IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. DANIEL STEVEN ZOLOTOFF, Defendant-Appellant, Respondent on Review.	Marion County Circuit Court No. 09C42126 CA A145303 SC S061003

PETITIONER STATE OF OREGON'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable DARRYL L. LARSON, Judge

Opinion Filed: December 21, 2012
Author of Opinion: NAKAMOTO, J.
Before: Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

Continued . . .

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STATEMENT OF THE CASE

The State of Oregon asks this court to reverse the decision of the Court of Appeals in *State v. Zolotoff*, 253 Or App 593, __ P3d __ (2012), and to affirm the judgment of the trial court. The jurors in this case unanimously found defendant guilty of the charged offense of possession of a weapon by an inmate, in violation of ORS 166.275. The state concedes that the trial court erred when it denied defendant's request that it instruct the jurors, pursuant to ORS 136.465, on the lesser offense of attempted possession of a weapon by an inmate.[1] But this court nonetheless should affirm, because the error was harmless in the context of this case. Or Const, Art VII (Amended), § 3; ORS 138.230.

The issue before the court is whether the trial court's error in not instructing the jury on a lesser offense is harmless, and hence does not require reversal, because the jury returned a verdict of guilty on the charged offense. If the trial court had instructed the jury on the lesser offense, it also would have

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[1] ORS 136.465 provides: "*In all cases, the defendant may be found guilty* of any crime the commission of which is necessarily included in that with which the defendant is charged in the accusatory instrument or *of an attempt to commit such crime*." (Emphasis added.)

provided the jury with the so-called "acquittal first" instruction that is mandated by ORS 136.460(2). Under that instruction, the jurors could not have considered that lesser offense unless they first found the defendant not guilty of the charged offense.[2] It is well established that that jurors are presumed to follow their instructions, and that presumption should apply to an acquittal-first instruction. In this case, nothing in this record provides a basis for concluding that the jurors would have been unable to comply with an acquittal-first instruction if the court had instructed on the lesser offense. Therefore, the trial court's error in not instructing the jury on a lesser offense was harmless given the jury's verdict of guilty on the charged offense, and this court should affirm despite the error.

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[2] ORS 136.460(2) provides:

> *The jury shall first consider the charged offense. Only if the jury finds the defendant not guilty of the charged offense may the jury consider a lesser included offense*. If there is more than one lesser included offense, the jury shall consider the lesser included offenses in order of seriousness. The jury may consider a less serious lesser included offense only after finding the defendant not guilty of any more serious lesser included offenses.

(Emphasis added.) If the jurors report that they are unable to reach a verdict either to convict or acquit on the charged offense, ORS 136.460(4) provides that "the state and defendant may stipulate that the jury may consider any lesser included offense."

STATEMENT OF FACTS

The statement of the facts set out by the Court of Appeals in its opinion is sufficient for purposes of this brief:

> In 2009, defendant was incarcerated at the Marion County Correctional Facility in a single-occupancy cell when Deputies Brazeal and Dunbar found a broken spoon attached to the underside of the toilet bowl with caulking from the cell window. The spoon was approximately three inches long and appeared to a certain extent to be sharpened. At trial, Brazeal testified that the round part of the spoon had been removed and that the spoon handle "was starting to angle at the head of it—starting to sharpen it." Because it appeared to be filed down, Brazeal believed that defendant had purposely broken the spoon and "was trying to make some sort of weapon out of it." Brazeal believed that defendant could have used the spoon as a weapon against someone at the facility, but that the spoon could have been sharpened even further. Dunbar testified that defendant was "in the process of making a stabbing device." He also believed that defendant could have used the spoon to stab either a deputy or another inmate. In addition, Deputy Herring testified that the spoon appeared to be a "shank," which is a prison term for an item that has been turned into weapon, that can be used as a knife, dagger, or stabbing instrument.

Zolotoff, 253 Or App at 595. (*See* App Br 3-5).

Defendant was charged with the felony offense of possession of a weapon by an inmate, in violation of ORS 166.275.[3] The information alleged:

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[3] ORS 166.275 provides:

> Any person committed to any institution who, while under the jurisdiction of any institution or while being conveyed to or

Footnote continued…

> The defendant, on or about March 8, 2009, in Marion County, Oregon, did unlawfully and knowingly possess and have under his custody and control a dangerous instrument or weapon while committed to the Marion County Correctional Facility and was under the jurisdiction of said institution.

(App Br, ER 1).

Before trial, defendant asked the trial court to instruct the jury on the lesser offense of "attempted possession of a weapon by an inmate." (App Br, ER 4-5). The prosecutor objected, arguing that an instruction on an attempt offense may not be given unless the charge alleges that the defendant committed the crime intentionally and that the charge in this case alleged that defendant acted only "knowingly." The trial court agreed and, citing only that basis, refused to give defendant's requested instruction. (Tr 4-5).

In closing argument, the prosecutor argued that the circumstantial evidence was sufficient to prove that defendant knew the spoon handle was

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(…continued)

> from any institution, possesses or carries upon the person, or has under the custody or control of the person any dangerous instrument, or any weapon including but not limited to any blackjack, slingshot, billy, sand club, metal knuckles, explosive substance, dirk, dagger, sharp instrument, pistol, revolver or other firearm without lawful authority, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the custody of the Department of Corrections for a term not more than 20 years.

affixed to the underside of the toilet bowl in his cell and that, given the manner in which it had been broken off and sharpened, the spoon handle constituted a "weapon." (Tr 128-33). He specifically argued: "Absolutely, this is a weapon." (Tr 131).

In his closing argument, defense counsel primarily argued that the state's evidence was not sufficient to prove that defendant *knew* that the spoon handle was hidden in his cell. (Tr 135-42). But he also argued that the evidence did not prove that the spoon handle was a "weapon" for purposes of the charge. (Tr 140-41). He concluded his argument by emphasizing to the jurors that if they did not find that the spoon handle was a weapon, then they had to find him not guilty. (Tr 143).

The trial court provided the jury with the standard instructions on proof beyond a reasonable doubt, "knowingly," and the elements of the charge, including a definition of "weapon."[4] (Tr 121-27). By a unanimous verdict, the jury found defendant guilty as charged. (Tr 149).

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[4] The court instructed the jurors: "As used in this offense, the term 'weapon' includes, but is not limited to, a sharp instrument; it can be any instrument of device that can be used offensively or defensively to gain an advantage." (Tr 126-27). Defendant has not taken issue with that definition.

On appeal, defendant assigned error to the trial court's denial of his request to instruct the jury on the lesser offense of attempted possession of a weapon by an inmate. He argued that he was entitled to that instruction under ORS 136.465 because the jurors rationally could have found that the spoon handle was not a weapon and that they rationally could have found that he only attempted to possess a weapon. (App Br 6-16). He also relied on *State v. Naylor*, 291 Or 191, 198-99, 629 P2d 1308 (1981), for the proposition that the trial court's error in not instructing the jurors on the lesser offense was not harmless even though they found him guilty on the charged offense. (App Br 16-18).

The state conceded that the trial court erred by not instructing the jurors on the offense of attempted possession of a weapon. (Resp Br 4-6). But the state argued that the error was harmless given the jury's verdict. The state contended that if the trial court had given the instruction that defendant had requested it also would have given the "acquittal first" instruction mandated by ORS 136.460(2), and so the jury would not have even considered the lesser offense. (App Br 7-11).

The Court of Appeals accepted the state's concession and held that the trial court erred by not instructing the jury on the lesser offense at defendant's

request. 253 Or App at 595-96. The court then rejected the state's argument that the error was harmless:

> We have rejected the state's harmless error argument before in the context of lesser-included offenses. In *State v. Leckenby*, 200 Or App 684, 117 P3d 273 (2005), we relied on *State v. Moses*, 165 Or App 317, 325-26, 997 P2d 251, *rev den*, 331 Or 334 (2000), for the proposition that, when a court does not give a lesser-included offense instruction, the jury does not have a complete statement of the law that applied to the case. *Leckenby*, 200 Or App at 690. We held that is reversible error because it could have an effect on how the jury evaluates the greater offense, even in light of the "acquittal first" requirement. *Id*. at 691. We reject the state's argument that those cases were wrongly decided and, based on *Leckenby*, hold that the failure to give the attempt instruction was not harmless. Accordingly, the trial court's failure to instruct the jury on the attempt crime was reversible error.

Zolotoff, 253 Or App at 596-97 (footnote omitted).

ISSUE PRESENTED

The trial court erred when it did not instruct the jury, at defendant's request, on the lesser offense of attempted possession of a weapon by an inmate. Was that error harmless given that the jury found him guilty on the charged offense?

PROPOSED RULE OF LAW

When a trial court instructs the jurors on a lesser offense, it also must instruct them pursuant to ORS 136.460(2) that they may not consider that lesser offense unless they first have acquitted the defendant of the charged offense.

Because it is presumed that jurors follow their instructions, when the jury finds the defendant guilty on the charged offense, that verdict demonstrates that the jury would not have considered the lesser offense if it had been submitted to them. As a result, a trial court's error in not instructing the jury on a lesser offense is harmless if the jurors found the defendant guilty on the charged offense, unless usual circumstances provide a basis for concluding that the jurors would have been unable to follow an acquittal-first instruction. Because nothing in this record provides a basis for concluding that the jurors would have been unable to comply with an acquittal-first instruction, the error in this case was harmless.

ARGUMENT

A. Introduction

It is helpful at the outset to isolate the narrow issue that is presented. The following points are not in dispute:

- The state presented sufficient evidence from which the jury permissibly could find beyond a reasonable doubt that defendant committed the charged offense of possession of a weapon by an inmate.[5]

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[5] *See, e.g., State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995) (describing and applying constitutional standard for sufficiency of the evidence to prove a criminal charge). Defendant did not

Footnote continued...

• The trial court erred when it denied defendant's request to have the jury instructed on the lesser offense of attempted unlawful possession of a weapon by an inmate.[6]

• Nothing in the parties' closing arguments or the court's instructions suggested to the jurors that they could find the defendant guilty of the charged offense even if they did not find that the sharpened spoon handle was, in fact, a weapon.

• The trial court correctly and sufficiently instructed the jury on the charged offense, on "reasonable doubt," and on its obligations with respect to reaching a verdict.

• The jury returned a unanimous verdict of guilty on the charged offense.

(…continued)
move for a judgment of acquittal at trial. (*See* Tr 118). And he did not contend on appeal that the evidence presented at trial was not sufficient to support a verdict of guilty on the charged offense. In particular, he has not disputed that the jury properly could find from the evidence presented that the sharped spoon handle constituted a "weapon" for purposes of ORS 166.275.

[6] Defendant was entitled have the jury instructed on that lesser offense under ORS 136.465, because the requested instruction correctly stated the law and the evidence presented at trial was such that a rational trier of fact could have found him not guilty of the charged offense but guilty of the lesser offense. *See, e.g., Cunningham*, *supra* n 5, 320 Or at 57-58 (describing and applying standard for determining whether defendant is entitled to instruction on lesser offense); *Naylor*, 291 Or at 195-96. As the Court of Appeals correctly noted, "there was evidence from which a jury could infer that the spoon in defendant's possession was not yet a weapon because he had not completed sharpening it and was merely in the process of making a weapon." *Zolotoff*, 253 Or App at 596.

> • If the trial court had given defendant's requested instruction on the lesser offense of attempted possession of a weapon by an inmate, it also would have given the jurors the acquittal-first instruction that is mandated by ORS 136.460(2).

The issue that is thus presented by this case lies at the intersection of four fundamental principles: (1) the defendant has a right, granted by ORS 136.465, to have the trial court instruct the jury on a lesser offense that is supported by the evidence; (2) under ORS 136.460, the jurors may not consider a lesser offense unless they first have acquitted the defendant of the charged offense; (3)the jurors must follow the law and their instructions, and there is a well-established presumption that they will do so; and (4) the appellate court is required by Article VII (Amended), section 3, of the Oregon Constitution and ORS 138.230, to affirm a judgment despite an error if the error was harmless.[7]

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[7] Article VII (Amended), section 3, provides, in pertinent part:

> If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court.

Footnote continued…

In *Naylor*, this court held that the trial court's error in that case in not instructing the jury on a lesser offense at the defendant's request was prejudicial and required a reversal even though the jury returned a verdict of guilty on the charged offense. 291Or at 197-99. But, as will be explained below, *Naylor* is no longer controlling authority.

In Sections B and C below, the state discusses the well-established rules that govern this court's determination whether a trial court's error in instructing the jury was harmless. In Section D, the state explains that, under those rules, the trial court's error in this case in not instructing the jury on the lesser offense was harmless because the jury found the defendant guilty on the charged offense. Finally, in Section E, the state explains that *Naylor* is no longer controlling authority, and hence does not require reversal, because that case was

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(…continued)
ORS 138.230 provides: "After hearing the appeal, the court shall give judgment, without regard to the decision of questions which were in the discretion of the court below or to technical errors, defects or exceptions which do not affect the substantial rights of the parties." Defendant did not argue below that any provision of the federal constitution entitled him to a reversal despite the jury's verdict on the charged offense, and the Court of Appeals cited in its opinion a series of its cases that are based only on state law. Consequently, this brief treats the issue presented as one only under state law. As will be noted below, however, the law on this issue under the federal constitution does not appear to be substantively different.

decided before the legislature had reinstated the acquittal-first rule by enacting ORS 136.460(2).

B. Jurors Are Presumed To Follow Their Instructions

This court has often stated and applied the rule that there is a presumption that jurors follow instructions that are given to them by the trial court: "Jurors are assumed to have followed their instructions, absent an overwhelming probability that they would be unable to do so." *State v. Terry*, 333 Or 163, 177, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002) (affirming death sentence, curative instruction was "sufficient to neutralize the possibility of prejudice to the defendant"); *State v. Bowen*, 340 Or 487, 516, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007) ("we must presume that the jury followed the trial court's charge"); *State v. Barone*, 329 Or 210, 236, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000) (affirming death sentence, limiting instruction "clearly instructed the jury to consider the evidence only for the specific purpose for which it was admitted").[8] The United States Supreme Court applies the same presumption. *See, e.g., Romano v. Oklahoma*, 512 US 1, 13, 114 S Ct

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[8] *See also State v. Smith*, 310 Or 1, 26, 791 P2d 836 (1990) (capital case, curative instruction was sufficient to eliminate possibility of prejudice). The Court of Appeals frequently applies the same presumption and affirms despite an error. *See, e.g., State v. Middleton*, 256 Or App 173, 178, __ P3d __ (2013); *State v. Hooper*, 256 Or App 237, 241, __ P3d __ (2013).

2004, 129 L Ed 2d 1 (1994) (affirming death sentence, limiting instruction was sufficient); *Greer v. Miller*, 483 US 756, 766 n 8, 107 S Ct 3102, 97 L Ed 2d 618 (1987) (murder conviction, curative instruction was sufficient); *Richardson v. Marsh*, 481 US 200, 206-07, 211, 107 S Ct 1702, 95 L Ed 2d 176 (1987) (murder conviction, limiting instruction was sufficient).

The rule that jurors are presumed to follow their instructions typically is applied in the context of a limiting or cautionary instruction that is given to the jurors in order to limit or preclude their consideration of problematic evidence. But it also is applied in the context of a claim that the jurors may have disregarded or misapplied the trial court's closing instructions. For example, in *Barone*, the trial court's closing instructions misstated the elements on the charge of aggravated murder, and that error was not identified until after the jury had retired to deliberate. 329 Or at 240-41. When the jury returned with the verdicts, the court took the verdicts but did not receive or open them; instead, the court advised the jury of the error, reinstructed them in a manner that "correctly described the law," and directed them to re-deliberate on those charges. *Id.* at 241-42. The jury later returned verdicts finding the defendant guilty on the charges of aggravated murder, and it ultimately imposed a death sentence. On review, this court affirmed despite the error in the original instructions, holding that the reinstruction "was sufficient to remedy the original

error." *Id.* at 242-43. This court observed: "We will not assume that the jury failed to follow the correct instructions—which were clear and straightforward—absent some compelling argument that the jury was incapable of doing so." *Id.* at 242.

Similarly, the United States Supreme Court in *Weeks v. Angelone*, 528 US 225, 120 S Ct 727, 145 L Ed 2d 727 (2000), affirmed the petitioner's death sentence after rejecting his claim that the jurors might have disregarded or misapplied the penalty-phase instructions with respect to their consideration of mitigating evidence; the defendant based on that claim on a question the jurors asked during their deliberations. The Court rejected that argument:

> Given that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not.
>
> A jury is presumed to follow its instructions. Similarly, a jury is presumed to understand a judge's answer to its question. To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer.

Weeks, 528 US at 234 (citations omitted).

In summary, the well-established rule that is applied in a variety of contexts is that, for purposes of harmless-error analysis, the courts will presume that the jurors "followed their instructions, absent an overwhelming probability

that they would be unable to do so." *Terry*, 333 Or at 177. Consequently, even if the trial court committed an error that might have been prejudicial, and hence might have required reversal, the appellate court nonetheless may affirm when the trial court gave an instruction that was sufficient to cure or obviate the error, if it is presumed that the jurors complied with that instruction.

C. Rules Governing Whether Error Is Harmless

Article VII (Amended), section 3, requires this court to affirm a judgment "notwithstanding any error committed during the trial" if this court "shall be of the opinion that it can determine what judgment should have been rendered in the court below." *See also* ORS 138.230 (appellate court must affirm despite errors that "do not affect the substantial rights of the parties"). In light of these provisions, a trial court's error in instructing the jury is not automatically viewed as prejudicial such that reversal necessarily is required.[9]

As this court noted in *Bowen*, 340 Or at 516, "a jury instruction does not constitute reversible error unless it prejudiced the defendant when the instructions are considered as a whole." *See also State v. Lopez-Minjarez*, 350

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[9] *See also Hedgpeth v. Pulido*, 555 US 57, 129 S Ct 530, 172 L Ed 2d 388 (2008) (*per curiam*) (an erroneous instruction is not "structural error" and hence is subject to harmless-error review); *Middleton v. McNeil*, 541 US 433, 124 S Ct 1830, 158 L Ed 2d 701 (2004) (*per curiam*) (state court properly found that erroneous instruction was harmless).

Or 576, 584, 260 P3d 439 (2011) (similar); *State v. Gowin*, 241 Or 544, 548, 407 P2d 631 (1965) (similar). The ultimate question is whether "there is little likelihood that the error affected the verdict." *State v. Wilson*, 323 Or 498, 507, 918 P2d 826 (1996); *see also State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). Whether the instructional error adversely affected the jury's verdict depends on whether that verdict "could have been based on a theory of criminal responsibility contained in the erroneous instruction." *Lopez-Minjarez*, 350 Or at 585.[10] That is, the question is whether the error may have allowed the jurors to find the defendant guilty based on findings that would not be sufficient to support a conviction under correct instructions. *State v. Pine*, 336 Or 194, 210, 82 P3d 130 (2003).

Applying this harmless-error rule, this court repeatedly has affirmed criminal convictions despite an instructional error. For example, in *State v. Hale*, 335 Or 612, 75 P3d 612 (2003), *cert den*, 541 US 94 (2004), this court affirmed some of the defendant's convictions for aggravated murder, and the death sentence, even though the trial court had erred by not providing the jury

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[10] In *Lopez-Minjarez*, 350 Or at 584-91, this court held that the trial court erred by providing the jury with the "natural and probable consequences" instruction, but it nonetheless affirmed some of the defendant's convictions after concluding that, in light of the evidence presented, that instructional error did not prejudice him with respect to the guilty verdicts on those counts.

with a "*Boots* instruction."[11] This court held that the error was harmless with respect to some of the convictions in light of the evidence presented and the jury's unanimous verdicts on other counts. 335 Or at 626-30. *See also State v. Lotches*, 331 Or 455, 471-72, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001) (similar); *Gowin*, 241 Or at 548-49 (affirming conviction for arson despite error in instruction).

In the specific context of a trial court's error in not correctly instructing on a lesser-included offense, this court has affirmed a conviction on the charged offense on the ground that the error was harmless. In *Bowen*, the defendant was charged with two counts of aggravated murder and one count of intentional murder, and the trial court instructed the jury per ORS 136.465 on the lesser offense of first-degree manslaughter—but only under the murder charge—and instructed the jury on the acquittal-first rule. 340 Or at 511-13. The jury found the defendant guilty on both counts of aggravated murder and sentenced him to death. *Id.* at 492. On review, the defendant claimed that the trial court's instructions were error because "he was entitled to instructions on intentional murder and first-degree manslaughter as lesser-included offenses to the aggravated murder charges." *Id.* at 514. This court held that defendant was

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[11] *State v. Boots*, 308 Or 371, 780 P2d 725 (1989).

correct that "he was entitled to an instruction that first-degree manslaughter is a lesser-included offense of aggravated murder, and the trial court erred in not giving that instruction under counts one and two." *Id.* at 516. But this court nonetheless affirmed, holding that that error was harmless in light of the other instructions and the jury's verdicts:

> In the present case, the record reflects that the trial court instructed the jury on the elements of aggravated murder (including the elements of burglary and robbery), intentional murder, and first-degree manslaughter, albeit not in the sequence that defendant requested. *Furthermore, we must presume that the jury followed the trial court's charge that it consider all of the jury instructions as a whole. In any event, the case was submitted to the jury with complete and correct statements of the law necessary for it to properly determine whether the state had proved defendant's guilt on the crimes charged beyond a reasonable doubt. Thus, we find it difficult to posit that, in view of the jury instructions as a whole, defendant was prejudiced by the trial court's decision to instruct the jury on the lesser-included offense of first-degree manslaughter in relation to the intentional murder charge, rather than in relation to the aggravated murder charges.* In our view, the trial court's instructions to the jury, as a whole, were sufficient to inform the jury of the possible verdicts it could return on the various charges, based on how it resolved the facts. Consequently, defendant was not prejudiced by the instructions themselves or the sequence in which they corresponded to the verdict form. We conclude, therefore, that the trial court's error was harmless.

Bowen, 340 Or at 516-17 (citation omitted, emphasis added). Therefore, an error in not instructing the jury on a lesser offense may be harmless, depending on the circumstances.

D. The Error Was Harmless Under The Standards Discussed Above

To be sure, the trial court erred when it did not instruct the jurors on the lesser offense of attempted possession of a weapon by an inmate. But if the trial court had instructed on that lesser offense, it also would have given the jurors the acquittal-first instruction required by ORS 136.460(2). Under that instruction, the jurors would have been directed that they could not even *consider* the lesser offense unless they first acquitted defendant on the charged offense:

> The jury shall first consider the charged offense. Only if the jury finds the defendant not guilty of the charged offense may the jury *consider* a lesser included offense.

ORS 136.460(2) (emphasis added). The jury unanimously found defendant guilty of the charged offense. If it is presumed that jurors follow their instructions, the trial court's error in not instructing the jury on the lesser offense certainly was harmless, because the jurors, having found unanimously that defendant was guilty on the charged offense, never would have even *considered* the lesser offense.

As noted above, the presumption has a caveat: "Jurors are assumed to have followed their instructions, *absent an overwhelming probability that they would be unable to do so*." *Terry*, 333 Or at 177 (emphasis added). This court thus has acknowledged that there may be cases in which the presumption

cannot be applied if the nature of the error or some particular circumstance—*e.g.*, the evidence, the parties' arguments, other instructions, or untoward events—provides a basis to conclude that there was "an overwhelming probability" the jurors would have been "unable" to follow their instructions.[12] Therefore, the question presented becomes whether there is anything unusual about the particular facts or circumstances of this case that would provide a basis for concluding that the jurors would have been *unable* to comply with the acquittal-first instruction. For the reasons discussed below, nothing about this case suggests that the jurors would have been "unable" to fully comply with an acquittal-first instruction if the trial court had instructed on the lesser offense.

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[12] In *State v. White*, 303 Or 333, 342, 736 P2d 552 (1987), and *State v. Jones*, 279 Or 55, 62, 566 P2d 867 (1977), this court held that the error at issue was so egregious and prejudicial that the trial court's cautionary instruction was not sufficient "to unring the bell." In *White*, the prosecutor had disclosed to the jury that the defendant, who was charged with aggravated murder, had refused to testify in his co-defendant's trial, thus improperly drawing the jury's attention to his invocation of his right to remain silent. In *Jones*, the defendant was charged with first-degree rape and the prosecutor improperly insinuated in questions to a defense witness that "he had done it so many times before." In *Bowen*, this court recently distinguished *White* and *Jones* and held that the prosecutor's error in introducing evidence of the defendant's prior conviction did not require reversal because "the trial court's cautionary instructions to the jury were sufficient to protect against prejudice to the defendant," thus applying the presumption that jurors follow their instruction. 340 Or at 511.

First, this case involved a factually simple charge, and the issue whether the spoon handle did or did not constitute a "weapon" within the scope of the charged offense was cleanly presented to the jurors. Both the prosecutor and the defense counsel emphasized that point in their closing arguments, and the latter specifically argued to the jurors that if they did not find it was a weapon, then they had to acquit. The trial court provided adequate instructions on that point. Nothing in this record may have suggested to the jurors that they could find defendant guilty on the charge even if they did not find that the spoon handle was a weapon. In short, there is no basis in this record to assume that the lack of an instruction on a lesser offense may have misled the jury to find the defendant guilty of the charge even though they did not find that he had committed it. By finding defendant guilty, the jurors necessarily found unanimously that the spoon handle was a "weapon."

Second, the evidence presented at trial was more than sufficient to support the jury's finding that the spoon handle was a "weapon," and the trial court's instructions on the charged offense and the standard of proof beyond a reasonable doubt were correct and sufficient. Consequently, this is not a case in which there is any reason to doubt the inherent reliability of the jury's verdict on the charged offense.

Third, there is nothing about the circumstances of this case that suggests

that the jurors were confused about the charge or their responsibilities, or that they were strongly divided during their deliberations. Because the jury's verdict was unanimous, it does not suggest any internal dissension among the jurors on the charged offense.

Finally, there is nothing unusual about this case that might have induced jurors to violate their oath and the court's instructions in order return a guilty verdict on the charged offense even though they may have found that defendant had not actually committed that offense. This was not a serious offense, there was not a person who was the victim of his crime, and the evidence did not suggest the defendant had committed some other serious offense for which he was not charged. In short, there is nothing about the nature of the crime or the particular circumstances of the offense that would have caused jurors who would have voted to acquit defendant on the charge to disregard their oath and the court's instructions and to have voted instead for a guilty verdict—*i.e.*, there is no basis in this record to assume that the lack of an instruction on a lesser offense may have induced the jury to find the defendant guilty of the charge even though they did not find that he had committed it.

In summary, this is not a case in which this court can say that there is "an overwhelming probability" that the jurors would have been "unable" to follow an acquittal-first instruction if the trial court had instructed them on the lesser

offense. Therefore, the trial court's error in not instructing the jury on the lesser offense was harmless under the standard rules that govern harmless-error review, as set forth above.

E. This Court's Ruling in *Naylor* Does Not Control This Case

As noted above, this court held in *Naylor*, 291 Or at 198-99, that the trial court's error in that case in not instructing on a lesser-included offense was prejudicial, and hence required reversal, even though the jury returned a verdict of guilty on the charged offense. It does not appear that this court ever previously had held that such an error is one that necessarily requires a remand for a new trial, and this court has not specifically addressed this question since *Naylor*.[13] Consequently, the question presented reduces to whether any of the

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[13] In *White*, *supra* n 12, 303 Or at 348-50, this court held that the trial court erred by not instructing the jury on a lesser-included offense at the defendant's request, and it summarily reversed and remanded for a new trial, but this court already had reversed and remanded for a new trial based on a separate error that occurred at trial. In *Beck v. Alabama*, 447 US 625, 100 S Ct 2382, 65 L Ed 2d 392 (1980), the defendant was convicted of capital murder and was sentenced to death, the Court held that the state court had erred by not instructing on a lesser-included non-capital offense as the defendant had requested, and the Court rejected the state's argument that the error was harmless. But the Court was careful to point out that its decision was based in part on the Eighth Amendment and was limited only to capital cases. 447 US at 637-38 & n 14. As this case illustrates, the Court of Appeals has been applying an automatic-reversal rule in this context. *See Zolotoff*, 253 Or App at 596-97 (and the cases cited therein).

reasons that this court cited in *Naylor* for reversing the judgment in that case may apply to this case. As will be explained below, this court's ruling in *Naylor* does not apply in this case because *Naylor* was decided during a period in which trial courts did not provide juries with an acquittal-first instruction.[14]

Until 1978, the "acquittal first" instruction was, by common practice, the standard instruction that was used in Oregon (and in many other jurisdictions) to introduce jurors to the concept of a necessarily or lesser-included offense and to direct them in their consideration of such a lesser offense. *State v. Allen*, 301 Or 35, 38, 717 P2d 1178 (1986).[15] In 1978, the Court of Appeals in *State v. Ogden*, 35 Or App 91, 95-96, 580 P2d 1049 (1978), disapproved the acquittal-first instruction, holding that the trial court committed reversible error by giving such an instruction:

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[14] It is not necessary for this court in this case to consider whether *Naylor* was correctly decided, nor is it necessary to overrule that decision in order to affirm the judgment in this case on the ground that the trial court's error was harmless. For the reasons discussed in the text, *Naylor* is no longer controlling authority given the reinstatement of the acquittal-first rule. As a result, this brief does not contend that this court should overrule *Naylor*.

[15] In *Allen*, 301 Or at 38, this court noted that the acquittal-first instruction "was first mentioned by this court in *State v. Steeves*, 29 Or 85, 43 P 947 (1896), and was the standard instruction given in this state for over 75 years."

> The doctrine of lesser included offenses allows the jury some latitude in considering the offenses about which they have been instructed. The supplemental [acquittal-first instruction] given by the court invaded this province of the jury and was error. It effectively inhibited the right of the jury to consider the lesser offense of trespass.

Ogden, 35 Or App at 97. The court then suggested instead that "it is proper for a court to instruct a jury they are first to consider the charge in the accusatory instrument and if they cannot agree upon a verdict in that charge they are to consider the lesser included offenses." *Id.* at 98. In 1986, this court in *Allen* adopted the reasoning of *Ogden* and also disapproved the "acquittal first" instruction, reasoning that it "exacerbates the risk of coerced decisions" and improperly prevents the jury "from appropriately considering the elements of any lesser offense or offenses." 301 Or at 40-41.

In 1997, the legislature overruled the *Ogden/Allen* rule and reinstated the acquittal-first rule by amending ORS 136.460 to add subsection (2). Or Laws 1997, ch 511, § 1. By enacting ORS 136.460(2), the legislature clearly expressed its intent that the jurors may consider a lesser offense only if and when they first have acquitted the defendant of the charged offense.[16]

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[16] At the time *Ogden* and *Allen* were decided, the acquittal-first instruction was not specifically prescribed by statute. *Ogden*, 35 Or App at 95-96. Neither court purported to base its disapproval of the acquittal-first instruction on some constitutional or statutory provision. After the acquittal-

Footnote continued...

This court decided *Naylor* in 1981—*i.e.*, within the 20-year period after *Ogden* and before the acquittal-first rule was reinstated in 1997. In *Naylor*, the defendant was charged with first-degree burglary, the trial court denied his request for an instruction on the lesser-included offense of second-degree criminal trespass, the defendant testified in his own defense and gave an exculpatory version of the event, and the jury found him guilty as charged. 291 Or at 193. On appeal, the Court of Appeals held that the trial court had erred by not instructing on the lesser-included offense but nonetheless affirmed, holding that the error was harmless because the verdict demonstrated that the jurors did not believe the defendant's testimony. *See ibid.* On review, this court held that the trial court's error in not instructing on the lesser offense was prejudicial and not harmless. *Id.* at 197-99. This court cited three reasons in support of that that ruling:

> (1) The error "resulted in the case being submitted to the jury without the complete statement of the law necessary for the

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(…continued)
first rule was reinstated by statute, the Court of Appeals rejected a defendant's claim that the *Ogden/Allen* rule was constitutionally required; it held that the acquittal-first rule was within the legislature's prerogative to require. *State v. Horsley*, 169 Or App 438, 443-44, 8 P3d 1021 (2000), *rev den* 331 Or 692 (2001). The court observed: "Whatever advantages or disadvantages each instruction might provide, we are confident that neither instruction is mandated nor prohibited by the Oregon or United States Constitutions." *Id.* at 443.

> jury to properly exercise its function in the trial of this defendant." *Id.* at 197-98.
>
> (2) If the error is viewed as harmless, then "[t]he right of the defendant to have the jury instructed on a lesser included offense could be violated with impunity by every trial court." *Id.* at 198.
>
> (3) "The difficulty with presenting the jury with the all-or-nothing choice is that the jury may believe a defendant to be guilty of some apparent violation of the criminal code but not of the crime charged. The jury is then confronted with the choice of finding innocent a defendant it believes has been guilty of wrongdoing or finding a defendant guilty of a crime greater than that which the jury believes he has committed." *Id.* at 198-99.

Similarly, this court held in *Allen* that the trial court erred by giving an acquittal-first instruction, concluded that the error was not harmless, and remanded for a new trial. The defendant in *Allen* was charged with first-degree kidnapping, the trial court instructed the jury at the defendant's request on the lesser-included offense of second-degree kidnapping, the court also gave a form of an acquittal-first instruction, and the jury found the defendant guilty of the charged offense. 301 Or at 37. On appeal, the Court of Appeals followed *Ogden* and held that the acquittal-first instruction was error but, instead of either affirming on harmless-error grounds or reversing and remanding for a new trial, it remanded for modification of the conviction to one for second-degree kidnapping. *See id.* at 40. This court reversed and remanded:

> Such a result cannot be sustained under the *Ogden* rationale. That rationale assumes that the coercive effects of the jury instruction prevented the jury from appropriately considering the elements of the principal offense. If that is so, *it follows that the*

> *jury was also prevented from appropriately considering the elements of any lesser included offense or offenses.* We therefore cannot say that any particular conviction for a lesser included offenses is "such as should have been rendered in the case." Or Const, Art VII (Amended), § 3. The kidnapping charges must be retried.

Allen, 301 Or at 41 (emphasis added).

For the reasons discussed below, this court's decisions in *Naylor* and *Allen* do not require reversal in this case, because those cases were decided before reinstatement of the acquittal-first rule and none of the factors that this court identified in those cases applies in this case.

1. Concern that jurors were not given "complete statement of the law"

The primary factor cited by this court in *Naylor* for concluding that the error in not instructing the jury on the lesser-included offense was prejudicial was that the omission "resulted in the case being submitted to the jury without the complete statement of the law necessary for the jury to properly exercise its function in the trial of this defendant."[17] *Naylor*, 291 Or at 197-98. But that factor merely begs the question. Whenever a trial court commits any error while instructing the jury—either by giving an erroneous instruction or, as here,

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[17] That is the same factor that was cited by the Court of Appeals in its opinion in this case. *Zolotoff*, 253 Or App at 596 ("the jury does not have a complete statement of the law that applied to this case").

by omitting an instruction—that error necessarily means that the jury did not receive a "complete statement of the law." As was discussed in Section C above, this court repeatedly has affirmed convictions despite instructional errors that resulted in the jury not having a "complete statement of the law." *See, e.g., Lopez-Minjarez*; *Bowen*; *Hale*; *Lotches*; *Gowin*. The question is not simply whether the trial court committed an error during its instructions that left the jurors without "a complete statement of the laws," but also whether the record demonstrates that the error was one that could have adversely affected the verdict that the jury returned. And the answer to that question requires an examination of the evidence that was presented, the parties' arguments, the other instructions that were given, and the verdicts that the jury returned.

The point is illustrated by *State v. Davis*, 70 Or 93, 140 P 448 (1914), which is the only case that this court cited in *Naylor* in support of its "complete statement of the law" factor. *See* 291 Or at 197-98. In *Davis*, the defendant was charged with first-degree murder, his defense was that he shot the victim in self-defense, and the jury found him guilty of second-degree murder. 70 Or at 95. On appeal, this court held that the trial court erred when it gave an instruction on self-defense that improperly "shifted the burden of proof and cast it upon the defendant." 70 Or at 100. This court then rejected the state's argument that the error was harmless:

> The state contends that by the provisions of Article VII, section 3, of the Constitution, the court should sustain the judgment notwithstanding the errors; *but the case was submitted to the jury upon a wrong theory of law*, both as to the application of the presumption mentioned and as to the burden of proof on the question of self-defense. Therefore we are not permitted to theorize as to what the verdict of the jury should have been if the issues had been properly presented.

70 Or at 101 (emphasis added). In other words, the erroneous instruction misstated the legal standard of proof to the defendant's detriment and thus allowed the jurors to find him guilty even though they might have acquitted him if they had been correctly instructed.[18] Under those circumstances, this court declined to weigh the evidence itself and then "to theorize as to what the verdict * * * should have been" if the jury had applied the correct standard.[19]

The state here does not contend that the error was harmless because this court should conclude, based on its own independent review of the evidence, that the evidence of defendant's guilt was overwhelming. Rather, the state's

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[18] *See also Lopez-Minjarez*, 350 Or at 589-91 (concluding that even though evidence was sufficient to support guilty verdict on murder charge the erroneous instruction was prejudicial because it would have allowed the jury to find the defendant guilty "on a legally incorrect theory").

[19] *Accord State v. Davis*, 336 Or at 32 ("The correct focus of the inquiry [under Article VII (Amended), section 3,] regarding the affirmance despite the error is on the possible influence of the error on the verdict rendered, not whether this court, sitting as factfinder, would regard the evidence of guilt as substantial and compelling.").

argument here is same one the one it successfully pressed in *Lopez-Minjarez*, *Bowen*, *Hale*, *Lotches*, and *Gowin*: in the context of the case, the specific error in the court's instructions did not adversely affect the jurors' determination of the defendant's guilt as expressed in their verdict. Merely because the instructions that were given contained an error—and thus were not a "complete statement of the law"—does not mean *ipso facto* that the jury's verdict was adversely affected. That may typically be the case when, as in *Davis*, the instruction misstated the correct legal standard and hence rendered the jury's verdict unreliable as a determination of guilt.[20] But that is not invariably true for any other instructional error.

In *Naylor*, the trial court's error in not instructing the jurors on the lesser-included offense did potentially affect the jury's verdict, because the jury in that case was limited by the acquittal-first rule and hence could have considered and rendered a verdict on the lesser-included offense without having to acquit the defendant on the charged offense. Under the *Ogden/Allen* rule, jurors could

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[20] *See also State v. Brown*, 310 Or 347, 355-56, 800 P2d 259 (1990) (erroneous instruction on charge of aggravated murder that inadvertently omitted essential element required reversal where evidence on that point was in dispute). *But see Washington v. Recuenco*, 548 US 212, 126 S Ct 2546, 165 L Ed 2d 466 (2006) (failure to instruct on element of offense is not "structural error" and is subject to harmless-error review where evidence on that point was undisputed).

choose to abort their deliberations on the charged offense without reaching a verdict and to deliberate instead on the lesser-included offense. And such a jury then could choose to find the defendant guilty only of that lesser offense and cease deliberations, without continuing deliberations and reaching a verdict on the charged offense. Thus, under the *Ogden/Allen* rule, jurors who eventually *might have* been able to reach a sufficient verdict of guilty on the charged offense after further deliberations—if they had been compelled to do so—were able to avoid rendering a verdict at all on that charge and could choose instead to return a verdict only on the lesser charge. Thus, a jury's guilty verdict on the charged offense did not necessarily render harmless an error in not providing an instruction on a lesser offense, because it was possible if the lesser offense had been submitted to the jurors, they may have chosen to find the defendant guilty only on that lesser offense without reaching any verdict at all on the charged offense. An error in not submitting a lesser offense thus deprived the jurors of "a complete statement of the law" to the defendant's prejudice because the jurors in that era could have chosen to return a verdict only on that lesser offense. For that reason, this court concluded in *Naylor* that it was "unable to say what the verdict would have been had the theory of the defense been

properly presented to the jury." 291 Or at 197-98.[21]

But the essential premise of that decision no longer applies because the acquittal-first rule is now again the law in this state. Under that rule, the jurors in this case could not have chosen to abort their deliberations on the charged offense without reaching a verdict and to have deliberated and rendered a verdict instead only on the lesser offense. Unlike the juries in *Naylor*, *Allen*, and *Ogden*, the jurors in this case could not have found the defendant guilty only of the lesser offense without reaching any verdict on the charged offense. For that reason, this court affirmatively can say what the verdict would have been even if the jury in this case had been fully instructed on the lesser offense: precisely the same verdict of guilty on the charged offense that the jury actually returned.

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[21] Similarly, in *Ogden*, the Court of Appeals reversed and remanded for a new trial despite the jury's verdict of guilty on the charged offense of second-degree burglary. The court noted that there was "a reasonable inference" that the jury was divided on the element that separated the charged offense from the lesser-included offense of criminal trespass and that, "[h]ad the jury been properly instructed there was a reasonable possibility that it would have embraced the lesser offense and arrived at a different verdict." 35 Or App at 97. In other words, the court concluded that, without the limitation of the acquittal-first rule, the jury may have chosen to abort its deliberations on burglary charge without reaching a verdict and found the defendant guilty instead only on the trespass offense.

2. Concern that courts could disregard ORS 136.435 "with impunity"

The second factor that this court cited in *Naylor* was that if an error in not instructing a jury on a lesser offense at the defendant's request can be viewed as harmless, then "[t]he right of the defendant to have the jury instructed on a lesser included offense could be violated with impunity by every trial court." 291 Or at 198. This factor must have little, if any, weight. The purpose of a reversal is only to correct the specific error that occurred—not to punish the trial court for committing the error or to set up that error as an example in order deter other trial courts from committing the same error. Article VII (Amended), section 3, and ORS 138.230 preclude a reversal based on an error unless the appellate court concludes that the error caused actual prejudice. Consequently, this court cannot reverse and remand for a new trial despite a lack of prejudice solely as a means to ensure that trial courts comply with a particular procedural rule, however salutary that rule may be.

Moreover, a defendant whose request for an instruction on a lesser offense is denied by the trial court is not without any remedy. If his defense has factual merit, the jury will acquit on the charged offense and he will thus avoid any conviction under that count. If he is found guilty on the charged offense, he can raise the issue on appeal and attempt to explain how, despite the verdict, he was prejudiced by the error in the particular circumstances of his case. If this

court in this case holds that a verdict of guilty on the charged offense necessarily renders such an error harmless, then a defendant whose request under ORS 136.465 for an instruction on a lesser offense is erroneously denied may seek to enforce that legal entitlement by a petition for a writ of mandamus. In short, it is not necessary for this court to reverse a conviction based on this particular error despite a lack of actual prejudice—in disregard of Article VII (Amended), section 3—solely in order to ensure that trial courts respect ORS 136.465.

3. Concern about the "all-or-nothing choice"

The final factor that this court cited in *Naylor* and *Allen* was:

> The difficulty with presenting the jury with the all-or-nothing choice is that the jury may believe a defendant to be guilty of some apparent violation of the criminal code but not of the crime charged. The jury is then confronted with the choice of finding innocent a defendant it believes has been guilty of wrongdoing or finding a defendant guilty of a crime greater than that which the jury believes he has committed.

Naylor, 291 Or at 198-99; *see also Allen*, 301 Or at 41. In other words, this court suggested that if the jury is confronted with a stark "all-or-nothing choice," the jury's verdict of guilty on the charged offense is unreliable because there is a risk that some jurors who may believe that the defendant committed some *other* offense will violate their oaths and instructions and vote to find the defendant guilty of the charged offense, even though they are not personally convinced beyond a reasonable doubt of his guilt on that charge, because they

do not want to want to acquit him entirely. That concern does not provide a basis in this case to question the jury's verdict of guilty on the charged offense.

First, in the majority of cases—if not the vast majority of cases—a criminal charge is submitted to a jury quite properly without any lesser offense. Sometimes, the charged offense is of a nature that there is no lesser offense available. Sometimes, the facts of the case do not provide a sufficient basis for submission of a lesser offense.[22] Sometimes, the lesser offense that is available would not be one for a jury to decide.[23] And sometimes, neither the prosecutor nor the defendant will choose to have the jury instructed on an available lesser offense.[24] Thus, it is not uncommon for a charge to be submitted to a jury as a

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[22] *See, e.g., State v. Cunningham*, *supra* n 5, 320 Or at 60-61 (in capital case, trial court correctly denied the defendant's request for an instruction on manslaughter as a lesser-included offense because, based on the evidence presented in that case, the defendant was not entitled to that instruction). In this case, if it had been a knife, rather than a spoon, that was hidden in defendant's cell, he would not have been entitled to an instruction on attempted possession of a weapon by an inmate or any other lesser offense, because his only available defense would have been that he did not know that the knife was there.

[23] *See State v. Swanson*, 351 Or 286, 266 P3d 45 (2011) (where defendant was charged with reckless driving, trial court correctly declined to instruct jury on lesser-included offense of careless driving, because that is only a violation).

[24] Nothing in either ORS 136.460 or ORS 136.465 *requires* that a lesser offense that is not charged in the indictment but is available based on the facts must be submitted to the jury even if neither party requests an instruction on

Footnote continued…

stark all-or-nothing choice, as was done in this case. This court never has suggested in any other context that confronting jurors with such a choice is, of itself, unduly coercive and effectively makes a guilty verdict in such circumstances an inherently unreliable determination of guilt. In fact, this court previously has rejected that notion.

In *State v. Washington*, 273 Or 829, 836, 543 P2d 1058 (1975), this court interpreted ORS 136.465 as allowing an instruction on a lesser offense only if: (1) it is a lesser-included offense, one that is necessarily included in the charged offense, or an attempt to commit the charged offense, *and* (2) there is "evidence, or an inference which can be drawn from the evidence, which supports the requested instruction such that the jury could rationally and consistently find the defendant guilty of the lesser offense and innocent of the

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(…continued)
such a lesser offense, and this court never has suggested that a trial court must submit an available lesser offense *sua sponte*. As a result, whether an available lesser offense is submitted to the jurors for their consideration under those statutes is a tactical choice for the parties to make based on the particular facts of the case. For example, a defendant who doubts the state's ability to prove an essential element of the charged offense reasonably can choose to gamble on the possibility of an outright acquittal rather than to provide the jury with an option of finding him guilty on a lesser offense. *See, e.g., Pereida-Alba v. Coursey*, 252 Or App 66, 70, __ P3d __ (2012), *rev allowed*, 353 Or 410 (2013) (noting that "the decision whether to request lesser-included instructions is a tactical decision for an attorney to make").

greater." This court in *Washington* specifically rejected the position that was urged by the defendant and the dissenting justices that a trial court should be allowed, at the defendant's request, to instruct on any lesser offense that was supported by the evidence. 273 Or at 838-42. Among the arguments made by the dissent in that case was that not allowing an instruction on any lesser offense that is requested by the defendant and supported by the evidence will put the jurors to a coercive all-or-nothing choice. 273 Or at 848 (O'Connell, C.J., dissenting). The majority opinion dismissed that concern without comment.[25] In other words, this court in *Washington* adopted the current limitation on the submission of lesser offenses even though that limitation may result in jurors being confronted with an all-or-nothing choice; this court evidently concluded that any concerns over the possible effects of such a choice are not sufficiently likely or weighty to justify a more expanded rule.

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[25] Chief Justice O'Connell previously had raised that same argument in his dissent in *State v. Williams*, 270 Or 152, 160, 526 P2d 1384 (1974) (O'Connell, C.J., dissenting). In that case, this court rejected proposition advanced by the defendant and the dissent that because a jury can choose to acquit for no reason, a trial court should be required to instruct on any lesser-included offense when requested by the defendant even if there is no rational basis, on the evidence presented, for the jury to acquit on the charged offense but still find the defendant guilty on the lesser offense. *Id.*, 270 Or at 157-58.

The United States Supreme Court has come to the same conclusion. The Court held in *Beck v. Alabama*, 447 US 625, 100 S Ct 2382, 65 L Ed 2d 392 (1980), a capital case, that the state trial court unconstitutionally confronted the jurors with an artificial all-or-nothing choice by precluding them from considering an available lesser-included non-capital offense. But the Court subsequently has made clear that such an all-or-nothing choice is constitutionally permissible—even in a capital case—when no lesser offense is available under state law. *See Hopkins v. Reeves*, 524 US 88, 118 S Ct 1895, 141 L Ed 2d 76 (1998) (state court properly refused to instruct on lesser offense that was not a proper lesser-included offenses under state law); *Spanziano v. Florida*, 468 US 447, 104 S Ct 3154, 82 L Ed 2d 340 (1984)(same, lesser offense barred by statute of limitations);. *Hopper v. Evans*, 456 US 605, 102 S Ct 2049, 72 L Ed 2d 367 (1982) (same, lesser offense was not supported by evidence). These cases illustrate that it does not violate the constitution to present the jurors with an all-or-nothing choice—even in the most serious of cases—if that is what the law requires. That is, an otherwise proper verdict of guilty is not *inherently* unreliable merely because the jurors were confronted on that charge with an all-or-nothing choice.

To be sure, this court in *Naylor* and *Allen* cited the possible coercive effect of confronting the jury with an all-or-nothing choice as one of several

bases for finding that the instructional error was not rendered harmless by the jury's verdict of guilty on the charged offense. But it must be remembered that those decisions were issued during period in which jurors were given free rein to consider and render a verdict on a lesser offense without ever reaching a verdict on the charged offense. In that context, this court's concern was that a juror who properly may have chosen to find the defendant guilty only a lesser offense—if the trial court had instructed on that lesser offense—could have been coerced by the all-or-nothing choice to find the defendant guilty on the charged offense. But the reinstatement of the acquittal-first rule as the *mandated* procedure means that jurors now are *required* to render a sufficient verdict on the charged offense before they may consider a lesser offense. Thus, jurors no longer have the option to avoid reaching a verdict on the charged offense. Consequently, whatever "coercion" a juror may feel about having to reach a verdict on the charged offense is one that is properly imposed by law.

In a more general sense, an all-or-nothing choice is not of itself so inherently coercive that a jury's verdict of guilty on the charged offense may be viewed as an unreliable determination of guilt. In many cases, the jury is properly confronted with such a choice—even on very serious charges—and that fact alone has not been considered a sufficient reason of itself to question the verdict or require a different procedure. *See, e.g., Hopkins*, *Washington*.

Our jury-trial system necessarily operates on the assumption that the jurors will diligently comply with their oaths, follow their instructions, and not speculate about other potential offenses that could have been charged—in particular, that they will not find a defendant guilty on a charge unless they each personally conclude that the state has proven his guilt beyond a reasonable doubt.[26]

In summary, given the reinstatement of the acquittal-first rule, *Naylor* and *Allen* are no longer controlling authority on the harmless-error issue presented in this case. The various concerns that this court expressed in those cases no longer provide a sufficient basis under current law to preclude a

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[26] The concern as this court expressed it in *Naylor* was that jurors confronted with the all-or-nothing choice who believe that the defendant is innocent of the charged offense but is guilty of some *other* wrongdoing might be induced to disregard their oath and instructions in order to find him "guilty of a crime greater than that which [they believe] he has committed." *Naylor*, 291 Or at 198-99. This court did not suggest in *Naylor* that jurors who would find the defendant *guilty* of the charged offense must be afforded a mechanism to disregard the law in order instead to return a verdict of guilty only on a lesser offense. This court specifically rejected such a proposition in *Williams*, *supra* n 25. Thus, this court's only concern in *Naylor* was that an all-or-nothing choice might induce jurors who would find the defendant not guilty on the charged offense to disregard their oath and instructions to find him *guilty* on that charge. Even if that may be a theoretical possibility, this court in *Naylor* did not cite any empirical data to suggest that there actually is any significant likelihood that jurors who are confronted with an all-or-nothing choice and find the defendant not guilty of the charged offense would nonetheless violate their oath and the court's instructions to return a guilty verdict.

determination that the error in this case was harmless. As demonstrated in Section D, nothing about the particular circumstances of this case suggests that the jurors would have been unable to follow an acquittal-first instruction had the trial court instructed them on the lesser offense. Therefore, this court should conclude that the trial court's error in not instructing the jury on the lesser offense was harmless because the jury returned a unanimous verdict of guilty on the charged offense.

CONCLUSION

This court should reverse the decision of the Court of Appeals and affirm the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 23, 2013, I directed the original Petitioner State of Oregon's Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Daniel C. Bennett, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10991 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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