FILED: March 31, 2021

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

WILLIAM JACK PARKERSON,
Defendant-Appellant.

Klamath County Circuit Court
1401933CR

A163629

David G. Hoppe, Judge.

Argued and submitted on December 03, 2019.

Stephanie J. Hortsch, Deputy Public Defender, argued the cause for appellant. Also on the opening and a supplemental brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services. William Jack Parkerson filed a supplemental brief *pro se*.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and Powers, Judge, and Sercombe, Senior Judge.

LAGESEN, P. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[ ] Costs allowed, payable by
[ ] Costs allowed, to abide the outcome on remand, payable by

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Appendix A

LAGESEN, P. J.

At defendant's jury trial for attempted aggravated murder with a firearm and first-degree assault with a firearm, Pascoe, who drove defendant away from the scene of the crime, testified that defendant twice shot a police officer. Defendant requested that the jury be instructed both that Pascoe was an accomplice witness as a matter of law--because Pascoe had been indicted for the same crimes as defendant--and that Pascoe's testimony should be viewed with distrust by the jury because of that accomplice status. The trial court denied the request. The jury returned a verdict of guilty on both counts. On appeal, defendant assigns error to, among other things, the court's (1) failure to issue the accomplice instructions, (2) failure to instruct the jury on the firearm element of each of defendant's offenses, and (3) instruction that a nonunanimous jury verdict could support a conviction of the charged crimes. We affirm.

According to the evidence presented at trial, Officer W was on patrol in Klamath County when he observed a vehicle occupied by three people and missing a front license plate. In the vehicle, Pascoe sat in the driver's seat, defendant sat in the front passenger seat, and another passenger, Holmgren, sat in back. W pulled Pascoe over for not having a front license plate. Holmgren got out of the stopped vehicle and walked past W; he seemed familiar to W, but W could not place him. W turned back to face the vehicle and, in his words, "I see this, there's a black barrel, set of eyes, there's a bang. And my face is on fire." Defendant shot W in the face from a distance of eight to 12 feet. W's gun was holstered, so, instead of shooting back, he ran down a nearby

alleyway. Defendant shot him once more in the back, then got back into the vehicle. Pascoe drove defendant away.

The police picked up Holmgren at a nearby Big Lots shortly after the incident. The police apprehended defendant and Pascoe the next day. Before they were arrested, they went to the home of one of defendant's acquaintances. Defendant told the acquaintance's brother, DeMartini, that he had "blasted a cop in the face and that they needed a place to go." Defendant said that he had used a .45 Hi-Point in the shooting, which he had buried in the mud in the Klamath Marsh.

Defendant was indicted by a grand jury for one count of attempted aggravated murder with a firearm, ORS 163.095, and one count of assault in the first degree with a firearm, ORS 163.185. Pascoe was indicted on the same day by the same grand jury for the same crimes, as well as two counts of criminal conspiracy, ORS 161.450; ORS 163.185: one for each count that defendant was charged with. The state later dismissed the charges against Pascoe without prejudice for the stated reason that it was "in the best interest of the parties."

Pascoe was one of the witnesses against defendant at his trial. She remembered that, earlier on the day of the shooting, she, defendant, and Holmgren were hanging out at a friend's house. Speaking to Holmgren, defendant said that he would not stop for the police. When asked at trial what Pascoe understood that statement to mean, she testified, "I didn't really understand it to mean anything to me because I was the driver of my vehicle, and if I'm getting stopped, I'm stopping." However, Pascoe knew

that defendant had a handgun tucked in his waist. The three of them got into Pascoe's vehicle and left the house. Shortly thereafter, W pulled Pascoe over. As soon as Pascoe stopped, Holmgren got out of the car. A few moments after that, defendant got out of the car. At that point, according to Pascoe,

> "everything happened really fast. I heard a shot as I was reaching into my glove box to get my insurance and registration because I knew that's what they ask for, and as I was reaching I heard this shot, and so of course I turned to look and--excuse me. And when I looked back, I saw [defendant] standing and pointing like this and I heard another shot, and I turned back around really fast because I didn't want him to know that I saw him, and--and I heard the officer screaming. And when I turned to the other way like this, I saw him holding his face and he had his other arm out like this and he was just yelling, screaming like this awful scream and was running away, like away, you know, like to the other side of the street. And I slunk down in my seat a little because at the time it looked like the officer like maybe had a weapon pointed this way and I didn't want to get shot, you know, and so I slunk down in my seat, and at the time, at that time [defendant] came back and got in my car and he told me to drive."

Pascoe testified that she had not been expecting defendant to shoot anyone, and that she thought it was "a possibility, absolutely" that defendant was going to kill her when he got back in the car. When asked why she drove away, she responded, "Who wouldn't dri--I mean, I didn't feel like I had a choice. I mean, I'm going to do what he says, he has a gun, he just shot someone."

Defendant's theory at trial was that the jury should have reasonable doubt that he was the shooter, positing that Holmgren was a possible alternative suspect. Defendant requested that the trial court instruct the jury that Pascoe was an accomplice as

a matter of law and that accomplice witness testimony should be viewed with distrust.[1] Defendant argued that the indictment against Pascoe for the same crimes was enough to warrant a matter-of-law accomplice instruction. The court declined to issue the instruction, concluding that the indictment alone was not enough and that the other evidence at trial did not establish that Pascoe was an accomplice as a matter of law. The jury unanimously found defendant guilty on both counts and found that defendant was a dangerous offender under ORS 161.725.

Defendant appeals. In his combined first three assignments of error, he

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[1] Defendant requested UCrJI 1056, UCrJI 1057, and UCrJI 1058(2). UCrJI 1056 provides:

> "The testimony of an accomplice in and of itself is not sufficient to support a conviction. There must be in addition some evidence other than the testimony of an accomplice that tends to connect the defendant with the commission of the crime.
>
> "This other evidence, or corroboration, need not be sufficient by itself to support a conviction but it must tend to show something more than just that a crime was committed. It must also connect or tend to connect the defendant with the commission of the crime."

UCrJI 1057 provides:

> "If you determine that a witness was an accomplice, then you should view that witness's testimony with distrust."

UCrJI 1058(2) provides:

> "You are instructed as a matter of law that [accomplice witness] is an accomplice in the commission of the crime of [*crime with which defendant is charged*]."

(Second brackets and italics in original.)

contends that the trial court erred in denying his request to deliver the accomplice jury instructions, particularly the accomplice-as-a-matter-of-law instruction, UCrJI 1058(2). As he did below, defendant argues that the "fact that a grand jury had found probable cause to indict Pascoe for the two offenses at issue necessarily proves that there was sufficient evidence to charge Pascoe with the crimes with which defendant was charged." The state responds that evidence must be presented *at trial* to support an accomplice-as-a-matter-of-law determination and no such evidence that Pascoe was an accomplice was presented.

The accomplice instructions at issue here are statutory instructions that must be delivered by a trial court "on all proper occasions." ORS 10.095. Specifically, ORS 10.095(4) requires that, "on all proper occasions," the jury be instructed that "the testimony of an accomplice ought to be viewed with distrust." We review for legal error "[w]hether an occasion is a 'proper' one for the delivery of one of the statutory instructions." *State v. Nelson*, 309 Or App 1, 6, ___ P3d ___ (2021). Our task here is to determine whether the trial court was required to conclude that, because Pascoe was indicted for the same crimes as defendant, she was an accomplice as a matter of law.

ORS 136.440(2) provides, in part, that "an 'accomplice' means a witness in a criminal action who, according to the evidence adduced in the action, is criminally liable for the conduct of the defendant under ORS 161.155 and 161.165." A "criminal action" is "an action at law by means of which a person is accused of the commission of a violation, misdemeanor or felony." ORS 131.005(6). The Supreme Court has explained

under what circumstances a witness is an accomplice and when it is appropriate for a trial court to issue an accomplice-as-a-matter-of-law instruction:

> "[A] person is an 'accomplice' for purposes of the corroboration requirement if 'the evidence is legally sufficient to justify an indictment of or information against a witness as an accomplice to the offense charged against the defendant, not necessarily to convict the witness of it.'"

State v. Oatney, 335 Or 276, 284, 66 P3d 475 (2003), *cert den*, 540 US 1151 (2004) (quoting *State v. Hull*, 286 Or 511, 516, 595 P2d 1240 (1979)).

> "If there is no dispute regarding whether a witness is an accomplice witness--that is, sufficient evidence exists to charge, but not necessarily to convict, the witness of the crimes with which the defendant is charged--then the trial court may determine, as a matter of law, that the witness is an accomplice. If, however, the facts regarding whether a witness is an accomplice are in dispute, then the jury decides, and the *defendant* must prove that the witness is an accomplice in order to require corroboration."

Id. at 284-85 (citing *Hull*, 286 Or at 515-17 (emphasis in original; internal citation and footnote omitted)). Thus, a witness is an accomplice as a matter of law if "sufficient evidence exists to charge" the witness with the same crimes that the defendant is charged with. *Id.* at 284.

In *State v. Torres*, 207 Or App 355, 142 P3d 99 (2006), we concluded that an indictment charging a witness with the crimes for which the defendant is charged conclusively establishes a witness's accomplice status. Similar to the case here, the defendant in *Torres* assigned error to the trial court's failure to conclude that one of the witnesses at trial, Haight, was an accomplice as a matter of law. *Id.* at 359. In fact, Haight had been charged, tried, and acquitted for several of the same crimes as the defendant. The state argued that the acquittal meant that Haight was not an accomplice.

Id. We summarized the applicable rule, "[I]f there is sufficient evidence to charge a witness of the crime with which a defendant is charged, then the trial court 'may determine, as a matter of law, that the witness is an accomplice.'" *Id.* at 359-60 (quoting *Oatney*, 335 Or at 284). Then, we concluded that, because Haight was charged with some of the same crimes as the defendant, he was an accomplice as a matter of law as to those counts on which both were charged:

> "As pertinent here, the indictment demonstrates that Haight was charged as a codefendant in Counts 9, 10, 15, 42, and 43. Accordingly, he was an accomplice as a matter of law for the purpose of those counts * * *."

Id. at 363.

On the issue of whether being charged for the same crimes makes a witness an accomplice witness as a matter of law, *Torres* is not materially distinguishable from this case. Like Haight, Pascoe was charged with the same crimes as defendant. And, like Haight's acquittal before defendant's trial, the dismissal of Pascoe's charges by mutual agreement with the state does not change the fact that a grand jury (the same one that indicted defendant) found probable cause to indict Pascoe for defendant's crimes.[2] That defeats the state's contention that a defendant cannot rely on an indictment to prove accomplice-witness status and, instead, must prove at trial the underlying facts necessary

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[2] We allow that, if the state had proved that the indictment was dismissed for lack of probable cause or otherwise demonstrated that it lacked probable cause for the indictment it sought and obtained against Pascoe, we might have reached a different conclusion. But here, Pascoe and the state agreed to dismissal, and the state did not demonstrate that the case it made to the grand jury was insufficient to support the indictment it obtained.

to warrant an accomplice-as-a-matter-of-law instruction. The trial court therefore erred in declining to issue the accomplice instructions.

That leaves the question of whether the trial court's error was harmless. We must affirm despite trial court error if there is little likelihood that the error affected the verdict. *State v. Payne*, 366 Or 588, 609, 468 P3d 445 (2020). "To make that determination, 'the court considers the instructions as a whole and in the context of the evidence and record at trial, including the parties' theories of the case with respect to the various charges and defenses at issue.'" *Id.* (quoting *State v. Ashkins*, 357 Or 642, 660, 357 P3d 490 (2015)). We conclude here that there is little likelihood that the error affected the verdict.

As an initial matter, under Oregon law, the accomplice-witness instructions serve to highlight that an accomplice might be shifting blame from themselves to the defendant: "[T]he purpose of the instructions addressing accomplice testimony, including the instruction[s] at issue here, is to address the concern that 'criminals may falsely accuse others of their misdeeds in order to minimize their own culpability.'" *Nelson*, 309 Or App at 7 (quoting *State v. Simson*, 308 Or 102, 108-10, 775 P2d 837 (1989)). On these particular facts, that blame-shifting dynamic, to the extent present, was not a particularly strong one. The issue for the jury was the identity of the undisputedly male shooter, so Pascoe's testimony identifying defendant as the shooter did not operate to shift blame from her to him, minimizing the need for the instruction to address potential blame shifting.

Given the nature of the evidence and arguments in this case, the instructions, even if given, would have had no tendency to affect the jury's finding that defendant was the shooter. W testified that he was facing defendant when defendant shot him from a distance of eight to 12 feet, and he specifically identified defendant in court as the shooter. Holmgren's sworn video deposition, which was shown to the jury, implicated defendant and was consistent with both Pascoe's and W's testimonies on the major details of the shooting. Although testimony about which door of Pascoe's car the shooter emerged from differed, multiple witnesses confirmed that, after shooting W, the male shooter got back into Pascoe's vehicle rather than walking away. As the state pointed out, undisputed evidence established that Holmgren, not defendant, was the one who walked away and was apprehended quickly at a nearby Big Lots. Finally, as noted earlier, there was evidence of defendant's own admissions to being the shooter. DeMartini testified that defendant told him that he had "blasted a cop in the face" using a .45 Hi-Point that he had buried in the mud in the marsh. On this record, there is no reason to think that there is any likelihood that the jury would have reasonable doubt about defendant's identity as the shooter, had it been supplied the accomplice-witness instructions with respect to Pascoe.

Defendant also assigns as plain error the trial court's failure to instruct the jury that it needed to find whether defendant used or threatened the use of a firearm during the commission of each of defendant's offenses. Although that error is, indeed, a plain one, it does not provide grounds for reversal because it is harmless. As we have

erred in admitting evidence that defendant's psychologist had diagnosed defendant with antisocial personality disorder, a contention we reject without written discussion. Additionally, in a *pro se* supplemental brief, defendant challenges (1) the denial of his motion for judgment of acquittal; (2) the court's refusal to suppress Holmgren's identification of defendant; and (3) the admission into evidence of Holmgren's deposition. He additionally claims that the prosecution failed to disclose favorable evidence to the defense, in violation of due process. Having considered those contentions, we conclude that defendant has not demonstrated that they provide grounds for reversal on appeal.

Affirmed.

explained, "One circumstance in which we will not and cannot exercise our discretion to correct a plain error is when that error is harmless, that is, when there is little likelihood that the error affected the jury's verdict." *State v. Kerne*, 289 Or App 345, 349, 410 P3d 369 (2017), *rev den*, 363 Or 119 (2018). Here, notwithstanding the lack of the instruction, with respect to each offense, the jury was instructed on the aggravating factor that defendant used a weapon in the commission of the offenses, and the jury found that aggravating factor present. Because the only weapon that the jury could have found defendant used was a gun--the record would not allow for a finding of any other weapon--the jury necessarily found that he committed the offenses with a firearm. Thus, defendant was not harmed by the omission of the instructions on these particular facts. *See id.* at 349-50 (although court's instruction erroneously omitted element of offense with respect to some counts, error was harmless where, in view of how the case was tried, jury's verdict on other counts demonstrated that jury made the necessary findings to convict).

A few more matters require resolution. Defendant assigns error to the trial court's instruction to the jury that it could return a nonunanimous verdict. The jury's verdicts on Counts 1 and 2 were unanimous. That claim of error is therefore foreclosed by *State v. Flores Ramos*, 367 Or 292, 294, 334, 478 P3d 515 (2020) (holding that error in instructing the jury that it could return nonunanimous guilty verdicts did not require reversal of convictions rendered by unanimous guilty verdicts), and *State v. Kincheloe*, 367 Or 335, 339, 478 P3d 507 (2020) (same). Defendant also contends that the court

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF KLAMATH

State of Oregon, Plaintiff	)	
	)	Case No.: 1401933CR
vs.	)	
	)	**JUDGMENT**
WILLIAM JACK PARKERSON, Defendant	)	Case File Date. 08/28/2014 District Attorney File #: 14-2524

DEFENDANT

True Name: WILLIAM JACK PARKERSON
Date Of Birth: 05/21/1984
Fingerprint Control No (FPN): JKLA114021940

Sex: Male

HEARING

Proceeding Date: 11/02/2016
Judge: David G. Hoppe
Court Reporter: ALD, .

Defendant appeared in person and was in custody. The court determined that the defendant was indigent for purposes of court-appointed counsel, and the court appointed counsel for the defendant. The defendant was represented by Attorney(s) MICHAEL P BERTHOLF, OSB Number 044642. Plaintiff appeared by and through Attorney(s) DAVID A SCHUTT, OSB Number 954085, Attorney(s) Alison G M Martin, OSB Number 136300.

COUNT(S)

It is adjudged that the defendant has been convicted on the following count(s):

Count 1 : Attempt to Commit Murder - Aggravated Murder - Firearm

Count number 1, Attempt to Commit Murder - Aggravated Murder - Firearm, 161.405(2)(a), Felony Class A, committed on or about 08/27/2014.

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 1 is 10 and the Criminal History Classification (CHC) is A.

This sentence is pursuant to the following special factors:

- Sentence per ORS 161.610
- Sentence per ORS 137.700

Appendix B

- Sentence per ORS 161.725
  Sentence per ORS 161.737

The court finds substantial and compelling reason for an Upward Durational Departure, as stated on the record. This departure is pursuant to the following aggravating or mitigating factor(s):

- Permanent Injury
- Persistent Involvement Unrelated to Current Crime
- Dangerous Offender

Incarceration

Defendant is sentenced to the custody of Oregon Dept of Corrections, for a period of 360 month(s). Defendant is remanded to the custody of the Klamath Sheriff for transportation to the Oregon Dept of Corrections for service of this sentence. The breakdown of the sentence is as follows:

60 months minimum at the Department of Corrections under ORS 161.610.

120 months minimum at the Department of Corrections under ORS 137.700.

130 months at the Department of Corrections is the determinate sentence of a gridblock 10A. Upward durational departure to 240 months at the Department of Corrections on the determinate sentence.

360 months at the Department of Corrections under the dangerous offender statute. Defendant may receive credit for time served.

The Defendant may not be considered by the executing or releasing authority for any form of Reduction in Sentence, Conditional or Supervised Release Program, Temporary Leave From Custody, Work Release. The Defendant may not be considered for release on post-prison supervision under ORS 421.508(4) upon successful completion of an alternative incarceration program.

It is ordered that the Defendant serve a minimum of 240 month(s).

Statutory Provisions

Defendant is ordered to submit blood or buccal sample and thumbprint pursuant to ORS 137.076.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Compensatory Fine/Restitution:

Restitution is ordered to be paid to the court and disbursed to the payee(s) named below.

Payee	Not To Exceed	Amount
SAIF Corporation		$212,725.87
Total		$212,725.87

Count 2 : Assault in the First Degree - Firearm

Count number 2, Assault in the First Degree - Firearm, 163.185, Felony Class A, committed on or about 08/27/2014.

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 2 is 9 and the Criminal History Classification (CHC) is A.

This sentence is pursuant to the following special factors:

- Sentence per ORS 161.610
- Sentence per ORS 137.700
- Sentence per ORS 161.725
  Sentence per ORS 161.737

The court finds substantial and compelling reason for an Upward Durational Departure, as stated on the record. This departure is pursuant to the following aggravating or mitigating factor(s):

- Permanent Injury
- Persistent Involvement Unrelated to Current Crime
- Dangerous Offender

Incarceration

Defendant is sentenced to the custody of Oregon Dept of Corrections, for a period of 360 month(s). Defendant is remanded to the custody of the Klamath Sheriff for transportation to the Oregon Dept of Corrections for service of this sentence. Defendant may receive credit for time served. The breakdown of the sentence is as follows:

60 months minimum at the Department of Corrections under ORS 161.610.

90 months minimum at the Department of Corrections under ORS 137.700.

72 months at the Department of Corrections is the determinate sentence of a gridblock 9A. Upward durational departure to 144 months at the Department of Corrections on the determinate sentence.

360 months at the Department of Corrections under the dangerous offender statute.

The Defendant may not be considered by the executing or releasing authority for any form of Reduction in Sentence,

Appendix B

Conditional or Supervised Release Program, Temporary Leave From Custody, Work Release. The Defendant may not be considered for release on post-prison supervision under ORS 421.508(4) upon successful completion of an alternative incarceration program.

It is ordered that the Defendant serve a minimum of 144 month(s). This sentence shall be concurrent with all previously imposed sentences.

Statutory Provisions

Defendant is ordered to submit blood or buccal sample and thumbprint pursuant to ORS 137.076.

If convicted of a felony or a crime involving domestic violence, you may lose the right to buy, sell, transport, receive, or possess a firearm, ammunition, or other weapons in both personal and professional endeavors pursuant to ORS 166.250, ORS 166.291, ORS 166.300, and/or 18 USC 922(g).

MONEY AWARD INCLUDING RESTITUTION

Judgment Creditor: State of Oregon
Judgment Debtor: WILLIAM JACK PARKERSON

Restitution

Payee	Amount
SAIF Corporation	$212,725.87

Payees are to be paid as ordered under Monetary Terms.

Defendant is ordered to pay the following monetary totals, including restitution or compensatory fine amounts stated above, which are listed in the Money Award portion of this document:

Type	Amount Owed
Restitution	$212,725.87
Total	$212,725.87

The court may increase the total amount owed by adding collection fees and other assessments. These fees and assessments may be added without further notice to the defendant and without further court order.

Subject to amendment of a judgment under ORS 137.107, money required to be paid as a condition of probation remains payable after revocation of probation only if the amount is included in the money award portion of the judgment document, even if the amount is referred to in other parts of the judgment document.

Any financial obligation(s) for conviction(s) of a violation, which is included in the Money Award, creates a judgment lien.

Payment Schedule

Payment of the fines, fees, assessments, and/or attorney's fees noted in this and any subsequent Money Award shall be scheduled by the clerk of the court pursuant to ORS 161.675.

Payable to:

Klamath County Circuit Court
316 Main St
Klamath Falls, Oregon 97601
P: 541-883-5503
F: http://courts.oregon.gov/klamath

Dated the 2nd day of November, 20 16

Signed: David G. Hoppe
David G. Hoppe

Appendix B

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

WILLIAM JACK PARKERSON,
Defendant-Appellant,
Petitioner on Review.

Court of Appeals
A163629

S069167

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
3/24/2022 11:07 AM

c: Stephanie Hortsch
Timothy A Sylwester

tnb

Appendix [redacted] C

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. WILLIAM JACK PARKERSON, Defendant-Appellant.	Klamath County Circuit Court Case No. 1401933CR CA A163629

APPELLANT'S PETITION FOR RECONSIDERATION

Appeal from the Judgment of the Circuit Court
for Klamath County
Honorable David G. Hoppe, Judge

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
STEPHANIE J. HORTSCH #983893
Senior Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
stephanie.j.hortsch@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
TIMOTHY A. SYLWESTER #813914
Senior Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
timothy.sylwester@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

Appendix D

APPELLANT'S PETITION FOR RECONSIDERATION

Defendant-appellant respectfully asks this court to reconsider its decision in *State v. Parkerson*, 310 Or App 271, 484 P3d 356 (2021), because (1) the court erred in applying the harmless error analysis and (2) this court did not address defendant's argument that the verdict on one of the aggravating factors was not unanimous. ORAP 6.25(1)(b), (e). A copy of this court's decision is attached.

I. Introduction

Defendant was convicted of attempted aggravated murder with a firearm and first-degree assault with a firearm. On appeal he argued, *inter alia*, that the trial court erred in instructing the jury that Pascoe was an accomplice witness as a matter of law.

This court found that the trial court erred in declining to provide the jury with the accomplice instructions. *Parkerson*, 310 Or App at 278. However, this court found that there was little likelihood that the error affected the verdict. *Id.* at 278-79.

This court first noted that the purpose of the accomplice instructions "is to address the concern that criminals may falsely accuse others of their misdeeds in order to minimize their own culpability." *Id.* (internal quotations and citations omitted). This court found that the "blame-shifting dynamic" in the present case was not particularly strong, because it was not in dispute that the shooter was male; thus, Pascoe's testimony did not "operate to shift blame from her to him[.]" *Id.* at 278-79.

Second, this court found that the instructions "would have no tendency to affect the jury's finding that defendant was the shooter" for three reasons:

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(1) The officer, W, identified defendant, in court, as the shooter.

(2) Holmgren implicated defendant in his deposition, and his account of the incident was generally consistent with that of Pascoe and W.

(3) DeMartini testified that defendant had admitted that he was the shooter.

Id. at 279.

This court also addressed defendant's argument that the trial court had erred in instructing the jury that it's verdicts need not be unanimous, finding that because the jury's verdicts on Counts 1 and 2 were unanimous, defendant's claim is foreclosed by recent decisions. *Id.* at 280. But this court did not address defendant's argument that one of the aggravating factors (persistent involvement), which was used to set one of the minimum incarceration terms, was based on an 11-1 verdict.

For the reasons that follow, defendant asks this court to reconsider its conclusion that the trial court's error in failing to provide the jury with the accomplice instructions had little likelihood to affect the verdict, and to address the nonunanimous jury verdict on one of the aggravating factors in the first instance.

II. The trial court's error in failing to instruct the jury that it should distrust Pascoe's testimony, because she was an accomplice as a matter of law, was not harmless.

A. Pascoe, who had been charged with conspiring with defendant to commit the offenses, provided testimony that operated to shift blame from herself and entirely onto defendant.

As noted, this court found that because it was not in dispute that the shooter was male, the need for the instruction was minimal because Pascoe's testimony did not serve to shift blame from herself onto another *as the shooter*. *Id.* at 278. But Pascoe's interest in shifting blame to defendant was not limited to the question of whether she faced

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culpability as the shooter; her culpability extended beyond that. She was charged with the same two offenses as defendant, as an accomplice, and she was also charged with two additional conspiracy counts. Thus, Pascoe was motivated to not only point to defendant as the shooter, but also, to minimize her involvement; she cast herself as an unfortunate bystander and defendant as the sole perpetrator of the offense. By shifting the blame entirely onto defendant, and away from her, Pascoe stood to escape culpability for her own misdeeds. Thus, the circumstances of this case fit squarely within the purpose of the accomplice testimony jury instructions.

An instruction that explicitly informs the jury that a witness's testimony "should" be viewed with distrust is a powerful instruction. Pascoe had a strong motivation to shift all blame from herself onto another. And in exchange for her testimony, the state dismissed her charges shortly before trial after she had spent 19 months in custody. Had the jury been informed that it should distrust Pascoe's testimony, it cannot be said that the trial court's error had little likelihood of affecting the verdict.

It is of no matter that defendant's defense was that Holmgren was the shooter, and that Pascoe pointed the finger at defendant as the shooter. Holmgren had died prior to trial, the state had charged defendant with the offenses, and the state alleged that Pascoe had aided and conspired with defendant in committing the offenses. To avoid culpability, it was in Pascoe's best interest to provide the state with whatever assistance it needed in obtaining a conviction against another. And because it was defendant on trial, not Holmgren, the jury could believe that Pascoe concluded that the best avenue to avoiding

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culpability herself was to shift blame onto defendant. Thus, the need for the instruction was strong and likely affected the verdict.

B. The error was not otherwise harmless.

Having found that there was little need for the instruction because Pascoe's testimony did not serve to shift blame from herself to defendant as the shooter, this court found the error harmless in light of the other evidence. *Parkerson*, 310 Or App at 279. Defendant discusses the three areas of the record addressed by this court, below.

1. W's in-court identification of defendant as the shooter

This court noted that "W testified that he was facing defendant when defendant shot him from a distance of eight to 12 feet, and he specifically identified defendant in court as the shooter." *Parkerson*, 310 Or App at 279. What this court failed to note, however, is that W was unable to identify the shooter following the incident. It was not until he was on the witness stand, facing defendant sitting at counsel table, that he was able to identify defendant as the shooter. Tr 327.

A witness may make an in-court identification of a defendant not based on his or her recollection of observations made at the time of the incident, but instead based on the suggestiveness of an in-court identification process when the defendant is sitting at the defense counsel table. *See e.g., U.S. v. Domina*, 784 F2d 1361, 1368 (9th Cir. 1986). Additionally, when an incident is extremely stressful, witnesses may be less able to remember details of the perpetrator. *State v. Lawson/James*, 352 Or 724, 769, 291 P3d 673 (2012) (high levels of stress can have a negative effect on a witness's ability to make an accurate identification). Here, defendant and Holmgren were similar in appearance—

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they were both bald men who were wearing shorts and no shirt. Tr 318-19, 483-84, 637. Given the stressful nature of the event and the suggestiveness of the in-court identification, the jury may not have placed much weight on W's identification of defendant as the shooter.

2. Holmgren's sworn video deposition

This court noted that Holmgren's sworn deposition was largely consistent with Pascoe's and W's testimony regarding the major details of the incident. *Parkerson*, 310 Or App at 279. But Holmgren was initially a suspect himself, so the jury was free to discount his deposition testimony as self-serving. And of course, the jury should have been instructed that it should distrust Pascoe's testimony. Although witnesses had testified that the shooter got back into the car, at least one witness testified that the shooter had exited from the driver's door (when it is not in dispute that Pascoe was the driver). As just discussed, defendant and Holmgren were similar in appearance, and eyewitness testimony is not infallible, particularly observations made in the throes of a highly stressful event.

3. DeMartini's testimony that defendant had made admissions

Finally, this court noted that defendant had made admissions to DeMartini. *Parkerson*, 310 Or App at 279. But the jury had been instructed that it may consider a witness's prior convictions in evaluating that witness's testimony, including the bearing it may have on their credibility. Tr 800-02. DeMartini is a convicted felon, Tr 728, so the jury may have found him not credible. And because DeMartini had assisted defendant and Pascoe after the shooting by transporting them to another location, Tr 727, the jury

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may have concluded that DeMartini had an interest in assisting the state rather than risk facing his own charges.

4. In sum, the record supports that the jury had reason to doubt that defendant was the shooter, and the trial court's failure to instruct the jury that Pascoe's testimony should be viewed with distrust was harmful.

For any number of the reasons discussed above, had the jury been instructed that Pascoe was an accomplice as a matter of law and that her testimony should be viewed with distrust, this court cannot say that there was little likelihood that the error affected the verdict.

III. This court did not address defendant's argument that the trial court erred in utilizing an aggravating factor that resulted from an 11-1 verdict.

In a supplemental brief, defendant assigned error to the trial court's instructions to the jury, given at both the guilt and sentencing phases of the trial, that its verdicts need not be unanimous. In its decision, this court noted that the guilty verdicts were unanimous and, thus, were foreclosed by controlling caselaw. *Parkerson*, 310 Or App at 280. But this court did not address the persistent involvement aggravating factor that was found by an 11-1 verdict.

In setting the minimum term of imprisonment, the trial court relied on two aggravating factors: persistent involvement and permanent injury. But the jury had returned an 11-1 verdict on the persistent involvement aggravating factor. Tr 1177. Although the permanent injury factor was found by a unanimous verdict, and although the trial court appears to have indicated at the sentencing hearing that either factor would be sufficient to support the departure, Tr 1204, this court should remand the case for

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resentencing. First, it will allow the trial court to clarify whether the permanent injury factor was sufficient, on its own, to support the departure; and second, it will ensure that the judgment accurately reflects the basis of the upward durational departure sentence that serves as the minimum term of imprisonment. Defendant is facing a lengthy prison sentence, and he will certainly pursue all post-judgment avenues available to him. Thus, it is necessary that the judgment accurately reflect the basis for the sentence.

IV. Conclusion

For the reasons addressed above, defendant respectfully asks this court to grant reconsideration and find that the trial court's error in failing to instruct the jury that it should view Pascoe's testimony with distrust was not harmless and remand for a new trial. Alternatively, defendant asks that this court remand for resentencing.

I certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Motion will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, and Timothy A. Sylwester #813914, Senior Assistant Attorney General, attorneys for respondent.

DATED August 11, 2021.

Respectfully submitted,

ERNEST G. LANNET - CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Stephanie Hortsch at 11:47 am, Aug 11, 2021

STEPHANIE J. HORTSCH OSB #983893
SENIOR DEPUTY PUBLIC DEFENDER
Stephanie.J.Hortsch@opds.state.or.us

Attorneys for Defendant-Appellant
William Jack Parkerson

Office of Public Defense Services • Appellate Division
1175 Court St. NE • Salem, Oregon 97301-4030
Telephone: (503) 378-3349 • Fax: (503) 378-2163

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
WILLIAM JACK PARKERSON,
Defendant-Appellant.
Klamath County Circuit Court
1401933CR; A163629

David G. Hoppe, Judge.

Argued and submitted December 3, 2019.

Stephanie J. Hortsch, Deputy Public Defender, argued the cause for appellant. Also on the opening and a supplemental brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services. William Jack Parkerson filed a supplemental brief *pro se.*

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and Powers, Judge, and Sercombe, Senior Judge.

LAGESEN, P. J.

Affirmed.

LAGESEN, P. J.

At defendant's jury trial for attempted aggravated murder with a firearm and first-degree assault with a firearm, Pascoe, who drove defendant away from the scene of the crime, testified that defendant twice shot a police officer. Defendant requested that the jury be instructed both that Pascoe was an accomplice witness as a matter of law—because Pascoe had been indicted for the same crimes as defendant—and that Pascoe's testimony should be viewed with distrust by the jury because of that accomplice status. The trial court denied the request. The jury returned a verdict of guilty on both counts. On appeal, defendant assigns error to, among other things, the court's (1) failure to issue the accomplice instructions, (2) failure to instruct the jury on the firearm element of each of defendant's offenses, and (3) instruction that a nonunanimous jury verdict could support a conviction of the charged crimes. We affirm.

According to the evidence presented at trial, Officer W was on patrol in Klamath County when he observed a vehicle occupied by three people and missing a front license plate. In the vehicle, Pascoe sat in the driver's seat, defendant sat in the front passenger seat, and another passenger, Holmgren, sat in back. W pulled Pascoe over for not having a front license plate. Holmgren got out of the stopped vehicle and walked past W; he seemed familiar to W, but W could not place him. W turned back to face the vehicle and, in his words, "I see this, there's a black barrel, set of eyes, there's a bang. And my face is on fire." Defendant shot W in the face from a distance of eight to 12 feet. W's gun was holstered, so, instead of shooting back, he ran down a nearby alleyway. Defendant shot him once more in the back, then got back into the vehicle. Pascoe drove defendant away.

The police picked up Holmgren at a nearby Big Lots shortly after the incident. The police apprehended defendant and Pascoe the next day. Before they were arrested, they went to the home of one of defendant's acquaintances. Defendant told the acquaintance's brother, DeMartini, that he had "blasted a cop in the face and that they needed a place to go." Defendant said that he had used a .45 Hi-Point in the shooting, which he had buried in the mud in the Klamath Marsh.

Defendant was indicted by a grand jury for one count of attempted aggravated murder with a firearm, ORS 163.095, and one count of assault in the first degree with a firearm, ORS 163.185. Pascoe was indicted on the same day by the same grand jury for the same crimes, as well as two counts of criminal conspiracy, ORS 161.450; ORS 163.185: one for each count that defendant was charged with. The state later dismissed the charges against Pascoe without prejudice for the stated reason that it was "in the best interest of the parties."

Pascoe was one of the witnesses against defendant at his trial. She remembered that, earlier on the day of the shooting, she, defendant, and Holmgren were hanging out at a friend's house. Speaking to Holmgren, defendant said that he would not stop for the police. When asked at trial what Pascoe understood that statement to mean, she testified, "I didn't really understand it to mean anything to me because I was the driver of my vehicle, and if I'm getting stopped, I'm stopping." However, Pascoe knew that defendant had a handgun tucked in his waist. The three of them got into Pascoe's vehicle and left the house. Shortly thereafter, W pulled Pascoe over. As soon as Pascoe stopped, Holmgren got out of the car. A few moments after that, defendant got out of the car. At that point, according to Pascoe,

> "everything happened really fast. I heard a shot as I was reaching into my glove box to get my insurance and registration because I knew that's what they ask for, and as I was reaching I heard this shot, and so of course I turned to look and—excuse me. And when I looked back, I saw [defendant] standing and pointing like this and I heard another shot, and I turned back around really fast because I didn't want him to know that I saw him, and—and I heard the officer screaming. And when I turned to the other way like this, I saw him holding his face and he had his other arm out like this and he was just yelling, screaming like this awful scream and was running away, like away, you know, like to the other side of the street. And I slunk down in my seat a little because at the time it looked like the officer like maybe had a weapon pointed this way and I didn't want to get shot, you know, and so I slunk down in my seat, and at the time, at that time [defendant] came back and got in my car and he told me to drive."

Pascoe testified that she had not been expecting defendant to shoot anyone, and that she thought it was "a possibility, absolutely" that defendant was going to kill her when he got back in the car. When asked why she drove away, she responded, "Who wouldn't dri—I mean, I didn't feel like I had a choice. I mean, I'm going to do what he says, he has a gun, he just shot someone."

Defendant's theory at trial was that the jury should have reasonable doubt that he was the shooter, positing that Holmgren was a possible alternative suspect. Defendant requested that the trial court instruct the jury that Pascoe was an accomplice as a matter of law and that accomplice witness testimony should be viewed with distrust.[1] Defendant argued that the indictment against Pascoe for the same crimes was enough to warrant a matter-of-law accomplice instruction. The court declined to issue the instruction, concluding that the indictment alone was not enough and that the other evidence at trial did not establish that Pascoe was an accomplice as a matter of law. The jury unanimously found defendant guilty on both counts and found that defendant was a dangerous offender under ORS 161.725.

Defendant appeals. In his combined first three assignments of error, he contends that the trial court erred in denying his request to deliver the accomplice jury

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[1] Defendant requested UCrJI 1056, UCrJI 1057, and UCrJI 1058(2). UCrJI 1056 provides:

> "The testimony of an accomplice in and of itself is not sufficient to support a conviction. There must be in addition some evidence other than the testimony of an accomplice that tends to connect the defendant with the commission of the crime.
>
> "This other evidence, or corroboration, need not be sufficient by itself to support a conviction but it must tend to show something more than just that a crime was committed. It must also connect or tend to connect the defendant with the commission of the crime."

UCrJI 1057 provides:

> "If you determine that a witness was an accomplice, then you should view that witness's testimony with distrust."

UCrJI 1058(2) provides:

> "You are instructed as a matter of law that [accomplice witness] is an accomplice in the commission of the crime of [*crime with which defendant is charged*]."

(Second brackets and italics in original.)

instructions, particularly the accomplice-as-a-matter-of-law instruction, UCrJI 1058(2). As he did below, defendant argues that the "fact that a grand jury had found probable cause to indict Pascoe for the two offenses at issue necessarily proves that there was sufficient evidence to charge Pascoe with the crimes with which defendant was charged." The state responds that evidence must be presented *at trial* to support an accomplice-as-a-matter-of-law determination and no such evidence that Pascoe was an accomplice was presented.

The accomplice instructions at issue here are statutory instructions that must be delivered by a trial court "on all proper occasions." ORS 10.095. Specifically, ORS 10.095(4) requires that, "on all proper occasions," the jury be instructed that "the testimony of an accomplice ought to be viewed with distrust." We review for legal error "[w]hether an occasion is a 'proper' one for the delivery of one of the statutory instructions." *State v. Nelson*, 309 Or App 1, 6, ___ P3d ___ (2021). Our task here is to determine whether the trial court was required to conclude that, because Pascoe was indicted for the same crimes as defendant, she was an accomplice as a matter of law.

ORS 136.440(2) provides, in part, that "an 'accomplice' means a witness in a criminal action who, according to the evidence adduced in the action, is criminally liable for the conduct of the defendant under ORS 161.155 and 161.165." A "criminal action" is "an action at law by means of which a person is accused of the commission of a violation, misdemeanor or felony." ORS 131.005(6). The Supreme Court has explained under what circumstances a witness is an accomplice and when it is appropriate for a trial court to issue an accomplice-as-a-matter-of-law instruction:

> "[A] person is an 'accomplice' for purposes of the corroboration requirement if 'the evidence is legally sufficient to justify an indictment of or information against a witness as an accomplice to the offense charged against the defendant, not necessarily to convict the witness of it.'"

State v. Oatney, 335 Or 276, 284, 66 P3d 475 (2003), *cert den*, 540 US 1151 (2004) (quoting *State v. Hull*, 286 Or 511, 516, 595 P2d 1240 (1979)).

> "If there is no dispute regarding whether a witness is an accomplice witness—that is, sufficient evidence exists to charge, but not necessarily to convict, the witness of the crimes with which the defendant is charged—then the trial court may determine, as a matter of law, that the witness is an accomplice. If, however, the facts regarding whether a witness is an accomplice are in dispute, then the jury decides, and the *defendant* must prove that the witness is an accomplice in order to require corroboration."

Id. at 284-85 (citing *Hull*, 286 Or at 515-17 (emphasis in original; internal citation and footnote omitted)). Thus, a witness is an accomplice as a matter of law if "sufficient evidence exists to charge" the witness with the same crimes that the defendant is charged with. *Id.* at 284.

In *State v. Torres*, 207 Or App 355, 142 P3d 99 (2006), we concluded that an indictment charging a witness with the crimes for which the defendant is charged conclusively establishes a witness's accomplice status. Similar to the case here, the defendant in *Torres* assigned error to the trial court's failure to conclude that one of the witnesses at trial, Haight, was an accomplice as a matter of law. *Id.* at 359. In fact, Haight had been charged, tried, and acquitted for several of the same crimes as the defendant. The state argued that the acquittal meant that Haight was not an accomplice. *Id.* We summarized the applicable rule, "[I]f there is sufficient evidence to charge a witness of the crime with which a defendant is charged, then the trial court 'may determine, as a matter of law, that the witness is an accomplice.'" *Id.* at 359-60 (quoting *Oatney*, 335 Or at 284). Then, we concluded that, because Haight was charged with some of the same crimes as the defendant, he was an accomplice as a matter of law as to those counts on which both were charged:

> "As pertinent here, the indictment demonstrates that Haight was charged as a codefendant in Counts 9, 10, 15, 42, and 43. Accordingly, he was an accomplice as a matter of law for the purpose of those counts ***."

Id. at 363.

On the issue of whether being charged for the same crimes makes a witness an accomplice witness as a matter of

law, *Torres* is not materially distinguishable from this case. Like Haight, Pascoe was charged with the same crimes as defendant. And, like Haight's acquittal before defendant's trial, the dismissal of Pascoe's charges by mutual agreement with the state does not change the fact that a grand jury (the same one that indicted defendant) found probable cause to indict Pascoe for defendant's crimes.[2] That defeats the state's contention that a defendant cannot rely on an indictment to prove accomplice-witness status and, instead, must prove at trial the underlying facts necessary to warrant an accomplice-as-a-matter-of-law instruction. The trial court therefore erred in declining to issue the accomplice instructions.

That leaves the question of whether the trial court's error was harmless. We must affirm despite trial court error if there is little likelihood that the error affected the verdict. *State v. Payne*, 366 Or 588, 609, 468 P3d 445 (2020). "To make that determination, 'the court considers the instructions as a whole and in the context of the evidence and record at trial, including the parties' theories of the case with respect to the various charges and defenses at issue.'" *Id.* (quoting *State v. Ashkins*, 357 Or 642, 660, 357 P3d 490 (2015)). We conclude here that there is little likelihood that the error affected the verdict.

As an initial matter, under Oregon law, the accomplice-witness instructions serve to highlight that an accomplice might be shifting blame from themselves to the defendant: "[T]he purpose of the instructions addressing accomplice testimony, including the instruction[s] at issue here, is to address the concern that 'criminals may falsely accuse others of their misdeeds in order to minimize their own culpability.'" *Nelson*, 309 Or App at 7 (quoting *State v. Simson*, 308 Or 102, 108-10, 775 P2d 837 (1989)). On these particular facts, that blame-shifting dynamic, to the extent present, was not a particularly strong one. The issue for the

[2] We allow that, if the state had proved that the indictment was dismissed for lack of probable cause or otherwise demonstrated that it lacked probable cause for the indictment it sought and obtained against Pascoe, we might have reached a different conclusion. But here, Pascoe and the state agreed to dismissal, and the state did not demonstrate that the case it made to the grand jury was insufficient to support the indictment it obtained.

jury was the identity of the undisputedly male shooter, so Pascoe's testimony identifying defendant as the shooter did not operate to shift blame from her to him, minimizing the need for the instruction to address potential blame shifting.

Given the nature of the evidence and arguments in this case, the instructions, even if given, would have had no tendency to affect the jury's finding that defendant was the shooter. W testified that he was facing defendant when defendant shot him from a distance of eight to 12 feet, and he specifically identified defendant in court as the shooter. Holmgren's sworn video deposition, which was shown to the jury, implicated defendant and was consistent with both Pascoe's and W's testimonies on the major details of the shooting. Although testimony about which door of Pascoe's car the shooter emerged from differed, multiple witnesses confirmed that, after shooting W, the male shooter got back into Pascoe's vehicle rather than walking away. As the state pointed out, undisputed evidence established that Holmgren, not defendant, was the one who walked away and was apprehended quickly at a nearby Big Lots. Finally, as noted earlier, there was evidence of defendant's own admissions to being the shooter. DeMartini testified that defendant told him that he had "blasted a cop in the face" using a .45 Hi-Point that he had buried in the mud in the marsh. On this record, there is no reason to think that there is any likelihood that the jury would have reasonable doubt about defendant's identity as the shooter, had it been supplied the accomplice-witness instructions with respect to Pascoe.

Defendant also assigns as plain error the trial court's failure to instruct the jury that it needed to find whether defendant used or threatened the use of a firearm during the commission of each of defendant's offenses. Although that error is, indeed, a plain one, it does not provide grounds for reversal because it is harmless. As we have explained, "One circumstance in which we will not and cannot exercise our discretion to correct a plain error is when that error is harmless, that is, when there is little likelihood that the error affected the jury's verdict." *State v. Kerne*, 289 Or App 345, 349, 410 P3d 369 (2017), *rev den*, 363 Or 119 (2018). Here, notwithstanding the lack of the instruction, with respect to each offense, the jury was instructed on

the aggravating factor that defendant used a weapon in the commission of the offenses, and the jury found that aggravating factor present. Because the only weapon that the jury could have found defendant used was a gun—the record would not allow for a finding of any other weapon—the jury necessarily found that he committed the offenses with a firearm. Thus, defendant was not harmed by the omission of the instructions on these particular facts. *See id.* at 349-50 (although court's instruction erroneously omitted element of offense with respect to some counts, error was harmless where, in view of how the case was tried, jury's verdict on other counts demonstrated that jury made the necessary findings to convict).

A few more matters require resolution. Defendant assigns error to the trial court's instruction to the jury that it could return a nonunanimous verdict. The jury's verdicts on Counts 1 and 2 were unanimous. That claim of error is therefore foreclosed by *State v. Flores Ramos*, 367 Or 292, 294, 334, 478 P3d 515 (2020) (holding that error in instructing the jury that it could return nonunanimous guilty verdicts did not require reversal of convictions rendered by unanimous guilty verdicts), and *State v. Kincheloe*, 367 Or 335, 339, 478 P3d 507 (2020) (same). Defendant also contends that the court erred in admitting evidence that defendant's psychologist had diagnosed defendant with antisocial personality disorder, a contention we reject without written discussion. Additionally, in a *pro se* supplemental brief, defendant challenges (1) the denial of his motion for judgment of acquittal; (2) the court's refusal to suppress Holmgren's identification of defendant; and (3) the admission into evidence of Holmgren's deposition. He additionally claims that the prosecution failed to disclose favorable evidence to the defense, in violation of due process. Having considered those contentions, we conclude that defendant has not demonstrated that they provide grounds for reversal on appeal.

Affirmed.

792 accomplice jury inst.

MR. BERTHOLF: So I am asking for accomplice as a matter of law. The basis for that is that the State did indict Karey Pascoe with the same charges, attempted aggravated murder and assault in the first degree. The case law, I think, clearly states that when it comes to accomplice testimony, if any facts are in dispute, the jury makes that decision and acts as a grand jury. In this case we have a grand jury that already made that decision, and therefore as a matter of law Karey Pascoe is an accomplice, and therefore the jury instruction of Karey Pascoe being an accomplice as a matter of law should be accepted, and therefore my other jury instructions should be accepted and presented to the jury.

THE COURT: What about the fact that she filed a motion, a demurrer, and that she was released and the charges dismissed?

MR. BERTHOLF: the charges were dismissed by the State on her agreeing to testify. The demurrer was never heard, so there was no ruling on that demurrer; the State chose to dismiss in lieu of Ms. Pascoe agreeing to cooperate with the State. Thank you.

THE COURT: Mr. Schutt.

MR. SCHUTT: Your Honor, just for purposes of the record, the cases that control in this is are *State v. Oatney*, which is 335 Or 276, *State v. Hull*, 288 Or 511, and

State v Wilson
State v Oatney
State v Hull

I think the Court has a copy of *State v. Wilson*, which is 240 Or App 475.

The law as it stands regarding this matter does not discuss what facts may be in existence; it's what information has been submitted at trial, what is adduced at trial. There is absolutely no information that has been adduced at this trial that Ms. Pascoe aided and abetted or can in any way be charged with these particular crimes and there's no information along those lines as far as Mr. Holmgren, and there is no dispute because there are no facts in evidence that you could even say that she was a co-conspirator and should be charged, so the test is not whether or not a grand jury ever charged somebody, whether in error or not; it is based on the facts adduced at trial that make a decision, and based on these cases, those -- that standard has not been met and the Court should not give that instruction.

THE COURT: All right. Well, I don't think there's an issue preclusion, a res judicata from the fact that she was indicted on that charge. We don't know what the testimony was at the grand jury or what evidence was presented to the grand jury. However, from what I have seen, I know in Oregon there is no accessory after the fact or accomplice after the fact under Oregon law, so -- however, you are obviously able to present your theory of

the case and they will receive preliminary instructions where you will have had the burden of proving that she was an accomplice. If you are requesting the accomplice instruction still, given my ruling, then I will not give the instruction as a matter of law; that's up to you.

MR. BERTHOLF: I am only requesting as a matter of law, and if that's not going to be presented, then the other ones I'm not going to ask, but I want that one.

THE COURT: Okay.

MR. BERTHOLF: And I will except to that jury instruction then --

THE COURT: Well, you've preserved your issue. I am not going to give accomplice as a matter of law, and if no one requests accomplice instructions, then I will not be giving accomplice instructions. Yes, Mr. Schutt --

MR. SCHUTT: Just for purposes of the record, I don't know if we ever got a copy of it, but there is a proposed special instruction.

THE COURT: It just says that she's an accomplice as a matter of law, it'll be scanned into the record. Do you have a copy of that, Mr. Bertholf?

MR. BERTHOLF: I -- the only --

THE COURT: I have, I have --

MR. BERTHOLF: -- I only had one sheet of paper left --

Appendix E

THE COURT: -- I have the proposed --

MR. BERTHOLF: We could --

THE COURT: -- instruction --

MR. BERTHOLF: -- have the court staff make a copy --

THE COURT: Yeah, well --

MR. BERTHOLF: -- for the State --

MR. SCHUTT: Just to complete our file.

THE COURT: Okay. I will see the attorneys then at, I guess, 12:15 to review final instructions to make sure we're all on the same page.

MR. BERTHOLF: Maybe we should be back at noon just to make sure --

THE COURT: That'd be great --

MR. BERTHOLF: -- we have enough time to get started at noon thirty --

THE COURT: -- if you're back at noon, that'd be great to start at actually 12:30, I'd appreciate that, and I also think that we need to have, because there is the enhancement fact or the additional fact that's pled on the indictment, the jury verdict form has to read differently than just simply guilty or not guilty; it also has the factor of the firearm, even though it's intrinsic to the charge.

MR. SCHUTT: We had made the, we had discussed

call, so --
MR. PARKERSON: Yeah.
MR. BERTHOLF: This was just about the deposition aspect and I think I've -- have I answered your question --
THE COURT: And you understand --
MR. PARKERSON: Yeah, for the most --
THE COURT: -- what your attorney said?
MR. PARKERSON: Yeah, I do.
THE COURT: And you want the reenactment available to them --
MR. PARKERSON: Yeah, I do. I was just, my only consideration was is the whole thing going to be played in its full content or is it just going to be the re --
THE COURT: It's already been played, sir, it's --
MR. PARKERSON: -- reenactment?
THE COURT: -- sworn testimony.
MR. PARKERSON: Right, okay.
THE COURT: They -- once an exhibit's in, they can go to whatever section.
MR. PARKERSON: Right.
THE COURT: What your attorney's able to do through his argument is to say to them, "Hey, pay attention to these aspects of the evidence."
MR. PARKERSON: Right.

THE COURT: What he says isn't evidence, but he can refer to the evidence.
MR. PARKERSON: Okay.
THE COURT: Okay?
MR. PARKERSON: Yep --
THE COURT: Does that make sense?
MR. PARKERSON: Yeah, thank you.
THE COURT: All right. Anything else?
MR. SCHUTT: Not on behalf of the State.
THE COURT: Does the State require additional time?
MR. SCHUTT: We're getting ready the PowerPoint put together. I think that what the Court had said is that we do closing arguments after lunch.
THE COURT: I was --
MR. SCHUTT: It's going to be a long, so, I mean, if you give us like an hour, we're going to be finished by noon, and then I don't think the Defense is going to want them to go to lunch just thinking about our closing before his, so -- but -- it's going to be to the jury this afternoon. We're a day -- we're two days early.
THE COURT: To me we're right on time, but -- okay. So --
MR. SCHUTT: We could start at 12:30, if you want to bring them back early or have them still be out until

then.
THE COURT: Mr. Bertholf, is that okay? 12:30 start --
MR. BERTHOLF: Either way is fine with me.
THE COURT: All right. And we'll -- I'll bring the jury back in, release them until 12:30, looking to start at 12:30.
MR. SCHUTT: Start at 12:30.
THE COURT: Okay. Let's do that.
MR. SCHUTT: Will the evidence be available in the courtroom during closing?
THE COURT: Always.
MR. SCHUTT: Just --
THE COURT: But before that evidence goes back to the jury, it has to be properly contained per court rule. And that will be done before they begin their deliberations.
MR. SCHUTT: Which ones do you want to see in case? Just the uniform, shirt, and the vest --
THE COURT: Just everything --
MR. SCHUTT: -- whatever has biological?
THE COURT: -- that has biological. Everything that has biological.
(Jury enters courtroom.)
THE COURT: All right, ladies and gentlemen, I

know you're used to long lunches. This one's going to be a really long one, so I'm going to call you back at 12:30 and we're going to finish up at that time. Okay? So please be back in the jury room at 12:30.
MR. BERTHOLF: Your Honor --
THE COURT: Yes?
MR. BERTHOLF: -- should I rest --
THE COURT: As you wish, yes.
MR. BERTHOLF: Defense rests.
THE COURT: Okay. So 12:30 and we'll finish up at that time. Okay? Thank you. Take your notes with you.
(Jury exits courtroom.)
THE COURT: Any other issues?
MR. BERTHOLF: Can't think of any.
MR. SCHUTT: Not --
THE COURT: All right --
MR. SCHUTT: -- on behalf of the State.
THE COURT: -- so the accomplice instruction that's been requested will be --
MR. BERTHOLF: Well, should we argue that now or later?
THE COURT: Oh, you wanted to do formal argument at 12:30 or can we do it right now?
MR. BERTHOLF: I'm ready to do it right now --
THE COURT: Let's do it right now.