

FILED: August 20, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOHN ELWOOD CAUSEY, JR.,
Defendant-Appellant.

Multnomah County Circuit Court
100646533

A148112

John A. Wittmayer, Judge.

Submitted on April 26, 2013.

Peter Gartlan, Chief Defender, and Morgen E. Daniels, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Jeff J. Payne, Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Egan, Judge, and De Muniz, Senior Judge.

DE MUNIZ, S. J.

Reversed and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 DE MUNIZ, S. J.

2 Defendant appeals a judgment of conviction for attempting to promote
3 prostitution, ORS 167.012(1)(d).¹ On appeal, defendant assigns error to the admission
4 into evidence of conversations recorded by an undercover police officer, printouts from a
5 website that contained photos and phone numbers, and text messages from two women
6 that were recovered from defendant's cell phone. According to defendant, the admission
7 of that evidence violated OEC 801 and defendant's right to confrontation under Article I,
8 section 11, of the Oregon Constitution. We conclude that the trial court's admission of
9 the text messages sent from one of the women to defendant was error requiring that we
10 reverse defendant's convictions and remand for a new trial.²

11 Because defendant was found guilty by a jury, we state the facts in the light
12 most favorable to the state. *State v. McDonnell*, 313 Or 478, 480, 837 P2d 941 (1992).
13 On May 4, 2010, Officer Miller was working undercover as a decoy on a prostitution
14 sting in Portland. While Miller was at a bus stop, Foster and her passenger, defendant,
15 drove up to Miller and asked her if she needed a ride. Miller recorded the conversation

¹ The charging instrument incorrectly identifies the statutory basis for the crime as ORS 167.012(3). However, there is no subsection (3) to ORS 167.012. ORS 167.012(1)(d) states that "[a] person commits the crime of promoting prostitution if, with intent to promote prostitution, the person knowingly * * * [e]ngages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution." The information charged in Count 2 that defendant "did unlawfully and intentionally, with intent to promote prostitution, engage in conduct, thereby instituting, aiding, and facilitating an attempted act of prostitution and attempted enterprise of prostitution."

² Because we conclude that those text messages should not have been admitted into evidence, we do not decide the admissibility of the other evidence.

1 that ensued between Miller, Foster, and defendant. Based on her training and experience,
2 Miller concluded that defendant was trying to recruit her to work as a prostitute. Miller
3 contacted officers Hertzler and Kula, who were also in the area, and they subsequently
4 arrested defendant on the charge of promoting prostitution. During the arrest, Hertzler
5 seized a cell phone from defendant's pocket. Kula also seized two cell phones from the
6 vehicle that Foster was driving, one of which he later determined belonged to Foster.
7 After obtaining a search warrant, Kula searched all three phones. He discovered a series
8 of text messages between defendant and Foster, as well as text messages between
9 defendant and a second woman and pictures of women in suggestive poses. The pictures
10 led Kula to an escort service website which contained pictures of Foster in suggestive
11 poses.

12 At trial, the state introduced the following text-message exchanges between
13 defendant and Foster:

14 *March 10, 2010*

15 Foster: "I'm at Chestnut Tree Hotel, Room 16. Call when done[.]"

16 Defendant: "Gotcha, Mama."

17 Foster: "This guy's late. How long should I wait for this guy before I give
18 up?"

19 Defendant: "Chill at the bar for about 15 minutes. Then give him a call.
20 Have a drink or two."

21 Foster: "We never exchanged numbers. We've only been talking through
22 email here and there. I just ordered a shot. If he's not here by 1:30, I'll call
23 you. If you're at your mom's maybe try checking my email and seeing if he
24 sent me anything."

1 Foster: "He just got here. I'll call you."

2 Defendant: "Run him for that."

3 Foster (approximately 30 minutes later): "I'm ready to go in five minutes."

4 *April 28, 2010*

5 Foster (after informing defendant that she is in room 110): "Just finished.
6 He's getting dressed. The hotel bitch is being nosey. How long before
7 you're here?"

8 Defendant: "About 15 minutes."

9 *May 2-3, 2010*

10 Foster (after informing defendant that she is in room 235): "He's here."

11 Foster (early the next morning): "I can go if you're ready to [come] get me.
12 I'm about to get dressed now."

13 Kula testified that he believed that the content of the text messages clearly showed a
14 pimp/prostitute relationship.

15 As noted, defendant assigns error to the admission of the text messages,
16 arguing that the messages were inadmissible hearsay under OEC 801 and, in any event,
17 that the admission of the text messages violated defendant's confrontation rights under
18 Article I, section 11, of the Oregon Constitution.³ The state responds that the text
19 messages are not hearsay because they were not offered for the truth of the matter
20 asserted. Rather, the state argues that the messages were offered to prove that defendant
21 had knowledge of Foster's prostitution activities and was personally involved with those

³ On appeal, defendant does not challenge the admission of the text messages that he sent.

1 activities.

2 Under the usual paradigm, we first consider defendant's statutory claim and
3 reach his constitutional claims only if it is necessary to do so. *See State v. Camarena*, 344
4 Or 28, 35-36, 176 P3d 380 (2008) (describing paradigm).

5 OEC 801(3) states, "'Hearsay' is a statement, other than one made by the
6 declarant while testifying at the trial or hearing, offered in evidence to prove the truth of
7 the matter asserted." The reason for the statutory exclusion is that hearsay statements are
8 generally considered to be untrustworthy. *State v. Cazares-Mendez/Reyes-Sanchez*, 350
9 Or 491, 505, 256 P3d 104 (2011). As noted above, the state's argument is that the text
10 messages from Foster were admissible because they were not offered by the state for the
11 truth of the matter asserted but instead offered only to prove that defendant had
12 knowledge of Foster's prostitution activities.

13 We reject the state's argument for the following reasons. Although the text
14 messages may have indicated that defendant had knowledge of Foster's activities, in order
15 for him to have that knowledge, the content of those text messages had to be true.
16 Although the state did not need to prove that Foster was at a particular time and place
17 charging a man \$500 for her services, the state did need to prove that Foster was meeting
18 a man for sex in exchange for money. The text messages are relevant because they are
19 circumstantial evidence of an "act or enterprise of prostitution" required under ORS
20 167.012(1)(d). For the text messages to be relevant as circumstantial evidence, however,
21 the jury was required to accept the truthfulness of the content of those messages. The

1 relevance was not that the statements were made, but the content of the statements.

2 In addition, the text messages were then used by the state as the basis for
3 Kula's expert opinion testimony that the messages were "highly consistent and indicative
4 of a pimp/prostitute relationship." In order for Kula to testify to that opinion, Kula had to
5 accept the truthfulness of the content of the text messages. In fact, the judge commented
6 that the state "had to prove an enterprise, don't they?" More importantly, in order for the
7 jury to accept Kula's opinion and make a similar inference, the jury had to accept the
8 truthfulness of the content of the text messages.

9 Because the text messages were out-of-court statements and their relevance
10 depended on the truth of the content of the messages, the messages were hearsay and not
11 admissible.⁴ The trial court erred in admitting the text messages, and that error requires
12 that we reverse and remand for a new trial.⁵

13 Reversed and remanded.

⁴ The state does not argue that the text messages were admissible under any exception to the rule against hearsay.

⁵ The state does not argue that the admission of the text messages was harmless error.