IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
LAWRENCE MORRIS,
Defendant-Appellant.

Umatilla County Circuit Court
CFH110141; A150850

Daniel J. Hill, Judge.

Submitted January 21, 2014.

Peter Gartlan, Chief Defender, and Susan Fair Drake, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Doug M. Petrina, Assistant Attorney General, filed the brief for respondent.

Before DeVore, Presiding Judge, and Hadlock, Chief Judge, and Duncan, Judge pro tempore.

DUNCAN, J. pro tempore.

Affirmed.

DUNCAN, J. pro tempore

Defendant challenges his conviction for delivery of cocaine "for consideration," contending that the trial court erred by submitting the "for consideration" subcategory fact to the jury during the sentencing phase of the criminal proceeding. Defendant makes two arguments: (1) the trial court lacked authority to submit the subcategory fact to the jury during the sentencing phase, because ORS 136.770, set out below, 288 Or App at 368 n 4, required the trial court to submit the subcategory fact to the jury during the trial phase of the proceeding, and (2) the submission of the subcategory fact to the jury in the sentencing phase violated defendant's statutory former jeopardy rights under ORS 131.515, set out below, 288 Or App at 375. We affirm.

I. HISTORICAL AND PROCEDURAL FACTS

Based on evidence that defendant sold a police informant cocaine and marijuana for $100 during a controlled drug buy, the state indicted defendant with unlawful delivery of cocaine for consideration, ORS 475.880(2), ORS 475.900(2)(a) (Count 1);[1] unlawful delivery of marijuana for consideration, *former* ORS 475.860(2)(a) (2011), *repealed by* Or Laws 2017, ch 21, § 126 (Count 2); and unlawful possession of cocaine, ORS 475.884 (Count 3).

The case was tried to a jury. At the outset of *voir dire*, the trial court informed the *venire* of the charges, including that the two deliveries were alleged to be "for consideration." During the trial, the police informant testified that he had paid defendant $100 for the cocaine and marijuana. Defendant testified that he had met the informant, but had not sold him drugs.

The verdict form that was initially prepared did not direct the jury to determine whether the deliveries were for consideration. Shortly before the case was submitted to the jury, the prosecutor noticed the omission with respect to the delivery of marijuana for consideration count, and the trial court corrected the verdict form to include the subcategory

[1] ORS 475.900 has been amended since defendant committed his crime; however, because those amendments do not affect our analysis, we refer to the current version of the statute in this opinion.

fact on that count. But the prosecutor did not notice the omission with respect to the delivery of cocaine for consideration count, and the trial court did not correct the verdict form on that count.

The jury returned the verdict form, finding defendant guilty of delivery of cocaine, delivery of marijuana for consideration, and possession of cocaine. Because the state was seeking to impose upward departure sentences—that is, sentences greater than the presumptive sentences under the felony sentencing guidelines—the trial court had scheduled a proceeding for the parties to litigate and the jury to determine the existence of aggravating facts, which are prerequisites for the imposition of departure sentences. The trial court told the jury to return a few days later for that proceeding.

Before the jury returned, the prosecutor realized that the verdict form that the jury had completed did not include the "for consideration" subcategory fact on the delivery of cocaine for consideration count. The fact, if found, would increase the crime seriousness level for the offense from four to six and, consequently, increase defendant's presumptive sentence under the guidelines.[2] *See* OAR 213-004-0002 (establishing 11 crime seriousness levels); ORS 475.900(2)(a) (delivery of cocaine for consideration is ranked at level 6); ORS 475.900(3)(a) (absent the existence of any subcategory facts, delivery of cocaine is ranked at level 4). The prosecutor asked the trial court for leave to present the subcategory fact to the jury, along with the aggravating facts for the departure sentences.[3]

Defendant objected, arguing that (1) the trial court did not have authority to submit the subcategory facts to the jury in the sentencing phase, and (2) delivery of cocaine is a lesser-included offense of delivery of cocaine for consideration

[2] The "for consideration" fact is a subcategory fact for delivery of cocaine. For delivery of marijuana, it affects whether the offense is a felony, misdemeanor, or violation. *Former* ORS 475.860(1), (3) (2011).

[3] The state was seeking departure sentences on the grounds that defendant had threatened actual violence during the commission of the offense, had not been deterred by prior sanctions, and had demonstrated disregard for law and rules, making successful probation unlikely. *See* OAR 213-008-0002 (identifying aggravating facts).

and, therefore, the jury's verdict on the former constituted an acquittal on the latter, and precluded the state from proceeding on the latter in the sentencing phase. The trial court allowed the state to submit the subcategory fact to the jury, and the jury returned a special verdict form finding that the delivery of cocaine was for consideration.

Defendant appeals, renewing the arguments he made in the trial court. We discuss those arguments in turn, but first pause to address the state's assertion that defendant's arguments were made too late to be preserved for appeal.

II. DISCUSSION

A. *Preservation*

The state asserts that "defendant's objection that the trial court erred by failing to submit the sentencing subcategory factor in the trial phase was untimely, because defendant waited until the sentencing phase to object." We reject that argument. At the time the offenses were submitted to the jury during the trial phase, defendant had no reason to object; the jury could and did return a valid verdict of delivery of cocaine, despite the failure to provide for a special verdict on the "for consideration" subcategory fact. It was not incumbent on defendant to request an instruction and special verdict for a greater sentence. The state, which alleged the subcategory fact, bore the burden of ensuring its submission to the jury.

B. *Authority to Submit Subcategory Fact*

Defendant's first argument on appeal is that the trial court lacked authority to submit the subcategory fact to the jury during the sentencing phase. Defendant contends that ORS 136.770 controls the submission of such facts to juries.

The legislature enacted ORS 136.760 to 136.792 following the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), and *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004). In *Apprendi*, the Court held that a defendant's jury trial right under the Sixth

Amendment to the United States Constitution includes the right to a jury trial on any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum. 530 US at 490. Thereafter, in *Blakely*, the Court clarified that the prescribed statutory maximum sentence in a sentencing guidelines scheme like Oregon's is the presumptive sentence that may be imposed as a result of the jury's verdict. *Blakely*, 542 US at 303-04. Thus, *Apprendi* and *Blakely* made clear that, under the Sixth Amendment, certain facts—including some that, in practice, had been historically found by trial courts—had to be found by juries.

After *Apprendi* and *Blakely*, the Oregon legislature enacted ORS 136.760 to 136.792 to establish a procedure for submitting an "enhancement fact" to a jury. *State v. Upton*, 339 Or 673, 677, 681, 125 P3d 713 (2005) (discussing Senate Bill 528 (2005), Or Laws 2005, ch 463). ORS 136.760 defines an "enhancement fact" as a "fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime."

The statutes governing the submission of enhancement facts establish a bifurcated procedure. Generally, enhancement facts that relate to an offense are to be submitted to the jury during the trial phase of a criminal proceeding, ORS 136.770,[4] and enhancement facts that relate

[4] ORS 136.770 provides:

"(1) When an enhancement fact relates to an offense charged in the accusatory instrument, the court shall submit the enhancement fact to the jury during the trial phase of the criminal proceeding unless the defendant:

"(a) Defers trial of the enhancement fact under subsection (4) of this section; or

"(b) Makes a written waiver of the right to a jury trial on the enhancement fact and:

"(A) Admits to the enhancement fact; or

"(B) Elects to have the enhancement fact tried to the court.

"(2) If the defendant makes the election under subsection (1)(b)(B) of this section and is found guilty during the trial phase of the criminal proceeding, the enhancement fact shall be tried during the sentencing phase of the proceeding.

"(3) If there is more than one enhancement fact relating to the offense and the defendant does not admit to all of them, the defendant shall elect to

to the defendant are to be submitted during the sentencing phase, ORS 136.773.[5] As relevant here, ORS 136.770 provides, "When an enhancement fact relates to an offense, the court shall submit the enhancement fact to the jury during the trial phase of the criminal proceeding," unless the defendant either (1) defers trial of the enhancement fact to the sentencing phase, with leave of the court, on the ground that trying it during the trial phase would unfairly prejudice the jury's verdict on an underlying offense, or (2) waives

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try to the jury or to the court all enhancement facts relating to the offense to which the defendant does not admit.

"(4) If the court finds that trying an enhancement fact relating to the offense during the trial phase of the criminal proceeding would unfairly prejudice the jury's verdict on an underlying offense, the court shall allow the defendant to defer trial of the enhancement fact to the sentencing phase of the proceeding without waiving the right to a jury trial on the enhancement fact.

"(5) If two or more defendants are being tried in the same criminal proceeding, each defendant shall make the elections required by this section."

[5] ORS 136.773 provides:

"(1) When an enhancement fact relates to the defendant, the court shall submit the enhancement fact to the jury during the sentencing phase of the criminal proceeding if the defendant is found guilty of an offense to which the enhancement fact applies unless the defendant makes a written waiver of the right to a jury trial on the enhancement fact and:

"(a) Admits to the enhancement fact; or

"(b) Elects to have the enhancement fact tried to the court.

"(2) If the defendant makes the election under subsection (1)(b) of this section and is found guilty during the trial phase of the criminal proceeding, the enhancement fact shall be tried during the sentencing phase of the proceeding.

"(3) If there is more than one enhancement fact relating to the defendant and the defendant does not admit to all of them, the defendant shall elect to try to the jury or to the court all enhancement facts relating to the defendant to which the defendant does not admit.

"(4) If two or more defendants are being tried in the same criminal proceeding, each defendant shall make the elections required by this section.

"(5) Unless the defendant waives the right to a jury trial on enhancement facts related to the defendant, the sentencing phase shall be conducted in the trial court before the jury following a finding of guilt by the jury. If for any reason a juror is unable to perform the function of a juror, the court shall dismiss the juror from the sentencing phase and draw the name of one of the alternate jurors. The alternate juror then becomes a member of the jury for the sentencing phase notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt. The court may allow the substitution of an alternate juror only if the jury has not begun to deliberate on the issue of an enhancement fact."

the right to a jury trial on the fact. If an enhancement fact is tried during the sentencing phase, the jury (or court, if the defendant waives the right to a jury trial on the fact) may consider all of the evidence received during the trial phase. ORS 136.780.

Based on ORS 136.770, defendant argues that the "for consideration" subcategory fact is an "enhancement fact," and because it relates to an offense, it must be submitted to the jury during the trial phase, unless the defendant defers or waives a jury finding on the fact. Defendant further argues that, because he did not defer or waive a jury finding on the "for consideration" subcategory fact, the trial court violated ORS 136.770 by submitting the fact to the jury during the sentencing phase.

In response, the state makes three arguments. First, the state argues that ORS 136.770 does not apply because ORS 132.557 governs the submission of subcategory facts to juries.[6] That statute, which predates ORS 136.770, provides that, if the state intends to rely on a subcategory fact to enhance a crime for sentencing purposes, the state must plead the subcategory fact in the indictment and prove it to the jury beyond a reasonable doubt. ORS 132.557(1) and (2). It also provides that "the jury shall return a special verdict of 'yes' or 'no' on each subcategory fact submitted." ORS 132.557(2). The state argues that ORS 132.557 is inconsistent with ORS 136.760 to 136.792 and that, because ORS 132.557 is more specific, it controls. *See* ORS 174.020(2) ("when a general and particular provision are inconsistent," the latter controls); *State v. Guzek*, 322 Or 245, 268, 906 P2d 222 (1995) ("[I]f the two statutes cannot be harmonized, 'the

[6] ORS 132.557 provides:

"(1) When a person is charged with a crime committed on or after November 1, 1989, that includes subcategories under the rules of the Oregon Criminal Justice Commission, the state is required to plead specially in the indictment, in addition to the elements of the crime, any subcategory fact on which the state intends to rely to enhance the crime for sentencing purposes. The state shall plead the elements and subcategory facts in a single count. Nothing in this subsection precludes the pleading of alternative theories.

"(2) The state must prove each subcategory fact beyond a reasonable doubt and the jury shall return a special verdict of 'yes' or 'no' on each subcategory fact submitted."

specific statute is considered an exception to the general statute.'" (Quoting *State v. Pearson*, 250 Or 54, 58, 440 P2d 229 (1968).)).

Second, the state argues that, even if ORS 136.770 applies, it does not preclude the late submission of a subcategory fact in cases like this. According to the state, "As a matter of legislative intent, nothing in the bifurcation procedure in ORS 136.770 and ORS 136.773 expressly or implicitly forbids a trial court from rectifying an oversight in submitting an issue that ordinarily would have been submitted earlier." The state contends that the bifurcation procedure is intended to protect a defendant in the guilt phase from a jury hearing prejudicial facts related to sentencing and "[t]hat concern is absent when—as here—the issue is whether the trial court may submit a matter to the jury in the sentencing phase, which is after guilt has already been established." (Emphasis omitted.) And, the state further argues, even if ORS 136.770 did not authorize the late submission of the "for consideration" subcategory fact, a court has general authority under ORS 136.030 and ORS 136.320 to submit facts to a jury. *See Upton*, 339 Or at 681 ("ORS 136.030 and ORS 136.320 *** authorize[e] a trial court to submit all questions of fact to a jury[.]").

Third, the state argues that, even if ORS 136.770 applies and limits a court's authority to submit subcategory facts to a jury, any error in this case was harmless because the "for consideration" subcategory fact was pleaded in the indictment and proved to the jury, which ultimately returned a special verdict on it. The state asserts that the fact was "fully litigated and defendant claims no prejudice in that regard." Moreover, the state contends, defendant was not prejudiced by the submission of the fact to the jury in the sentencing phase because "[b]ifurcation 'is a procedural safeguard to insulate the jury from unduly prejudicial evidence[,]'" (quoting *State v. Pinnell*, 311 Or 98, 107, 806 P2d 110 (1991)), and, in this case, the alleged error "is that the trial court submitted the matter to the jury *too late*[,]" which "is not an error that could have tainted the jury's guilt determination." (Emphasis in original.)

Because it is dispositive, we turn to the state's harmless error argument. We must affirm a judgment notwithstanding

error if the error was harmless. Or Const, Art VII (Amended), § 3 (an appellate court must affirm if it is "of [the] opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, *** notwithstanding any error committed during the trial"); ORS 138.230 (in criminal cases, "[a]fter hearing the appeal, the court shall give judgment, without regard to *** technical errors, defects or exceptions which do not affect the substantial rights of the parties"); *see also* ORS 131.035 ("No departure from the form or mode prescribed by law, error or mistake in any criminal *** proceeding renders it invalid, unless it has prejudiced the defendant in respect to a substantial right.").

A court's failure to comply with sentencing procedures "does not require reversal and remand for resentencing unless the error 'prejudiced the defendant in respect to a substantial right.'" *State v. Dawson*, 252 Or App 85, 90, 284 P3d 1272 (2012) (quoting ORS 131.035). To determine whether a "substantial right" of the defendant has been affected or prejudiced, we examine "the record in light of the nature and purposes of the statutory right." *Id.*

Examining the record in light of the purposes of ORS 136.770, we conclude that any error in the submission of the "for consideration" subcategory fact to the jury during the sentencing phase was harmless. As discussed, the procedures in ORS 136.760 to 136.792, were enacted to effectuate a criminal defendant's Sixth Amendment jury trial right, as required by *Apprendi* and *Blakely*. In this case, as the state notes, defendant has not identified how the trial court's alleged error could have undermined that purpose or affected his jury trial rights. Other than the timing, the trial court followed all of the procedural requirements in ORS 136.760 to 136.792 in submitting the "for consideration" subcategory fact to the jury. Because it was pleaded in the indictment, defendant had notice that the state intended to rely on the fact as a sentence enhancement fact. ORS 136.790. The fact was fully litigated by the parties—the state argued, in opening and closing, that defendant had sold cocaine to the informant "for consideration," and both the state and defendant put on evidence relevant to the fact. As required by

the United States Constitution and ORS 136.780 and ORS 136.785, the fact was submitted to and determined by the jury, and the jury was instructed to consider the evidence at trial and that it was required to find the fact beyond a reasonable doubt.

As discussed, ORS 136.770 provides a defendant with the right to request a deferral of the trial of an enhancement fact relating to the offense to the sentencing phase. ORS 136.770(1)(a) and (4). The purpose of that bifurcation is to avoid presenting prejudicial evidence to the jury when it determines guilt. *Upton*, 339 Or at 683; *see also* ORS 136.770(4) ("If the court finds that trying an enhancement fact relating to the offense during the trial phase would unfairly prejudice the jury's verdict on an underlying offense, the court shall allow the defendant to defer trial of the enhancement fact to the sentencing phase ***.") Defendant has not argued that submitting the "for consideration" subcategory fact to the jury during the sentencing phase undermined that purpose. And, as discussed above, the jury properly heard evidence at trial that defendant received consideration for the marijuana and cocaine and considered that evidence when it determined defendant's guilt for unlawful delivery of marijuana for consideration in the trial phase. Given that the jury had already found that the delivery of marijuana was for consideration, we conclude that there is little likelihood that the late submission of the "for consideration" subcategory fact on the delivery of cocaine count affected the jury's finding regarding that fact. *See State v. Moen*, 309 Or 45, 51-53, 786 P2d 111 (1990) (any error in presenting penalty-phase evidence to the grand jury was harmless, because the grand jury had returned an indictment against defendant before it heard any penalty evidence and returned a second indictment, and where the indictment was not submitted to the jury during the guilt phase); *Pinnell*, 311 Or at 108-09 (error in allowing impermissible *voir dire* involving penalty phase issue was harmless under the particular circumstances of the case).

Finally, defendant has not shown that he suffered any prejudice as a result of the timing of the jury's verdict on the "for consideration" subcategory fact. In some instances,

we have held that corrective procedures involving the jury come too late. For example, a court cannot recall the jury to correct an irregular or ambiguous verdict by redeliberating on or clarifying the verdict after the verdict has been received and the jury is "no longer under the court's control." *State v. Vann*, 158 Or App 65, 73-74, 973 P2d 354 (1999). However, in those cases, our concern "was premised on the practical reality that once jurors are released from the court's control and are allowed to leave the courtroom, they may discuss the case openly with anyone, thereby tainting any future deliberations." *State v. Vogh*, 179 Or App 585, 590 n 3, 41 P3d 421 (2002) (internal quotation marks omitted). The record reveals that, in this case, the jury remained under the trial court's "control" between the return of the guilty verdict and the sentencing proceeding. After the court received the guilty verdict, the court dismissed the jury but instructed it to return in a few days for sentencing. Then the court specifically instructed them not to discuss the case with anyone or do any kind of outside research:

> "Okay. You've reached your verdict on this, however, as far as the facts goes and everything else that you have otherwise considered here today. I would like you to return with a fairly pristine mind, as far as not having researched any of these issues, thought about them in that sense, tried not to watch CSI too many times between now and then.
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> "I'd like to—although it's not facts, but you're still going to be considering other sentencing facts and you'll hear some additional evidence, probably receive some additional evidence, and you'll hear argument. I liken this to a pristine snow slope. Freshly snowed, not quite like the muck that we have outside, and doesn't have a bunch of ski tracks on it, so your mind hopefully when you come back Friday morning, will not have a whole bunch of things that muddle it up, that you've thought about this that much or anything like that. Just start from now, skip over till Friday morning.
>
> "We'll start afresh Friday morning with what we need to do. But otherwise, you don't need to think about this, please don't research it. All those rules and instructions I previously gave you still apply, okay? So no texting, no chatting, and stuff like that. So all the instructions previously still apply."

Because the jury remained under the trial court's control in the interim between the guilt phase and sentencing phase, defendant was not prejudiced by a risk that the jury's determination had been tainted by any outside influences.

In sum, even assuming that the trial court lacked authority to submit the "for consideration" subcategory fact to the jury when it did, defendant has failed to demonstrate, as required for reversal, that the error was prejudicial.

C. *Former Jeopardy*

As mentioned, in addition to arguing that the trial court lacked authority to submit the "for consideration" subcategory fact to the jury during the sentencing phase, defendant argues that, by doing so, the trial court violated his rights under ORS 131.515, Oregon's former jeopardy statute. ORS 131.515 provides, in part:

> "(1) No person shall be prosecuted twice for the same offense.
>
> "*****
>
> "(3) If a person is prosecuted for an offense consisting of different degrees, the conviction or acquittal resulting therefrom is a bar to a later prosecution for the same offense, for any inferior degree of the offense, for an attempt to commit the offense or for an offense necessarily included therein.
>
> "(4) A finding of guilty of a lesser included offense on any count is an acquittal of the greater inclusive offense only as to that count."

Thus, if a person has been prosecuted for an "offense," the person may not be prosecuted later for the same offense or for any lesser-included or greater-inclusive offenses. Defendant argues that, for the purposes of ORS 131.515, subcategory facts are "elements" that create greater-inclusive "offenses." Therefore, according to defendant, delivery of cocaine is a lesser-included offense of delivery of cocaine for consideration. Because a finding of guilt on a lesser-included offense constitutes an acquittal on the greater-inclusive offense, defendant argues that, in this case, the jury's verdict in the trial phase finding him guilty of delivery of cocaine

constituted an acquittal of delivery of cocaine for consideration and, therefore, barred the "prosecution" of that offense in the sentencing phase.

Defendant's statutory former jeopardy argument fails for two reasons. First, contrary to defendant's premise, subcategory facts are not elements of an offense for statutory former jeopardy purposes. ORS 131.515 prohibits successive prosecutions for an "offense," and the term "offense," as used in the statute, "refers only to the conduct that comprises the statutorily defined felony or misdemeanor." *State v. Sawatzky*, 339 Or 689, 694, 125 P3d 722 (2005).[7] Therefore, the state is not prosecuting a defendant a second time for an "offense" (or a greater-inclusive "offense") for the purposes of ORS 131.515 when, after the trial phase of a criminal proceeding, it submits an aggravating or enhancing fact to the jury. *Id*.

Second, the sentencing phase of a criminal proceeding is not a successive prosecution; it is part of a single prosecution. *See id.* at 695 (former jeopardy provisions did not preclude the state from presenting aggravating facts to the jury for the first time during a sentencing proceeding on remand, because the sentencing proceeding was not a second prosecution); *see also State v. Montez*, 309 Or 564, 604, 789 P2d 1352 (1990) ("A penalty phase hearing is merely a continuation of the same trial and not a separate or collateral proceeding threatening a new or different sanction."). Thus, defendant was not subjected to successive prosecutions.

III. CONCLUSION

In sum, even assuming that, as defendant asserts, the trial court lacked authority to submit the "for consideration" subcategory fact to the jury during the sentencing phase, defendant has failed to establish that the error was prejudicial. In addition, the submission of the subcategory

[7] However, as the Supreme Court held in *Sawatzky*, aggravating or enhancing facts are elements for the purposes of the Sixth Amendment jury trial right and the state and federal former jeopardy protections under Article I, section 12, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. 339 Or at 696.

fact did not violate defendant's statutory former jeopardy rights.

Affirmed.