

FILED: December 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

PARISS PV LOMCHANTHALA,
Defendant-Appellant.

Marion County Circuit Court
12C43321

A152232

Mary Mertens James, Judge.

Argued and submitted on May 28, 2014.

Emily P. Seltzer, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Brandon Cobb, Certified Law Student, argued the cause for respondent. On the brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Shannon T. Reel, Assistant Attorney General.

Before Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.

GARRETT, J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

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

2 A jury convicted defendant of assaulting a public safety officer,
3 ORS 163.208. On appeal, defendant assigns error to the trial court's refusal to
4 specifically instruct the jury that, to be guilty, defendant had to engage in a "voluntary
5 act." We conclude that defendant was not entitled to his requested instruction and,
6 therefore, affirm.

7 Salem Police Officer Smith responded to a call of a domestic disturbance in
8 which the suspect, defendant, had left the scene on foot. Defendant had a warrant out for
9 his arrest at the time. Smith reported to a location at a field near a school, where he saw a
10 person matching defendant's description. Smith called out to defendant, told him he was
11 under arrest, and instructed him to show his hands and get down on the ground.
12 Defendant said, "No." When Smith told defendant that there was a warrant out for
13 defendant's arrest, defendant said, "I know." According to Smith, defendant's eyes were
14 red and watery, and defendant had a "thousand[-]yard stare." Defendant turned to
15 squarely face Smith in what Smith described at trial as a "fighting stance."

16 Smith operates a K-9 police dog unit and had a dog in his vehicle at the
17 time. Smith called for back-up and warned defendant that, if he did not comply, the dog
18 would be released from the car, and defendant would be bitten. Defendant said, "So?"
19 Smith repeated the warning and instructions to defendant several times, but defendant did
20 not comply. Using a remote device, Smith opened the door to his vehicle, releasing the
21 dog, and gave the dog an instruction to bite defendant. The dog chased defendant and bit

1 him, knocking him off balance. Smith then approached and made physical contact with
2 defendant in an attempt to subdue him and take him into custody. As the two men made
3 contact, they slid partway down a slope, coming to rest with their feet elevated above
4 their heads, with Smith on top of defendant. The men continued to wrestle, and the dog
5 continued to inflict bites on defendant. Defendant was grabbing at Smith's head, neck,
6 and waist. At some point, defendant hit Smith in the jaw with his wrist or forearm.
7 Smith's mouth was open at that moment because he was talking to defendant. The impact
8 of the strike slammed Smith's jaw shut.

9 Back-up officers arrived at the scene, and eventually they were able to take
10 defendant into custody. Smith felt pain in his jaw for approximately two hours after the
11 encounter. Smith testified that, on a scale of one to ten, with ten being the most extreme
12 pain, Smith rated his pain at that time a five. He did not seek treatment for the injury.
13 Defendant was treated for several dog bites.

14 The state charged defendant with assaulting a public safety officer,
15 ORS 163.208.¹ Before trial, defendant requested that the court issue Uniform Criminal
16 Jury Instruction 1065, which reads as follows:

17 "For criminal liability, Oregon law requires the performance of a
18 voluntary act or omission.

¹ ORS 163.208(1) 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."

1 "(1) Act--a bodily movement.

2 "(2) Voluntary act--a bodily movement performed consciously.

3 "(3) Omission--a failure to perform an act the performance of which
4 is required by law.

5 "(4) Conduct--an act or omission and its accompanying mental state.

6 "(5) To act--either to perform an act or to omit to perform an act.

7 "(6) Culpable mental state--means intentionally, knowingly,
8 recklessly, or with criminal negligence."

9 Defendant argued to the trial court that the instruction--at least an
10 instruction incorporating subsections (2), (4), and (6)--was necessary because defendant
11 would argue to the jury that his physical actions in striking Smith were involuntary under
12 the circumstances. The state objected that defendant's requested instruction was
13 potentially confusing and unnecessary. The trial court agreed, noting that defendant's
14 instruction "introduces additional terms" that were unrelated to other instructions or to the
15 elements of the charged offense. Instead, the trial court gave the following instruction:

16 "In this case to establish the crime of assaulting a public safety
17 officer, the State must prove beyond a reasonable doubt the following five
18 elements: That the act occurred in Marion County, Oregon; that the act
19 occurred on or about May 12, 2012; that [defendant] knowingly caused
20 physical injury to [Smith]; that [defendant] knew [Smith] to be a peace
21 officer; and [Smith] was acting in the course of official duty.

22 "A person acts knowingly or with knowledge if that person acts with
23 an awareness that his or her conduct is of a particular nature, or that a
24 particular circumstance exists. When used in the phrase 'knowingly caused
25 physical injury to * * *,' knowingly or with knowledge means that the
26 Defendant was aware of the assaultive nature of his conduct. The term
27 'physical injury' means an injury that impairs a person's physical condition,
28 or causes substantial pain."

1 Defendant was convicted. On appeal, defendant's sole assignment of error
2 is to the trial court's refusal to give his requested "voluntary act" instruction.

3 We review a trial court's refusal to give a defendant's requested jury
4 instruction for errors of law. *State v. Moore*, 324 Or 396, 428-29, 927 P2d 1073 (1996).
5 A defendant is generally entitled to have a jury instruction given if there is evidence to
6 support it and if the instruction accurately states the law. *State v. Thaxton*, 190 Or App
7 351, 356, 79 P3d 897 (2003). Failure to give a requested instruction is not reversible
8 error, however, if the instruction that the trial court gave, "although not in the form
9 requested, adequately covers the subject of the requested instruction." *State v. Tucker*,
10 315 Or 321, 332, 845 P2d 904 (1993). If we conclude that the trial court's instructions, as
11 a whole, were erroneous, we must determine whether defendant was prejudiced. *State v.*
12 *Williams*, 313 Or 19, 38, 828 P2d 1006, *cert den*, 506 US 858 (1992).

13 Defendant's argument on appeal is straightforward. The jury, he contends,
14 could have found that defendant was off-balance and distracted by the dog during the
15 struggle with Smith and, therefore, that defendant's "flailing" of his arms did not
16 constitute a "voluntary act." Defendant argues that the trial court's instruction, which
17 described the meaning of "knowingly," was inadequate because the jury could have found
18 that defendant "knew" that his arms were coming into contact with Smith but also that
19 defendant's "act" of flailing his arms was not "voluntary." The state responds that the
20 evidence at trial did not support defendant's requested instruction, and that, in any event,
21 the instructions that the trial court gave adequately covered the subject matter of the

1 instruction that defendant wanted.

2 We do not necessarily agree with the state's argument that the trial court's
3 instruction adequately covered the subject matter, *if* the evidence at trial supported
4 defendant's instruction. The state argues that, because the jury was instructed that it had
5 to find that defendant acted "knowingly" (*i.e.*, was "aware of the assaultive nature of his
6 conduct"), then the jury could not have concluded that an involuntary act could suffice.
7 The state's argument appears to conflate the mental state requirement, *i.e.*, *mens rea*, with
8 the requirement that any criminal conduct be voluntary, *i.e.*, *actus reus*, foreclosing the
9 possibility that a rational jury could ever find that a person was "aware" of engaging in
10 certain conduct without *voluntarily* engaging in that conduct.

11 We need not further consider that question, however, because the evidence
12 in this case does not support defendant's requested instruction. Defendant relies entirely
13 on the testimony of Smith and another officer, who described Smith's struggle with
14 defendant. Defendant argues that, from that testimony, which included a description of
15 the dog biting defendant and the two men sliding down the slope, the jury could have
16 inferred that defendant's conduct toward Smith was involuntary.

17 The problem for defendant is that Smith testified consistently and
18 unequivocally that defendant was not "flailing wildly" and that their physical struggle
19 "was definitely a fight."² Smith also testified that, after both men began to slip down the

² During trial, the prosecutor and Smith had the following exchange:

"[THE STATE:] I guess I want to be clear. When he is doing the

1 embankment, part of defendant's body became lodged against a sign post, which
2 prevented the two men from sliding further, and that the strike to Smith's jaw came at
3 some point after that. In short, the record contains no evidence refuting Smith's
4 testimony that defendant, despite being knocked off balance, resisted Smith by
5 intentionally engaging in physical contact and continuing to fight him throughout the
6 duration of the encounter. Because the evidence does not support defendant's contention
7 that he did not engage in a voluntary act, the trial court did not err in refusing to give
8 defendant's requested instruction.

9 Affirmed.

things he is doing, grabbing your face, and your neck, and your--hitting you in the jaw, and whatnot, again, without talking about speculating on his mental state, but what was your impression of what was going on there? Was he trying to get away from you? Was he just kind of flailing wildly? What was happening?

"[OFFICER SMITH] No, it was--it was definitely a fight. I am a defensive tactics instructor for the department, and we classify people that we arrest in three categories; no, maybe and yes. A yes person is; you are under arrest. They turn around and put their hands together. A no person is someone who does absolutely not want to go to jail, and they do actions or words that relay that. And then the maybe person is the one where you say you are under arrest, and they just kind of stand there and look at you, but they really don't do anything.

"From the first command that I gave him to stop, that he was under arrest, he was a no person. I mean, there was no indication at all at any point that he was willing to give up."