required to
18 prove beyond a reasonable doubt. Granted, the court's phrasing of its statement to
19 defendant was far from ideal. Nonetheless, in context, it was not a comment on the
20 evidence.

21 In addition, given the specific instructions that the court later gave to the

1 jury, we cannot conclude that the jury would have been misled by the court's earlier
2 statement limiting defendant's closing argument. In particular, among other things, the
3 court instructed the jurors that it was their "sole responsibility to make all of the decisions
4 about the facts in th[e] case" and that they were not to "allow anything [that the court
5 had] said or done during the course of th[e] trial to suggest that [the court had] formed
6 any opinion" about the case. With respect to the particular criminal charges at issue, the
7 court instructed the jury that, for defendant to be convicted of reckless driving, the state
8 was required to prove four elements beyond a reasonable doubt, one of which was that
9 "[t]he act occurred in a vehicle in transit" and that, "[a]t some point the vehicle passed
10 into or over Linn County." For reckless endangerment, the court instructed the jury that,
11 to convict defendant, it had to find beyond a reasonable doubt that the "act occurred in
12 Linn County, Oregon." Thus, the court clearly instructed the jury as to the factual
13 findings that it had to make relating to venue in order for defendant to be convicted.

14 "[W]e assume that jurors follow their instructions, absent an overwhelming
15 probability that they would be unable to do so." *State v. Barone*, 329 Or 210, 225, 986
16 P2d 5 (1999), *cert den*, 528 US 1086 (2000) (internal quotation marks omitted). Under
17 all the circumstances presented here, we cannot conclude that the trial court's statement to
18 defendant during closing argument would have led the jury to believe that, regardless of
19 the court's specific instructions, there was no need to determine factually whether the
20 crime occurred in Linn County or in a vehicle in transit that passed into Linn County.⁴ In

⁴ Defendant did not request any additional jury instructions or note any exception to

1 other words, regardless of the court's poor choice of words in limiting defendant's
2 argument, we cannot conclude that the statement in question prejudiced defendant.

3 Affirmed.

the jury instructions that were given. *See* ORCP 59 H.