IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
ABRAHAM ROMAN,
Defendant-Appellant.

Josephine County Circuit Court
15CR09582; A160341

Pat Wolke, Judge.

Argued and submitted April 26, 2017.

Brett J. Allin, Deputy Public Defender, argued the cause for appellant. With him on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Nathan Riemersma, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before DeHoog, Presiding Judge, and James, Judge, and Haselton, Senior Judge.*

JAMES, J.

Affirmed.

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* James, J., *vice* Sercombe, S. J.

JAMES, J.

Defendant appeals from a judgment of conviction of one count of driving under the influence of intoxicants, ORS 813.010(4), one count of reckless driving, ORS 811.140, and one count of failure to perform the duties of a driver, ORS 811.700. On appeal he raises two assignments of error. We reject without discussion defendant's first assignment of error, and write only to address his second in which he claims the trial court erred in giving Uniform Criminal Jury Instruction (UCrJI) 1029, known as the "witness-false-in-part" instruction, to the jury.

The state responds that the trial court was correct to give the instruction because defendant's trial testimony can be interpreted as consciously false when viewed against his prior statements to law enforcement. Additionally, the state offers an alternative basis for affirmance: that the trial court could reasonably conclude that the physical evidence at trial was sufficient for the jury to find that defendant had consciously testified falsely. We agree with the state and affirm on the alternative basis.

The relevant factual background is largely undisputed by the parties. In the early morning hours of March 9, 2015, an ambulance crew reported that a damaged pickup truck pulled into a Shell station and two occupants fled on foot. Grants Pass Police Officer Anuschat and his partner responded and saw a truck at the station with extensive front-end damage and a tire missing. The officers contacted defendant and another man, Williams, walking about a block from the Shell station. Defendant appeared visibly intoxicated.

Upon questioning, defendant twice told the officers that he had been driving, but changed his statement and denied driving after Anuschat confronted him with the extensive damage to the truck. Later in the encounter, after defendant had been detained in a patrol car, Officer Perkins confronted defendant with his earlier statements to the other officers that he was the driver. Again, defendant denied driving.

Perkins asked to look under defendant's shirt to check for injuries or abrasions that might be consistent with a person sitting in either the passenger seat or driver seat. Defendant consented and Perkins observed "an upside down U shape abrasion on his chest," which, as Perkins testified, suggested to him "that there was no seat belt on, and when he went forward he hit the top of the steering wheel." Perkins took photographs of the mark on defendant's chest. Perkins also looked under Williams's shirt and saw a red abrasion on the top of his right collarbone, which Perkins believed was consistent with a passenger seatbelt. Williams did not have a mark on his left shoulder. Perkins later obtained breathalyzer results from defendant showing a blood alcohol concentration of 0.13 percent.

At trial, defendant testified that he was not driving. Defendant acknowledged that he had been false with the officers initially, offering as explanation:

> "[DEFENDANT]: That's been one of my problems ever since I was young, taking the blame for people when I shouldn't have, and that was my error in taking the fall, and trying to say I did. But I was incoherent, and I was heavily intoxicated. So I was more of just speaking without thinking. And I didn't really think about it, and it didn't enter my thought process until everything was already said and done."

Defendant reiterated this reasoning on cross-examination:

> "[THE PROSECUTOR]: Wh[y] didn't you just tell the police that Williams was driving? If he was in fact was driving?
>
> "[DEFENDANT]: Because for the reason that you objected to, sir. He was already going through something—
>
> "[THE PROSECUTOR]: And even—
>
> "[DEFENDANT]: —similar.
>
> "[THE PROSECUTOR]: —even though you saw you were being arrested, taken into custody?
>
> "[DEFENDANT]: Yes, I was incoherent and I was intoxicated. It didn't go through my thought process.

"[THE PROSECUTOR]: But you knew enough to tell the officers that you weren't driving though? Right?

"[DEFENDANT]: Yes, once it settled in."

At the state's request, and over defendant's objection, the trial court gave UCrJI 1029, the "witness-false-in-part" instruction. The trial court reasoned that there was "conflicting testimony as well in terms of statements that were given, and then testimony that was given in court ***." On appeal, defendant challenges the trial court's giving of the instruction, arguing that defendant's trial testimony was not inconsistent with his prior statements.[1]

UCrJI 1029 is derived from ORS 10.095(3) which provides that on "proper occasions" the jury is to be instructed "[t]hat a witness false in one part of the testimony of the witness may be distrusted in others." The trial court in this case instructed the jury using the uniform instruction, which reads:

"EVALUATING WITNESS TESTIMONY, WITNESS FALSE IN PART. Sometimes a witness may give incorrect or even inconsistent testimony. This does not necessarily constitute lying on the part of the witness. The witness's testimony may be an honest mistake or a confusion. The witness may simply forget matters or his or her memory of an event may contain honest inconsistencies or contradictions. Also different witnesses m[a]y observe or recount the same event differently.

"However if you find that a witness has intentionally lied in part in his or her testimony you may, but are not required to, distrust other portions of that witness' testimony.

"As jurors you have the sole responsibility to determine which testimony or portions of testimony you will or will not rely on in reaching your verdict."

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[1] Defendant's sole contention on appeal is that the evidence at trial did not support the instruction, *i.e.*, there were no inconsistencies from which the jury could find that any witness had consciously lied in his or her testimony. He does not contend that, even if the trial court found a sufficient factual basis for the instruction, it was not otherwise a "proper occasion" and therefore an abuse of discretion to give it.

In determining whether a case presents a "proper occasion" to give the instruction described in ORS 10.095(3), the court must "determine, from all the testimony, whether or not there has been sufficient evidence for the jury to decide that at least one witness consciously testified falsely." *Ireland v. Mitchell*, 226 Or 286, 293, 359 P2d 894 (1961) (explaining *former* ORS 17.250(3) (1961), *renumbered as* ORS 10.095 (1981)); *State v. Milnes*, 256 Or App 701, 706, 708, 301 P3d 966 (2013) (quoting *Ireland* and applying that test to determine "proper occasion" for giving UCrJI 1029).

We review a trial court's decision to give the witness-false-in-part instruction for an abuse of discretion, which, in this case, means that we review to determine "whether the factual predicate to give the instruction was met." *Milnes*, 256 Or App at 702. In this case, that means reviewing the record to determine if there was sufficient evidence that a jury could decide that defendant consciously testified falsely. If the record contains sufficient evidence, the trial court did not abuse its discretion in giving the instruction.

The state's primary argument on appeal, and the basis for giving the instruction relied upon by the trial court, is that defendant's admission at trial that he lied to the investigating officer supports the instruction. Defendant counters that we have foreclosed that line of argument in *Milnes*:

> "Although defendant told the police something different about her behavior the night of the offense than she testified to at trial, in her trial testimony, she admitted that she had lied to the police earlier. In response to questions on cross-examination, defendant explained that she had lied about Brett being in the bedroom because she did not want him to get into trouble for drinking in violation of his probation. Thus, the identified inconsistency does not tend to show that there was anything about defendant's testimony that was false—let alone consciously false—when measured against her earlier statements. Instead, defendant's testimony in this case demonstrates quite clearly that her prior statements were false, not that her testimony was false. In other words, there is nothing about defendant's statements to the police that contradicts her testimony at trial that she had lied in making those statements. In

> short, defendant's statements at the scene do not provide a basis from which the jury could find that defendant consciously testified falsely, and the court abused its discretion in giving the instruction on that basis."

Milnes, 256 Or App at 708-09 (emphases omitted).

According to defendant, this case is indistinguishable from *Milnes* and the state disagrees. However, we need not address and resolve the parties' dispute on this point, because the state proffers an alternative basis for affirmance: that defendant's trial testimony was sufficiently incompatible with the physical evidence so as to justify the court's decision to give the instruction. *See* *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (describing "right for the wrong reason" principle, which permits an appellate court to affirm a correct decision of the trial court on a basis other than one on which the trial court relied if certain predicate conditions are satisfied).[2]

The state argues that the physical evidence supports a conclusion that defendant's testimony was false. Contrary to defendant's testimony that he was not driving, evidence showed bruising on defendant consistent with a steering wheel impact. Further, evidence showed that the only other person present, Williams, had bruising consistent with a passenger side shoulder strap.

Defendant argues that physical evidence cannot be considered. Relying on *Milnes*, defendant argues that we have held that falsity may be determined only through evaluation of trial testimony to other statements. Defendant is correct that in *Milnes* we said that in determining falsity, the witness' trial testimony is judged against "(1) his or her

[2] Affirmance on alternative grounds is only appropriate where (1) the facts of record are sufficient to support the alternative basis for affirmance; (2) the trial court's ruling is consistent with the view of the evidence under the alternative basis for affirmance; and (3) the record is materially the same as that which would have been developed had the prevailing party raised the alternative basis for affirmance below. *Outdoor Media*, 331 Or at 659-60. Defendant disputes the merits of the state's proffered alternative basis, but does not argue—and we do not perceive—that the record would have developed differently, or that any of the *Outdoor Media* factors preclude this court from affirming on the alternative grounds raised on appeal.

deposition testimony, (2) another witness's trial testimony, or (3) the witness's prior, unsworn statements to investigating officials." *Milnes*, 256 Or App at 708. However, *Milnes* does not foreclose other ways falsity can be established.

The portion of *Milnes* upon which defendant relies was simply distilling the holdings of three previous cases, *Ireland*, 226 Or at 289; *State v. Long*, 106 Or App 389, 395, 807 P2d 815, *adh'd to as modified on recons*, 107 Or App 284, 812 P2d 831 (1991), *overruled on other grounds by City of Portland v. Jackson*, 111 Or App 233, 826 P2d 37 (1992), *rev'd*, 316 Or 143, 850 P2d 1093 (1993); and *State v. Weaver*, 139 Or App 207, 211, 911 P2d 969, *rev den*, 323 Or 483 (1996). Of note, in *Milnes*, this court considered a fourth potential source of falsity: internal inconsistencies in a witness's trial testimony. Ultimately, we declined to affirm on that basis—not because it was not a proper area of consideration—but because we determined in that case that the trial testimony was not, in fact, internally contradictory. *Milnes*, 256 Or App at 710 ("Her subsequent response indicating that she did not think enough time had passed for Brett to have gone out the window and therefore she 'knew' that he was hiding does not contradict her testimony that she had not thought about what she expected when she opened the door. Accordingly, we decline to affirm the trial court's ruling on the alternative basis advanced by the state.").

The operative inquiry for determining if a court should give the witness-false-in-part instruction, as expressed in *Ireland*, is whether or not there has been sufficient evidence for the jury to decide that at least one witness consciously testified falsely. 226 Or at 293. Nothing in *Ireland* limits the type of evidence that may be considered.

Here, the physical evidence was not merely inconsistent with defendant's testimony, it was directly oppositional to defendant's testimony that he was not driving. Certainly, contradictory evidence is not *conclusive* as to falsity. But contradictory evidence can lead a reasonable trial judge, having observed the "atmosphere of the trial" to conclude that the jury could find "that the defendant's testimony did not ring true." *Ireland*, 226 Or at 294.

Further, as we noted in *State v. Sharinghousen*, 279 Or App 593, 597, 379 P3d 728 (2016), "the jury could find that the testimony was *consciously* false, given its significance to the charged offense." (emphasis added). Here, whether defendant was driving was central to all of the charges against him and not a line of testimony easily subject to "honest mistake, confusion, and hazy recollection." *Ireland*, 226 Or at 293.

Because the trial court could reasonably conclude that there was sufficient evidence for the jury to decide that at least one witness consciously testified falsely, the factual predicate to give the instruction was met. Accordingly, the trial court did not abuse its discretion in giving the instruction.

Affirmed.