

FILED: November 14, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOSEPH JAMES LASKY,
Defendant-Appellant.

Multnomah County Circuit Court
100330988

A147889

Leslie M. Roberts, Judge.

Argued and submitted on July 31, 2013.

David O. Ferry, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Karla H. Ferrall, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Schuman, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

HASELTON, C. J.

Conviction on Count 1 and Count 2 for unauthorized use of a vehicle reversed and remanded; remanded for resentencing; otherwise affirmed.

1 HASELTON, C. J.

2 After a jury trial, defendant was convicted of unauthorized use of a vehicle
3 (UUV), ORS 164.135; second-degree criminal trespass, ORS 164.245; and third-degree
4 criminal mischief, ORS 164.345, based on an incident in which he removed a truck and
5 trailer from a locked lot where he had consigned the vehicles for sale. Defendant
6 appeals, assigning error to the trial court's allowance of the state's *in limine* motion to
7 exclude a police officer's statement to defendant that he could retrieve those vehicles.¹
8 The trial court concluded that the statement was not relevant. We conclude that the
9 statement was relevant to defendant's state of mind with respect to the UUV charges and,
10 thus, the trial court erred in excluding it. Accordingly, we reverse and remand
11 defendant's conviction for UUV on Count 1 and Count 2, remand for resentencing, and
12 otherwise affirm.

13 We review determinations of relevance for errors of law. *State v. Titus*, 328
14 Or 475, 481, 982 P2d 1133 (1999). The assignment of error in this case pertains to the
15 relevance of certain excluded evidence. Accordingly, we describe the evidence that was
16 introduced at trial, without regard to whether the evidence was favorable to the defense or
17 the state.

18 Defendant is a car-hauling long-haul trucker. On multiple occasions,
19 defendant had taken his car-hauling truck and trailer for maintenance and repairs to

¹ We reject defendant's other assignment of error without further published discussion.

1 Pacific Coast Truck & Trailer, LLC (Pacific Coast), a repair business and parts seller
2 located in Portland. In August 2006, defendant consigned a 1992 truck and car-hauling
3 trailer at Pacific Coast. Pacific Coast performed mechanical work on the truck to prepare
4 it for sale. The truck and trailer sat on a Pacific Coast lot for over two years and never
5 sold.²

6 In October 2008, defendant and two of his friends went to Pacific Coast to
7 retrieve the truck and trailer during a time when the business was open. The vehicles
8 were parked on a fenced lot behind a locked gate near the Pacific Coast garage and
9 office. According to defendant, he intended to provide the truck and trailer to one of the
10 two men who had accompanied him. Pacific Coast owner Gary Clark informed
11 defendant that he would not be allowed to remove the vehicles unless and until defendant
12 paid for work that had been completed. Defendant responded that he had not authorized
13 any work, and he did not believe that he owed any money. Ultimately, defendant left
14 without the truck and trailer.

15 After that encounter, Clark contacted an agent to file a mechanic's lien.
16 Clark also towed an old, inoperable Studebaker station wagon into a position blocking the
17 truck and trailer against the fence so that they could not be removed. Clark then took
18 photographs of all of the vehicles and the locked gate.

19 At trial, the state successfully sought to exclude evidence that, after

² Defendant owned a newer truck and trailer that he used for his car-hauling business.

1 defendant and Clark disagreed about defendant taking the vehicles from the lot,
2 defendant purportedly contacted the Portland Police Department and inquired about
3 whether he was entitled to retrieve the vehicles. According to defendant, a police officer
4 informed him that he could lawfully reclaim his truck and trailer from Pacific Coast by
5 "simply driving them off" of the lot. Evidence of that exchange was excluded, and the
6 propriety of that exclusion is the subject of this appeal.

7 On the evening of October 31, while the business was closed, defendant
8 returned to Pacific Coast, again with two other men. The men removed the lock from the
9 gate, entered the lot, moved the Studebaker, and took the truck and trailer. Defendant
10 parked the vehicles in Toledo, Washington, where a Portland police officer later
11 discovered them in January 2010. In March, the state charged defendant with, *inter alia*,
12 two counts of UUV pertaining to, respectively, the truck and the trailer, second-degree
13 criminal trespass, and third-degree criminal mischief.³ With respect to the UUV count
14 pertaining to the truck, the state alleged in the indictment, "The said Defendant, on or
15 about October 31, 2008, * * * did unlawfully and knowingly take, operate, exercise
16 control over and ride in a vehicle, to-wit: a 1992 Peterbuilt [*sic*] truck, without the
17 consent of the owner Pacific Coast Truck & Trailer, LLC[.]" The indictment contained
18 an identical count with respect to the trailer.⁴

³ Defendant was, additionally, initially charged with two counts of first-degree aggravated theft. The state dismissed those charges before trial.

⁴ "[ORS 164.135] does not define or refer to any other statutory definition of the term 'vehicle,' and the Commentary indicates that the drafters intentionally refrained from

1 After he was indicted, defendant filed a civil suit against Pacific Coast for
2 conversion of the truck and trailer. In his complaint, defendant alleged that,

3 "[o]n or about October 31, 2008, [defendant] was advised by the Portland
4 police that he could lawfully reclaim his truck and trailer from [Pacific
5 Coast] by simply driving them off [Pacific Coast's] property. [Defendant]
6 did so that evening."

7 Before the criminal trial, the state moved for a ruling that a portion of
8 defendant's allegation in his conversion complaint (*viz.*, "[Defendant] did so that
9 evening.") was admissible to establish that he in fact took the truck and trailer from
10 Pacific Coast's property. The state argued that the remainder of the statement (the part
11 that was not an admission) was inadmissible hearsay that must be redacted. Defendant
12 responded that the admission would impermissibly be taken out of context if the portion
13 of the statement pertaining to what the police officer told him was omitted.

14 In ruling on the state's motion, the court reasoned:

15 "If this had been a statement in this case for which an advantage was
16 sought, then it would have--and then it could have been a judicial
17 admission. If it is a statement in another case, then it is a statement which
18 is admissible because it's a statement of the party opponent, and it can come
19 in as a statement of the party opponent as an admission. [Now] it's
20 something that he can try to walk his way back from with the jury. He can
21 say he really didn't mean [it]. He can say whatever he wants about it; but,
22 he said it, and it comes in as his statement. If he wishes to introduce the
23 rest of the statement, he can do that to the extent that it sheds light on it.

providing a restrictive definition." *State v. Essig*, 31 Or App 639, 644, 571 P2d 170 (1977), *rev den*, 281 Or 323 (1978) (citing Commentary to Oregon Criminal Code, § 134, 142-43 (1970), explaining that "[t]he first draft of the [UUV] section limited its coverage to 'motor-propelled' vehicles only; however, the Commission believed that the proposal should also protect owners of such things as *trailers*, sailboats and gliders" (emphasis added)). Ultimately, the trial court merged the jury's guilty verdicts on the two UUV counts into a single conviction.

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"I will not require the state to put in more than the admission that it's interested in. I would permit the defense to put in more of the related statement to the extent it's relevant--and it is obviously relevant here."

The state subsequently made a separate *in limine* motion to categorically exclude any evidence with respect to "what the police told [defendant] regarding what was appropriate to do as far as retrieving his vehicle." In support of that motion, the state argued:

"I think it's established that ignorance of the law is not a defense to any crime. Whether the ignorance comes from your own ignorance or from your spouse, what they tell you, or from a police officer--it does not matter. And, so, whether the police told [defendant that he could retrieve his vehicles] or not is not relevant. It's hearsay, for one. And, two, it's not relevant. And so I would ask that you not allow any testimony or evidence regarding what someone told [defendant] about whether it was okay for him to retrieve his vehicle."

Defendant remonstrated that the evidence was relevant:

"[DEFENSE COUNSEL]: Well, the problem we've got in a criminal case is, as I understand it, you have to have a joint union of intent and act. And if you don't do an act with criminal intent, then you don't have the requisite *mens rea* to be convicted of the act. *And I think that it all goes to his state of mind when * * * he went and took the vehicle. * * * [I]f he was told by somebody from the Portland Police Bureau, 'Yeah, this is a civil matter. You can go get your truck if you own it and you don't owe any money. You could go get it.' Now, if that's his state of mind, then he's not acting with criminal intent.*

"THE COURT: Well, whether he knows it's unlawful or not, he is conscious that he is going to get the truck. Now, what I'm concerned about--isn't there a defense of claim of right?

"[THE STATE]: No, there is not. Honest claim of right only applies to theft charges. It doesn't apply to * * * just UUVs * * * because you're not stealing. * * *

1 "THE COURT: Suppose there were two identical red Hondas and
2 one you owned and the other you didn't, and you get into the wrong red
3 Honda, not knowing that it was not your car: Could you be charged with
4 [UUV]?

5 "[THE STATE]: [The defendant] would have to be aware that it was
6 not [his] car.

7 "* * * * *

8 "But, honest claim of right only goes to theft charges, and it's clear
9 in the statute that that's a defense. It's not a listed defense for UUV. * * *
10 [I]f it is honest claim of right, I have to disprove that.

11 "* * * * *

12 "But to me that's a collateral issue, whether the police told him--
13 whether his ignorance is from what the police told him or his spouse told
14 him, it doesn't matter. Ignorance is not a defense on these charges.

15 "[DEFENSE COUNSEL]: Your Honor, the very essence of [UUV]
16 is the taking.

17 "* * * * *

18 "THE COURT: Well, I think that for your purpose, the concern
19 would be the unauthorized part, not the taking part. * * *

20 "[DEFENSE COUNSEL]: Well, the reason I mention the taking is
21 because it goes to his intent. First of all, the [UUV] is so close to the theft
22 statute that the defense of claim of right should apply and that his state of
23 mind in saying, 'Hey, can I go get my truck?' 'Well, yeah, you can go get
24 it.' 'Well, it's on another guy's property.' 'Okay. Go get it. Just don't
25 breach the peace[.]' * * * Then his state of mind is relevant. And anything
26 that was told to him would be relevant not for the purpose of whether or not
27 it was right or wrong, but as to whether or not he believed it and his actions
28 were based on that.

29 "THE COURT: But whether he believed that it was legal or not
30 ordinarily is irrelevant. It's whether he knew that he was doing what he was
31 doing, not whether he knew that what he was doing was proscribed."

32 (Emphases added.) The court concluded that the evidence was irrelevant and ruled that it

1 would be excluded.

2 As quoted in detail above, defendant argued that the proffered evidence was
3 relevant to the issue of whether he had acted with the requisite culpable intent.
4 Specifically, he argued that the police officer's statements were relevant to his state of
5 mind with respect to the use of the vehicles as it related to the UUV charges--and only to
6 those charges. Defendant did not articulate any specific theory of relevance with respect
7 to the criminal trespass and criminal mischief charges. The state argued that defendant's
8 subjective belief was irrelevant to his criminal culpability.

9 After that evidentiary ruling, the state argued at trial that, notwithstanding
10 that defendant held title to the vehicles, Pacific Coast had a superior possessory interest
11 based on a mechanic's lien, and that defendant knew that Pacific Coast had a superior
12 possessory interest in the vehicles. *See* ORS 164.005(4) (providing that "owner" for
13 purposes of UUV means "any person who has a right to possession thereof superior to
14 that of the taker, obtainer or withholder"). The state contended that defendant knew that
15 he did not have consent from Pacific Coast to take the vehicles and, in any event,
16 defendant was not legally entitled to remove the lock or enter the lot.

17 Defendant remonstrated that he believed that he was the rightful owner of
18 the truck and trailer when he took the vehicles. Defendant testified at trial as follows:

19 "[T]wo weeks prior [to taking the vehicles], I had called Portland police
20 and explained to them my situation. I had showed them my paperwork, I
21 had showed the lien, I had showed them my consignment agreement, and I
22 had showed them my titles. And I told them that I am the legal owner of
23 this truck."

1 At that point, the state objected on relevance grounds, and the court sustained the
2 objection. Defendant further argued that he was entitled to use self-help to recover his
3 vehicles from Pacific Coast's property.

4 The jury found defendant guilty on all counts, and the trial court, after
5 merging the convictions on Counts 1 and 2, entered a judgment of conviction and
6 amended judgment of conviction.

7 Defendant appeals, assigning error to the court's ruling excluding evidence
8 that a Portland police officer advised him that he could reclaim his truck and trailer from
9 Pacific Coast. Defendant contends that the police officer's statement was relevant to his
10 theory that he had acted under an honest claim of right when he took the vehicles from
11 Pacific Coast's property. Defendant contends that, even if the statutory claim of right
12 defense, ORS 164.035,⁵ is limited to theft charges and, thus, is inapplicable to UUV
13 charges, the state was, nevertheless, required to prove every element of the UUV charge,
14 including that defendant knew that he did not have the consent of the owner. "In that
15 context," defendant asserts, "evidence that defendant sought the assistance of the police,
16 and was informed by them that he could lawfully pick up his vehicle, was relevant to his
17 claim that he did *not* know that he did not have the consent of the vehicle's 'owner.'"
18 (Emphasis in original.)

⁵ ORS 164.035(1)(b) provides that, "[i]n a prosecution for theft[,] it is a defense that the defendant acted under an honest claim of right, in that * * * [t]he defendant reasonably believed that the defendant was entitled to the property involved or had a right to acquire or dispose of it as the defendant did."

1 With respect to the criminal trespass and criminal mischief charges, in his
2 brief, defendant simply contends that the trial court erred "when it held that evidence that
3 a police officer told defendant that he could enter on another's property to retrieve his
4 vehicle was irrelevant to his defense against unlawful use of a motor vehicle, criminal
5 trespass, and criminal mischief charges."

6 On appeal, the state remonstrates that the trial court properly excluded
7 testimony concerning defendant's prior communications with a police officer because the
8 proffered statements were irrelevant.⁶ The state reiterates its argument that honest claim
9 of right is not a defense to UUV under Oregon law. The state also contends that
10 defendant failed to preserve the assigned error, because defendant did not make an offer
11 of proof with respect to what the officer told defendant.

12 We begin by clarifying which of defendant's contentions are properly
13 before us on appeal, starting with the state's argument with respect to the lack of an offer
14 of proof. "Normally, an offer of proof is required to preserve error when a trial court
15 excludes testimony." *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988). However, a
16 challenge to exclusion of evidence may be preserved, notwithstanding the absence of an
17 offer of proof, if "[t]he questions asked and the arguments presented to the court on the

⁶ On appeal, the state does not reiterate its contention before the trial court that the statement is inadmissible hearsay. In any event, as we understand it, defendant does not argue that the statement is admissible "to prove the truth of the matter asserted," OEC 801(3), but rather for "the effect on the listener," which is not hearsay. *See, e.g., State v. Hren*, 237 Or App 605, 607, 241 P3d 1168 (2010) ("Statements that are relevant to show their effect on a listener are not hearsay.").

1 issue were adequate to inform the trial court of the substance of the evidence and its error
2 in excluding it." *Schacher v. Dunne*, 109 Or App 607, 610, 820 P2d 865 (1991), *rev den*,
3 313 Or 74 (1992); *see also State v. Morgan*, 251 Or App 99, 105, 284 P3d 496 (2012)
4 (same).

5 Here, the state first brought the "substance of the [disputed] evidence" to
6 the trial court's attention in its initial *in limine* motion seeking to admit that portion of the
7 allegation in defendant's civil conversion complaint that acknowledged that he had
8 removed the truck and trailer, while concurrently seeking to preclude admission of the
9 statement that defendant "was advised by the Portland police that he could lawfully
10 reclaim his truck and trailer from [Pacific Coast] by simply driving them off [Pacific
11 Coast's] property." As noted, the state in a subsequent *in limine* motion sought to
12 categorically exclude the evidence of "what the police told [defendant] regarding what
13 was appropriate to do as far as retrieving his vehicle." Defendant did not offer the
14 evidence; rather, the state broadly characterized the evidence that it sought to have
15 excluded. Given those circumstances, as well as the extensive colloquy quoted above, it
16 is patent that both parties and the trial court knew the source and content of the evidence
17 and understood defendant's argument as to the relevance of the excluded evidence--at
18 least with respect to the *mens rea* element of UUV. Under those circumstances,
19 defendant preserved his appellate challenge, notwithstanding the absence of an explicit
20 offer of proof. *See Peebles v. Lampert*, 345 Or 209, 219-23, 191 P3d 637 (2008)
21 ("Preservation gives a trial court the chance to consider and rule on a contention, thereby

1 possibly avoiding an error altogether or correcting one already made, which in turn may
2 obviate the need for an appeal.").

3 Nevertheless, some of defendant's appellate contentions are unreviewable
4 as unpreserved because they were not raised before the trial court. In particular, as noted,
5 defendant, while urging the relevance of the excluded evidence as to the UUV charges,
6 raised no argument to the trial court as to whether, or how, that evidence might be
7 relevant to his defense of the criminal trespass and criminal mischief charges. *See* ___ Or
8 App at ___ (slip op at 7). As a result, the trial court was never alerted to any contention
9 that the evidence was admissible as to those charges. Accordingly, defendant's belated
10 contention that the excluded evidence was also relevant to the criminal trespass and
11 criminal mischief charges is unpreserved; we thus limit our review and the following
12 analysis to the asserted relevance of the excluded evidence to the UUV charges.⁷

13 We conclude, for reasons that follow, that the excluded evidence was
14 relevant to the theory of defense with respect to the UUV charges. "Relevant evidence"
15 means evidence having any tendency to make the existence of any fact that is of
16 consequence to the determination of the action more probable or less probable than it
17 would be without the evidence." OEC 401. "All relevant evidence is admissible, except
18 as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United
19 States and Oregon, or by Oregon statutory and decisional law. Evidence which is not

⁷ Defendant makes no argument in his brief on appeal that the asserted erroneous exclusion of the disputed evidence somehow impermissibly affected the jury's consideration of the other charges.

1 relevant is not admissible." OEC 402. Evidence having any tendency to make the
2 defendant's theory of the case more likely is relevant. *State v. Beden*, 162 Or App 178,
3 184, 986 P2d 94 (1999).

4 We need not decide whether the statutory "honest claim of right" defense,
5 ORS 164.035(1)(b), is limited to prosecutions for theft, ORS 164.015 to 164.055, or also
6 applies to UUV.⁸ That is so because we agree with defendant's contention that, in all
7 events, the state must prove *every* element of *every* crime beyond a reasonable doubt.
8 Accordingly, in this case, the state, to establish UUV, was required to prove that
9 defendant acted with a culpable mental state in removing the truck and trailer--and, here,
10 the excluded evidence related to whether defendant acted with the requisite mental state.

11 The state's burden with respect to the *mens rea* element of UUV is well
12 settled. To obtain a conviction on a UUV charge, the state must prove that the defendant
13 knew that he did not have the owner's consent to use the vehicle. *See, e.g., State v. Bell*,
14 220 Or App 266, 269, 185 P3d 541 (2008) ("[T]he state was required to prove that
15 defendant *actually knew* that the car was stolen." (Emphasis in original.)); *State ex rel*
16 *Juv. Dept. v. Mitchell*, 142 Or App 40, 44, 920 P2d 1103 (1996) (reversing juvenile court

⁸ See Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 133, 140 (July 1970) (noting, in relation to the claim-of-right defense provision, ORS 164.035, that, when a defendant develops evidence on the issue of claim of right, "[w]hat the defendant does by his evidence is to 'raise a reasonable doubt' about the *mens rea* element of the crime, and the burden continues on the state to prove every element of the crime charged beyond a reasonable doubt. Unquestionably, a jury would be so instructed in the absence of such a provision in the draft, but it seems preferable to make the Code as comprehensive as possible by spelling it out.").

1 jurisdiction where the evidence was not sufficient to support a finding that, beyond a
2 reasonable doubt, the child knew that the vehicle in which he had ridden was stolen);
3 *State v. Shuneson*, 132 Or App 283, 287, 888 P2d 90 (1995) (reversing UUV conviction
4 after concluding that "there was insufficient evidence from which a rational trier of fact
5 could find beyond a reasonable doubt that defendant knew that she did not have the
6 owner's consent to ride in the [vehicle]"); *State v. Jordan*, 79 Or App 682, 685, 719 P2d
7 1327, *rev den*, 301 Or 667 (1986) ("Unauthorized use of a vehicle requires only that the
8 defendant ride in a vehicle that he knows is stolen."). Thus, any evidence that would tend
9 to raise a reasonable doubt about whether, at the time that he took the vehicles, defendant
10 knew that he did not have the owner's consent is relevant to his defense to the UUV
11 charges.

12 Here, defendant's proffered evidence that a police officer told him that he
13 could lawfully retrieve his vehicles, if they belonged to him, would "hav[e] [a] tendency
14 to make [it] more probable," OEC 401, that, at the time that he took the vehicles,
15 defendant believed that *he* had a possessory interest in the vehicles superior to Pacific
16 Coast's possessory interest and, thus, he was the "owner" of the truck and trailer. That, in
17 turn, would make it "less probable" that defendant knew that he did not have the
18 "owner's" consent--and, concomitantly, "less probable" that he acted with the requisite
19 culpable mental state. To be sure, the jury would be free to disbelieve such evidence.
20 *See State v. Dubois*, 221 Or App 644, 651-52, 191 P3d 670 (2008) (affirming UUV
21 conviction where "the state presented ample evidence from which the jury could have

1 found that * * * [the defendant] knew that her * * * claim of ownership was both
2 fraudulent and illegitimate"). Nevertheless, the excluded evidence was relevant as to
3 whether defendant acted with the requisite culpable intent when he took the vehicles from
4 Pacific Coast's property. Accordingly, the trial court erred in excluding the evidence as
5 irrelevant.

6 Conviction on Count 1 and Count 2 for unauthorized use of a vehicle
7 reversed and remanded; remanded for resentencing; otherwise affirmed.