IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
CRAIG ALAN McNUTT,
aka Craig A. McNutt,
Defendant-Appellant.

Jackson County Circuit Court
14CR30680; A162615

Timothy Barnack, Judge.

Submitted April 24, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Laura A. Frikert, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Patrick M. Ebbett, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

DEHOOG, J.

Affirmed.

DEHOOG, J.

Defendant appeals a judgment of conviction for first-degree aggravated theft. ORS 164.057, and a supplemental judgment imposing restitution. Defendant assigns error to the trial court's overruling of his objection, on hearsay grounds, to the alleged victim's testimony as to something a detective had told her during the investigation.[1] In response, the state argues that the disputed testimony did not contain hearsay because the detective's statement was not admitted for the truth of the matter it asserted. We, however, conclude that it is unnecessary to resolve whether that statement constituted improper hearsay, because any alleged error in admitting the statement was harmless. We therefore affirm.

When we review a trial court's evidentiary ruling, we do so in light of the record that was before the court at the time of the ruling. *State v. Brumbach*, 273 Or App 552, 553, 359 P3d 490 (2015), *rev den*, 359 Or 525 (2016). However, when evaluating whether the erroneous admission of evidence was harmless, we consider all pertinent parts of the record. *Id.* at 553-54. We state the facts with those standards in mind.

Defendant and the victim were in a romantic relationship, and, in November 2012, he moved into her home, where he lived for over a year. In her home, the victim kept a safe that defendant had given her. Defendant knew the combination to the safe, and he may also have had a key to unlock it. The victim kept large sums of cash in the safe. When she and defendant first met, she had accumulated about $180,000 in cash; she later placed that amount in the safe. The victim organized her cash in small bank envelopes, with each envelope containing $10,000 in new $100 bills. The victim kept a record of the number of envelopes that she had on a post-it note inside the safe. Defendant also accessed the safe, using it to store spare keys and paperwork.

[1] Defendant raises two additional assignments of error relating to the nonunanimous jury verdict in his case. Defendant contends that the Sixth and Fourteenth Amendments to the United States Constitution require unanimous jury verdicts for the charges in this case. We reject those assignments of error on the merits without further discussion. *See State v. Gerig*, 297 Or App 884, 886 n 2, 444 P3d 1145 (2019) (taking that approach).

In March 2014, the couple separated and defendant moved out of the victim's home. Later that year, after the victim had nearly depleted the savings from her safe, she discovered that one of the remaining envelopes contained only $322—22 one-dollar bills surrounded by three $100 bills—rather than $10,000 in $100 bills as she had anticipated. Also, based on her post-it note, the victim believed that an entire additional envelope was missing. In total, therefore, the victim determined that approximately $19,700 in cash was missing from her safe.

After the victim reported the missing money to the police, they arranged two pretext phone calls between the victim and defendant. The state later played the recordings of those two calls at trial. In those calls, defendant explained why he had taken the money, what he had done with the money, and that he had intended to return the money to the victim. As a result of that evidence, defendant ultimately was charged with first-degree aggravated theft, alleging that he had unlawfully and knowingly committed theft of property valued at $10,000 or more. ORS 164.057.[2]

Before trial, defendant served the victim with a subpoena for her complete tax records. The victim moved to quash the subpoena. At a hearing on that motion, the victim's attorney contended that defendant was misusing the legal process to harass the victim. According to defendant, however, the documents were necessary to his defense because the victim had given some of her bank and tax records to the police to help substantiate how much money was missing from the safe, and the subpoenaed documents could potentially refute that evidence. In response, the

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[2] ORS 164.057 provides, in relevant part:

"(1) A person commits the crime of aggravated theft in the first degree if:

"(a) The person violates ORS 164.055 with respect to property, other than a motor vehicle ***; and

"(b) The value of the property in a single or aggregate transaction is $10,000 or more."

ORS 164.055 refers to ORS 164.015, which provides, in relevant part:

"A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

"(1) Takes, appropriates, obtains or withholds such property from an owner thereof[.]"

state indicated that it did not intend to use the records it had received from the victim to establish how much money defendant had stolen; instead, it would rely primarily on the victim's testimony to establish that amount. The trial court agreed with the victim that defendant appeared to have ulterior motives for requesting her records, and it ultimately quashed the subpoena, reasoning that the prejudicial effect of requiring the victim to disclose the requested records to defendant outweighed any minimal relevance those records might have.

During the victim's testimony at trial, defendant began cross-examining her as to why she had been willing to give her financial records to the police but had not been willing to disclose those same records to defendant. The state objected, reminding the court of its earlier ruling that defendant had not sufficiently shown that he was entitled to those records. Defense counsel responded, "he just made—a matter for the Court," and the court discussed the matter with the attorneys off the record. When trial resumed, counsel continued questioning the victim about her motion to quash the subpoena and her unwillingness to provide her financial records to defendant. In response, the victim gave various explanations for her unwillingness to disclose her records to defendant. First, she said that it would have been difficult for her to obtain and photocopy all the files and that she was not willing to undertake that task. Second, she explained:

> "[T]here was several different things that have happened to me during the time or since the time of [defendant's] arrest; my car has been keyed, I received what turned out to be letters from [defendant] that were sent to the City of Ashland, saying that I had done work to my home, repairs or additions or work to my home, without permits and that was all settled with the city ***."

Finally, the victim's third reason for not wanting to disclose her financial records to defendant led to the statement that defendant alleges was improper hearsay, as follows:

> "[VICTIM]: And there were items missing from my yard, from my home during that time. I had seen [defendant] at the edge of parking lots, following me in town. I

called the detective about it, spoke with him on more than one occasion, and at one point, he told me that he had spoken to the District Attorney's office and—

"[DEFENSE COUNSEL]: Objection. Hearsay.

"[VICTIM]: —that it was a good possibility—

"[DEFENSE COUNSEL]: Objection. Hearsay.

"COURT: Overruled.

"[VICTIM]: —that they would re-arrest him again, for—

"[DEFENSE COUNSEL]: Move to strike as hearsay. She has no personal knowledge.

"COURT: Overruled."

Ultimately, the jury convicted defendant of first-degree aggravated theft as charged. Defendant now appeals.

As he did at trial, defendant argues on appeal that the victim's testimony that the detective had told her that there was a good possibility that defendant would be re-arrested constituted impermissible hearsay and that it was therefore error to admit it. In response, the state argues that the detective's out-of-court statement did not constitute hearsay, because it was not offered for the truth of the matter it asserted. Rather, the state contends, it was offered for the nonhearsay purpose of explaining its effect on the listener; specifically, its effect on the victim's decision not to cooperate with the defense's request for documents. The state further contends that any error in admitting the statement was harmless. For the reasons that follow, we agree with the state that any error was harmless.

As the state points out, under OEC 801(3), "hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See State v. Clegg*, 332 Or 432, 439, 31 P3d 408 (2001) (distinguishing statements offered to prove the truth of the matter asserted from those not offered for their truth). Hearsay statements are generally excluded, subject to certain exceptions not relevant here, because they are considered to be untrustworthy. *State v. Causey*, 265 Or App 151, 154, 333 P3d 345 (2014).

However, statements that are relevant to show their effect on a listener are not considered hearsay because they are not admitted for the truth of the matter asserted. *State v. Hren*, 237 Or App 605, 607, 241 P3d 1168 (2010). The parties' dispute would require us to determine into which of those two categories the detective's out-of-court statement falls. Because, however, we conclude that any error in admitting the alleged hearsay statement was harmless, it is not necessary for us to resolve that dispute.

Turning our focus to the parties' harmlessness arguments, we note that we must affirm a conviction if there is little likelihood that an error affected the verdict, *i.e.*, the error was "harmless." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003); OEC 103(1) ("Evidential error is not presumed to be prejudicial."). In defendant's view, the admission of the detective's statement was not harmless because it suggested that he was subject to arrest for other crimes, which, in turn, substantiated the victim's testimony that defendant had committed the charged crime against her. That evidence, defendant reasons, impugned his character and made him less credible. And, given the central role that the credibility of both defendant and the victim played in this case, we should not conclude that the admission of the disputed statement was harmless. In response, the state emphasizes that the victim was permitted to testify without objection that defendant had been harassing her; in the state's view, any error was harmless because any prejudice that might result from that history would be due to the conduct itself, and not due to the victim's further testimony that the detective had told her that they *might* arrest defendant for that conduct. Therefore, the state concludes, it is unlikely that the testimony regarding the detective's statement affected the jury's determination of either witness's credibility.

We agree with the state's view as to harmlessness. The fact that the victim recounted the detective's statement that there was a "good possibility" that they would re-arrest defendant was not prejudicial. As the state observes, the victim testified—without objection—regarding conduct that she attributed to defendant and that the jury would likely have associated with the detective's re-arrest statement. That is, the victim testified that defendant had been harassing

her by filing complaints alleging that she had violated city building codes, removing items from her property, and following her around town. She further implied that defendant had keyed her car. Her reference to the detective's statement that there was a "good possibility" that they would re-arrest defendant immediately followed that testimony. As a result, the jury would have connected the two. And, given that the potential harm in allowing in evidence of a person's arrest is that the finder-of-fact may infer that the person engaged in criminal conduct justifying that arrest—and, given further, that here the jury heard direct testimony regarding such underlying conduct—the detective's "re-arrest" comment would have been no more damaging to defendant's credibility than the victim's testimony regarding the alleged actions that formed the basis for that possible arrest. We, therefore, agree with the state that there is little likelihood that the alleged hearsay statement affected the jury's credibility determination.

Moreover, the role that the ostensibly inadmissible evidence played in the state's case further supports our conclusion that any error was harmless. *State v. Perkins*, 221 Or App 136, 145, 188 P3d 482 (2008) (considering role evidence played in proponent's theory of case as part of harmlessness analysis). This is not a case where the state relied on the alleged hearsay statement in its argument to the jury. *Cf. id.* (erroneously admitted evidence not harmless when state highlighted evidence in opening statement and direct examination of witness; state's argument suggested that evidence went to the heart of state's theory of the case). The record does not suggest that the alleged hearsay statement—which came out during cross-examination by defense counsel and was not elicited by the state—was central to any aspect of the state's theory of the case. We conclude that there is little likelihood that the evidence affected the jury's verdict and that it was therefore harmless. Accordingly, we affirm.

Affirmed.