IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
*Plaintiff-Respondent,*

*v.*

MARTIN LUTHER HARTLEY,
*Defendant-Appellant.*

Multnomah County Circuit Court
131236011; A157701

Karin Johana Immergut, Judge.

Argued and submitted September 6, 2016.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Jamie Contreras, Assistant Attorney General, argued the cause for respondent. On the brief were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Michael S. Shin, Assistant Attorney General.

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

DEHOOG, P. J.

Reversed and remanded.

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* Egan, J., *vice* Flynn, J. pro tempore; Aoyagi, J., *vice* Sercombe, S. J.

**DEHOOG, P. J.**

A jury found defendant guilty of second-degree assault with a firearm and unlawful use of a weapon based on allegations that he shot the victim with a rifle. On appeal, defendant raises eight assignments of error. We discuss only defendant's second and third assignments, in which he asserts that the trial court erred in allowing police officers to testify that the victim's girlfriend told them that defendant had shot the victim, because those statements are inadmissible hearsay. Because we conclude that the trial court erred in admitting that testimony and that the error was not harmless, we reverse and remand.[1]

To place defendant's evidentiary objection in context, we start by recounting the testimony presented at trial. Defendant, the victim, and the victim's girlfriend, Chanthavong, are friends who have known each other for several years. Defendant lived in a small camper trailer located behind another individual's house. One evening, Chanthavong and the victim arranged through text messages to visit defendant and his girlfriend. According to Chanthavong, someone else may have been outside the trailer when they arrived. Due in part to the effects of methamphetamine, however, she did not recall focusing on anyone else who may have been present.

Upon entering the trailer, the victim and Chanthavong sat down, while defendant's girlfriend stood nearby and defendant remained standing in the open doorway. While standing there, defendant confronted the victim about Christmas presents that had been taken from a car. As the two of them spoke, Chanthavong heard something that to her sounded like a shot from a BB gun. She did not immediately recognize what had happened, but realized that the victim was hurt when he bent over and grabbed her arm, saying "ow, ow," and then began to hop on one leg.

At trial, Chanthavong made it clear that she "didn't see actually who shot [the victim], like who actually pulled the trigger." She explained that her focus had been

[1] Given our resolution of defendant's second and third assignments of error, it is not necessary to consider his remaining assignments.

on defendant's girlfriend and that she, therefore, had only heard the shot.

The victim immediately left the trailer with Chanthavong, who helped him get to their car. Before reaching the car, Chanthavong saw defendant carrying a gun. He appeared angry and was telling them to leave. Chanthavong drove off with the victim and stopped at a nearby gas station, where she saw blood on the victim's shin and attempted to wrap his wound with her scarf. Chanthavong then drove the victim to a hospital, where staff contacted the police.

Officer Klauzer of the Portland Police Bureau interviewed Chanthavong at the hospital. Officer Asheim examined the victim's wound before it was closed. In his opinion, the wound was consistent with a small-caliber bullet and was not self-inflicted. Based on information that Chanthavong provided at the hospital, Officers Asheim and Billard drove Chanthavong back to defendant's residence. After Chanthavong confirmed that the shooting had taken place there, Asheim and Billard asked her whether she could identify anyone else at the scene. Those officers testified that they had conducted a "field show up" with defendant at his residence, and that Chanthavong had identified him as the person who shot the victim.[2]

The state prosecuted defendant for second-degree assault with a firearm, ORS 163.175, and unlawful use of a weapon, ORS 166.220. A jury found defendant guilty of both offenses, and the trial court entered a judgment of conviction.[3]

On appeal from that judgment, defendant assigns error to the trial court's ruling allowing the two officers to testify about Chanthavong's identification of defendant as the shooter. Because our analysis turns on the specifics of that identification, we describe that exchange in some detail. Asheim and Billard conducted the field show-up on the night of the shooting. Asheim testified that, upon being brought back to defendant's residence, Chanthavong had

[2] The details of that identification are described below.

[3] The trial court merged Count 2 (unlawful use of a weapon) with Count 1 (second-degree assault) at sentencing.

"identified the house and the driveway *** the trailer in the back. All of that." After being asked what other identifications Chanthavong had made, Asheim replied: "She did make—we did a field show up with [defendant] and she did identify him as the person that sho[t] [the victim]." Defense counsel objected to Chanthavong's statement as inadmissible hearsay, but the trial court overruled that objection.

Billard described the identification in further detail. He explained that they had followed standard procedure for show-up identifications. They told Chanthavong that there was a person at the scene that they wanted her to see, that the "person may or may not be involved in the incident, and [that] it was *** important for her to take her time and be sure [and] not feel any pressure to make an identification if she wasn't sure." According to Billard, Chanthavong "immediately" made an identification, stating, "Yes. That's Marty.[4] He's the one who shot [the victim]." This time, defense counsel did not object to the witness's testimony that Chanthavong had identified defendant as the shooter.

Defendant contends that the trial court erred in allowing Asheim and Billard to testify about Chanthavong's statement, because her out-of-court assertion that defendant was the one who shot her boyfriend constituted inadmissible hearsay. Defendant acknowledges that, properly admitted under OEC 801(4)(a)(C), a statement of identification is not hearsay.[5] He argues, however, that Chanthavong's statement that defendant "shot" the victim is *not* a statement of identification under OEC 801(4)(a)(C). The state responds that defendant failed to preserve his claim of error, that the trial court did not err, and that, if the court did err, its error was harmless. We address those contentions in turn.

We begin with the state's argument that defendant failed to preserve his claim of error. The state contends that,

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[4] Martin, or "Marty," is defendant's first name.

[5] OEC 801(4)(a)(C) provides that a statement is not hearsay if:

"(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

"*****

"(C) One of identification of a person made after perceiving the person."

in context, defendant's objection to Asheim's testimony was insufficient to preserve his hearsay challenge; the state further notes that defendant failed to object to Billard's testimony altogether. We do not agree that defendant's objection to Asheim's testimony was insufficient to preserve a challenge to that evidence. As noted, defense counsel specifically objected to Asheim's testimony on hearsay grounds.[6] And Billard testified regarding the same matter right after Asheim. Because the trial court's intervening explanation of why it overruled counsel's objection equally applied to Billard's testimony, a second objection would have been futile. Under those circumstances, defendant was not required to make the same objection a second time to preserve his challenge. *See State v. Walker*, 350 Or 540, 550, 258 P3d 1228 (2011) ("Once a court has ruled, a party is generally not obligated to renew his or her contentions in order to preserve them for the purpose of appeal."). Accordingly, defendant preserved his hearsay arguments for appeal.

Turning to the merits, a trial court's determination that a statement is not hearsay presents a question of law that we review for legal error. *State v. Henderson-Laird*, 280 Or App 107, 115, 380 P3d 1066, *rev den*, 360 Or 465 (2016). An out-of-court statement is typically hearsay if it is offered to prove the truth of the matter it asserts. OEC 801(3). Hearsay is inadmissible unless an exception to the rule against hearsay applies. OEC 802. Certain out-of-court statements, however, are not hearsay. As relevant here, under OEC 801(4)(a)(C), an out-of-court statement is not hearsay if:

> "(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> "* * * * *

[6] When the trial court later explained outside the presence of the jury that it had overruled defendant's objection because Chanthavong's statement to Asheim had been a statement of identification, defense counsel argued that the requirements of a different exception—one allowing for impeachment with prior inconsistent statements—had not been satisfied. However, we understand counsel's statement that it "goes beyond the issue" in response to the trial court's explanation as an assertion that Chanthavong's statement exceeded the bounds of a statement of identification and that it therefore constituted inadmissible hearsay. That is the same argument that defendant advances on appeal.

> "(C) One of identification of a person made after perceiving the person."

That rule, which expressly excludes out-of-court identifications from the definition of hearsay, resulted from the common view that in-court identifications tended to be unsatisfactory and inconclusive when compared to those made earlier and under less suggestive conditions. Legislative Commentary to OEC 801, *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 801.02[2], 712 (6th ed 2013). But in enacting that exception to the general rule, the legislature warned that it is narrow in scope, stating:

> "The subparagraph should not be read literally. It is aimed at situations where the declarant is shown a person or photograph of a person and makes an identification as a result of that showing ('that is the person who did it'). It is not aimed at situations where, after an event, the declarant simply makes a statement which identifies the person involved ('X did it')."

*Id*. at 713. We must consider the trial court's reliance on the exception in light of that history and the legislature's express limitations on its scope. Viewed in that light, we conclude that the exception under OEC 801(4)(a)(C) does not apply to Chanthavong's statement that defendant was "the one who shot" the victim.

We recognize that the procedures leading up to Chanthavong's statement bore certain hallmarks of a traditional show-up or line-up identification. The officers did not ask Chanthavong whether defendant was the shooter; they asked her whether he was "involved in the incident." Her identification of defendant occurred after the officers brought her to him, and shortly after the incident in which she had perceived him. Also, because the officers admonished Chanthavong "to take her time and be sure [and] not feel any pressure to make an identification," her statement at the scene could be viewed as having been made under less suggestive conditions than an in-court identification. But, even though those circumstances may reflect the rationale behind the hearsay exception for statements of identification, they do not render Chanthavong's statement accusing defendant of being the shooter admissible under OEC 801(4)(a)(C).

As the legislature explained, OEC 801(4)(a)(C) is not to be read literally. Thus, while the exception applies to a statement of identification "made after perceiving the person," OEC 801(4)(a)(C), that sequence alone is insufficient to render the statement nonhearsay. Instead, to qualify as nonhearsay, the identification *must result from*, and not merely *follow*, the declarant's perception of the person. Legislative Commentary to OEC 801, *reprinted in* Kirkpatrick, *Oregon Evidence* § 801.02[2] at 713 (explaining that the exception applies when the declarant is able to make an identification "as a result of" being "shown a person or photograph of a person").

Here, Chanthavong's identification of defendant as the shooter followed, as a temporal matter, her perception of him during the field show-up. Her identification was not, however, causally related to—or the "result of"—perceiving him at that time; instead, the evidence indisputably established that her ability to identify defendant resulted from her acquaintance with him rather than her perception of him. As a result, there is no practical difference between her statement to the officers—"That's Marty. He's the one who shot [the victim]"—and a more direct accusation, such as, "My friend Marty shot my boyfriend." *See id.* (stating that exception under OEC 801(4)(a)(C) "is not aimed at situations where, after an event, the declarant simply makes a statement which identifies the person involved ('X did it')"). The latter statement, if made out of court, would indisputably be hearsay; the statement Chanthavong actually made is analytically the same. That fact strongly suggests that it is not within the intended scope of OEC 801(4)(a)(C).

Moreover, by both its terms and the legislature's explanatory text, OEC 801(4)(a)(C) is intended to allow into evidence statements of *identification*, not accusations of guilt. Only the former implicate the concerns that gave rise to the rule: that in-court identifications are inconclusive, unsatisfactory, and potentially suggestive. Here, given Chanthavong's prior acquaintance with defendant, there was no risk that her in-court identification of him as the shooter—had she made one—would simply be viewed as the product of the fact that defendant was the one on trial and in the courtroom.

In this case, Chanthavong's statements were not offered to identify defendant. Rather, the statements were offered as substantive evidence that defendant shot the victim. As such, those statements do not fit within the narrow scope of OEC 801(4)(a)(C), and the trial court therefore erred in admitting them.

Having concluded that the trial court erred, we must determine whether that error was harmless. "We will affirm a judgment of conviction notwithstanding the erroneous admission of evidence if there is little likelihood that the admission of the evidence affected the verdict." *State v. Sewell*, 222 Or App 423, 428, 193 P3d 1046 (2008), *adh'd to on recons*, 225 Or App 296, 201 P3d 918, *rev den*, 346 Or 258 (2009). When evaluating that likelihood, we consider the erroneously admitted evidence in the context of the other evidence on the same issue. *Id.* at 429. Because of the state's emphasis on the statements of identification and how it used the statements in closing argument, we cannot conclude that there is little likelihood that the admission of the statements affected the verdict.

During its closing, the state argued:

> "And I want to start out by pointing out the one thing that you heard directly twice from two officers that heard it that came directly from Ms. Chanthavong yesterday, and it was the words, 'That's Marty. He's the one who shot [the victim].' Clear as day."

It reiterated:

> "The direct evidence that you have in this case is Ms. Chanthavong clearly stating that ***, 'That's Marty. He's the one who shot [the victim].'"

These excerpts demonstrate that the state did not use Chanthavong's statements merely as evidence of identification. Rather, the state relied on her accusation of defendant as direct evidence of his guilt. And, given that at trial, in contrast to her earlier statements to the police, Chanthavong's testimony was that she had not seen who shot the victim, her out-of-court statement had even greater potential to influence the jury's decision. Accordingly, we cannot conclude that there is little likelihood that the admission of the

statements affected the verdict; the error was therefore not harmless.

Reversed and remanded.