IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOSHUA VINCENT WALSH,
Defendant-Appellant.

Multnomah County Circuit Court
120733317; A155201

Kathleen M. Dailey, Judge.

Submitted August 23, 2016.

Peter Gartlan, Chief Defender, and Eric Johansen, Deputy Public Defender, Office of Public Defense Services, filed the opening brief for appellant. John Vincent Walsh filed the reply and supplemental briefs *pro se*.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Susan G. Howe, Assistant Attorney General, filed the answering brief for respondent. On the supplemental brief were Ellen F. Rosenblum, Attorney General, Paul L. Smith, Deputy Solicitor General, and Susan G. Howe, Assistant Attorney General.

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

DEHOOG, P. J.

Convictions on Counts 7, 8, 9, 10, and 11 reversed; remanded for resentencing; otherwise affirmed.

DEHOOG, P. J.

Defendant appeals a judgment convicting him of first-degree robbery (Count 4), ORS 164.415; first-degree burglary (Count 5), ORS 164.225; second-degree robbery (Count 6), ORS 164.405; fleeing or attempting to elude a police officer (Count 7), ORS 811.540; reckless driving (Count 8), ORS 811.140; unlawful possession of heroin (Count 9), ORS 475.854; and recklessly endangering another person (Counts 10 and 11), ORS 163.195.[1] Those charges arose out of a series of connected events, but the indictment did not reflect any such connection. On appeal, defendant contends that, because the indictment failed to demonstrate on its face that the charges were properly joined, the trial court erred when it disallowed his demurrer. For the reasons that follow, we agree that the trial court erred and that, as to several counts, its error was not harmless. Accordingly, we reverse on Counts 7, 8, 9, 10, and 11, remand for resentencing, and otherwise affirm.[2]

For context, we begin by reviewing the relevant statutory and decisional law, together with the specific allegations of the indictment, noting that, as we "have repeatedly held ***, a court 'may consider only the information alleged in the indictment'" when ruling on a demurrer. *State v. Waters*, 273 Or App 665, 667, 359 P3d 526 (2015) (quoting *State v. Cervantes*, 232 Or App 567, 573, 223 P3d 425 (2009)). We review the denial of a demurrer for errors of law. *State v. Marks*, 286 Or App 775, 780, 400 P3d 951 (2017).

Under ORS 135.630(2), a defendant may demur to the indictment "when it appears upon the face thereof" that the indictment "does not substantially conform to the requirements of ORS 132.510 to ORS 132.560[.]" One such requirement arises from ORS 132.560(1)(b), which allows a single charging instrument to allege multiple offenses

> "if the offenses charged are alleged to have been committed by the same person or persons and are:

[1] Counts 1 to 3 of the indictment involved only a codefendant who pleaded guilty prior to defendant's trial. The trial court acquitted defendant of a second count of first-degree robbery (Count 12).

[2] We reject without discussion the remaining assignments of error in defendant's opening and supplemental briefs.

"(A) Of the same or similar character;

"(B) Based on the same act or transaction; or

"(C) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

The net effect of ORS 135.630 and ORS 132.560 is that an indictment must state the basis for the joinder of the crimes it charges, "whether by alleging the basis for joinder in the language of the joinder statute or by alleging facts sufficient to establish compliance with the joinder statute." *State v. Poston*, 277 Or App 137, 144-45, 370 P3d 904 (2016), *adh'd to on recons*, 285 Or App 750, 399 P3d 488, *rev den*, 361 Or 886 (2017). Language that shows only that charges *could meet* one of the bases for joinder in ORS 132.560(1)(b) is insufficient; the indictment "must show *on its face* that the requirements of ORS 132.560 *have been met*." *Id.* at 143 (emphases in original).

Here, the indictment alleged, in relevant part:

"[Count 4, Robbery in the First Degree]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, while in the course of committing and attempting to commit theft, with the intent of preventing and overcoming resistance to defendant's taking of property and retention of the property immediately after the taking, and being armed with a deadly weapon, use and threaten the immediate use of physical force upon another person[.]

"[Count 5, Burglary in the First Degree]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, did unlawfully and knowingly enter and remain in a dwelling located at [a specific address], Portland, Oregon, with the intent to commit the crime of Theft therein[.]

"The state further alleges that the above-described offense was committed in an occupied dwelling.

"[Count 6, Robbery in the Second Degree]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, did unlawfully and

knowingly, while in the course of committing and attempting to commit theft, with the intent of preventing and overcoming resistance to defendant's taking of property and retention of the property immediately after the taking, and being aided by another person actually present, use and threaten the immediate use of physical force upon another person[.]

"[Count 7, Felony Fleeing or Attempting to Elude a Police Officer]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, being an operator of a motor vehicle upon a public highway and premises open to the public, and having been given a visible and audible signal to stop by a police officer who was in uniform and prominently displaying the police officer's badge of office and operating a vehicle appropriately marked showing it to be an official police vehicle, did unlawfully and knowingly, while still in the vehicle, flee and attempt to elude a pursuing police officer[.]

"[Count 8, Reckless Driving]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, did unlawfully and recklessly drive a vehicle upon a public highway and premises open to the public, in a manner that endangered the safety of persons or property[.]

"[Count 9, Unlawful Possession of Heroin]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, did unlawfully and intentionally and knowingly possess HEROIN[.]

"The state further alleges that defendant was in possession of five grams or more of a mixture or substance containing a detectable amount of HEROIN[.]

"[Count 10, Recklessly Endangering Another Person]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, did unlawfully and recklessly create a substantial risk of serious physical injury to another person[.]

"[Count 11, Recklessly Endangering Another Person]

"[Defendant], on or about July 26, 2012, in the County of Multnomah, State of Oregon, did unlawfully and recklessly

> create a substantial risk of serious physical injury to another person[.]"

(Uppercase in original.)

Defendant demurred to the indictment, arguing that it should be dismissed because it failed, on its face, "to allege that counts 7-11 are from the same act or transaction or part of a common scheme or plan as counts 4-6." Defendant separately argued that Count 9, which alleged the unlawful possession of heroin, had "absolutely nothing to do with the Robbery counts or the driving offenses alleged." The trial court disallowed the demurrer and, following a bench trial, found defendant guilty of Counts 4 through 11.

The indictment does not allege joinder in the language of ORS 132.560. Nor does the indictment on its face "alleg[e] facts sufficient to establish compliance with the joinder statute," *Poston*, 277 Or App at 145, by showing that the charges are "[o]f the same or similar character," "[b]ased on the same act or transaction," or "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." ORS 132.560 (1)(b)(A) - (C). We agree with defendant that, as to the charge of unlawful possession of heroin, Count 9, nothing other than the alleged date and county of the offense suggests any similarity or connection to the other counts. Those allegations do not satisfy the joinder statute. *See State v. Miller*, 287 Or App 135, 149, 401 P3d 229 (2017) (mere fact that offenses occurred on same date and in same county is insufficient basis for joinder). The same is true of the so-called "driving offenses," Counts 7, 8, 10, and 11.[3] There is nothing on the face of the indictment that indicates that defendant committed the driving offenses while fleeing from the scene where the conduct in Counts 4 through 6 took place. *See id.* (driving-related offense not properly joined with attempted murder and assault charges). Nor does the indictment allege any other facts showing the required relationship under ORS 132.560(1)(b)(A) to (C). Thus, the trial court erred in

[3] Although Counts 10 and 11 do not allege driving, it is evident from the record that those charges arose along with the charges of fleeing and reckless driving alleged in Counts 7 and 8. Accordingly, and for ease of reading, we refer to Counts 7, 8, 10, and 11 collectively as the "driving offenses."

disallowing defendant's demurrer, because "it appear[ed] upon the face [of the indictment] *** that it [did] not substantially conform to the requirements of *** 132.560[.]" ORS 135.630.

Our conclusion that the trial court erred does not complete our inquiry. That is because, "[u]nder Article VII (Amended), section 3, of the Oregon Constitution, we must affirm a conviction if there is little likelihood that [an] error affected the verdict." *Poston*, 277 Or App at 145 (second alteration in original; internal quotation marks omitted). Here, the question "whether improper joinder of charges affected the verdict depends on whether joinder led to the admission of evidence that would not have been admissible but for the joinder *** and, if so, whether that evidence affected the verdict on those charges." *Id.* That analysis requires us to examine the erroneously joined charges as though they had been tried separately and to determine whether "[a]ll of the evidence that was presented at defendant's trial would have been admissible" at each separate trial. *Id.* at 146. As we have explained,

> "[o]ur analysis in *Poston* demonstrates that evidence presented at trial on erroneously joined charges would be 'admissible,' as we used that term in *Poston*, in a hypothetical trial on each charge or properly joined group of charges, only when (1) each item of evidence that was actually presented could have been admitted in the hypothetical trial under a legally correct evidentiary analysis and (2) it is implausible that, had the defendant objected under OEC 403 or raised some other objection invoking the trial court's discretion, the trial court would have excluded that evidence in the hypothetical trial."

State v. Clardy, 286 Or App 745, 772-73, 401 P3d 1188, *adh'd to as modified on recons*, 288 Or App 163, ___ P3d ___ (2017). If each item of evidence admitted at defendant's trial would have, in a *Poston* sense, been "admissible" at a separate trial of any improperly joined offenses, then the erroneous denial of defendant's demurrer would be harmless with respect to those offenses.

Furthermore, even if evidence presented at defendant's trial would not have been "admissible" under *Poston*, the trial court's error would nonetheless be harmless if there

remained little likelihood that the inadmissible evidence would have affected the verdict in a separate trial. *Poston*, 277 Or App at 145; *Clardy*, 286 Or App at 773 n 8. In making that assessment, we recognize that, by relying on multitiered assumptions about hypothetical trials, we encounter increasing difficulty in determining the likely effect of evidence and, accordingly, in concluding whether, as a matter of law, there is little likelihood that the evidence would have affected an imagined verdict. Nonetheless, Article VII (Amended), section 3, and our case law require us to undertake that assessment.

Here, the state's evidence was that, on the date of the charges, defendant and two other individuals had entered the house of an acquaintance, Weinberger, who at the time used and sold heroin that he kept at home. Upon entering, defendant and the other men encountered a woman, Green. Defendant took items out of the home while a codefendant held Green at gunpoint. When Green tried to call the police, the codefendant responded by punching her in the face. Later, after the men had driven off, Green called 9-1-1. In her call, she described the men who had entered Weinberger's home, the car they had driven, and one of the items that defendant had taken. Shortly thereafter, a patrol officer spotted a car matching Green's description and activated his overhead lights. Rather than immediately pulling over, the car accelerated and turned off the road into a cul-de-sac before eventually coming to a stop. Defendant was the lone occupant of the car, which contained various items that had been taken from Weinberger's home. After arresting defendant, an officer found a baggie of heroin in his pocket.

In addition to that evidence, the court heard evidence in support of Count 12, the first-degree robbery charge on which it acquitted defendant. That charge involved allegations that, earlier in the day of the above burglary, defendant and a codefendant had forcibly stolen Weinberger's wallet and cell phone. Weinberger and another witness testified that, in the course of that robbery, defendant had attempted to "tase" Weinberger and that the codefendant had held a gun to Weinberger's head and forced him to empty out his pockets.

We begin our harmless-error analysis with respect to Counts 4 through 6, the robbery and burglary charges.[4] In a hypothetical trial involving only those charges, evidence of defendant's "driving offenses" would have been admissible evidence of flight, relevant as circumstantial evidence of defendant's state of mind. *State v. Minchue*, 173 Or App 520, 524, 24 P3d 386 (2001). Moreover, we view it as unlikely that the trial court would have excluded, on discretionary grounds, that evidence of defendant's flight from arrest, given that it followed so shortly after defendant had left the scene of an alleged robbery. *See Miller*, 287 Or App at 150 (considering it "implausible" that the court would have excluded relevant evidence of flight). It is less evident that defendant's possession of heroin would have been admissible as that term is used in *Poston*. That assessment is unnecessary, however, because, as we explain below, there is little likelihood that that erroneous admission of the heroin evidence would affect the verdict in a separate trial on the burglary and robbery charges.

The question of harmlessness does not depend on our view of the weight of the evidence. Nonetheless, we often conclude that erroneously admitted evidence is harmless when the evidence of guilt is overwhelming, and when the challenged evidence is "merely cumulative" of, rather than "qualitatively different" from, other, properly admitted evidence. *State v. Stewart*, 270 Or App 333, 340-41, 347 P3d 1060, *rev den*, 357 Or 743 (2015). Here, if the heroin evidence were to be offered as circumstantial evidence that defendant had been in Weinberger's home, it would be merely cumulative of the evidence that an officer found, in defendant's car, property that was much more clearly associated with that crime scene. Moreover, the state produced ample direct evidence of defendant's involvement, such as Green's testimony identifying defendant as one of the men who had robbed her, and a codefendant's admission at trial that he and defendant had committed the burglary and robbery together. Accordingly, the court's error in denying the demurrer was harmless as to the burglary and robbery charges, Counts

[4] Based on defendant's argument to the trial court, we consider a single hypothetical trial for Counts 4 through 6, and Count 12. Below, we do the same with regard to the "driving offenses," Counts 7, 8, 10, and 11.

4, 5, and 6, and we affirm defendant's convictions on those counts.

With regard to the remaining charges, however, we conclude that the erroneous denial of defendant's demurrer was not harmless. As noted, the "driving offenses" included allegations of fleeing or attempting to elude, reckless driving, and recklessly endangering another person. In a separate trial on those offenses, evidence that defendant had recently committed several serious crimes would be relevant to show that he had a motive to avoid contact with the police and had therefore "*knowingly* fle[d] or attempt[ed] to elude a pursuing police officer." ORS 811.540(1)(b)(A) (emphasis added). It is plausible, however, that a trial court would exclude at least some of that evidence as unduly prejudicial under OEC 403, given that it would have, at most, little relevance to the charges of reckless driving and reckless endangerment. That is especially true given that the details of defendant's other crimes, including his attempt to "tase" Weinberger and his codefendant's violent conduct, could be viewed by a court as inflammatory and having very little probative value regarding defendant's motive to flee or anything else concerning the driving offenses. Further, because the only other evidence of defendant's alleged driving offenses was the testimony of the patrol officer, we cannot conclude that those other, minimally probative and prejudicial details would have had "little likelihood" of affecting the verdict in a trial on only those offenses. Thus, the court's error was not harmless as to Counts 7, 8, 10, and 11.

Our analysis is much the same for Count 9, the unlawful possession of heroin charge. Even if evidence of defendant's other criminal conduct would have been relevant to prove some element of that charge—which is by no means clear—it is certainly plausible that the trial court would have excluded some or all of that evidence under OEC 403, especially the more inflammatory details noted above. *See Miller*, 287 Or App at 151 (where the defendant was arrested in possession of a gun, evidence that the defendant had recently fired a gun at a group of people would not have been "necessary" to prove that the defendant knowingly possessed the gun). And, given that the only other evidence that defendant knowingly possessed the heroin was that it was

found in his pocket, we cannot conclude that the admission of those prejudicial details would have had "little likelihood" of affecting the verdict in a trial solely for possession of heroin. *See id.* The court's error was therefore not harmless on Count 9.

Convictions on Counts 7, 8, 9, 10, and 11 reversed; remanded for resentencing; otherwise affirmed.