

**FILED: November 27, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

MICHAEL ANTHONY WATTS,  
Defendant-Appellant.

Baker County Circuit Court  
10290

A149317

Ronald J. Pahl, Judge.

Submitted on June 18, 2013.

Peter Gartlan, Chief Defender, and Erica Herb, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Laura S. Anderson, Senior Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

ORTEGA, P. J.

Convictions for unlawful possession of methamphetamine and unlawful delivery of methamphetamine within 1,000 feet of a school reversed and remanded; otherwise affirmed.

1                   ORTEGA, P. J.

2                   A jury convicted defendant of unlawful possession of methamphetamine,  
3    ORS 475.894, and unlawful delivery of methamphetamine within 1,000 feet of a school,  
4    ORS 475.892.<sup>1</sup> Defendant appeals, raising four assignments of error, three of which  
5    assert that the trial court erred in entering a judgment based on a nonunanimous jury  
6    verdict. We reject those assignments of error without discussion. Defendant asserts in  
7    his first assignment of error that the court erred by allowing a detective's testimony  
8    regarding defendant's credibility. The state concedes that the admission of that testimony  
9    was error, but argues that it was harmless. We conclude that admission of that testimony  
10   was not harmless and, therefore, reverse and remand.

11                  Our review to determine whether an evidentiary error was harmless  
12   requires us to review all pertinent portions of the record. *State v. Sierra-Depina*, 230 Or  
13   App 86, 88, 213 P3d 863, *rev den*, 347 Or 290 (2009). With that standard in mind, the  
14   facts of this case are as follows. Following up on a tip suggesting that defendant had  
15   manufactured methamphetamine in a motel room, Baker City detective Rilee followed  
16   defendant to a restaurant across from Baker High School. Once there, Rilee observed  
17   defendant carry a brown paper bag from his truck into the restaurant, and informed  
18   Oregon State detective Conner, who was also observing the area, of what he had seen. A  
19   few minutes later, Conner entered the restaurant where he observed defendant sitting at a

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<sup>1</sup>           The jury also acquitted defendant of two related charges: unlawful possession of a  
firearm, ORS 166.250, and unlawful manufacture of methamphetamine, ORS 475.886.

1 table with a woman, Chase. Defendant left the bag with Chase upon leaving the  
2 restaurant.

3 Connor questioned Chase after defendant's departure and searched the bag  
4 that defendant had left with her. The bag contained about 20 grams of methamphetamine  
5 and related paraphernalia, including two glass pipes with white methamphetamine-like  
6 residue on them and a leather case with "M Watts" (defendant's first initial and last name)  
7 written on it. During questioning, Chase told Connor that she had set up  
8 methamphetamine deals in the past and was at the restaurant setting up a  
9 methamphetamine deal for defendant.

10 Meanwhile, another officer, Davidson, conducted a traffic stop with  
11 defendant. When Rilee arrived he questioned defendant, who denied any knowledge of  
12 the methamphetamine and paraphernalia found in Chase's possession. According to  
13 defendant, Chase owned the methamphetamine found in the bag and was responsible for  
14 writing "M Watts" on the leather case. The officers searched defendant's truck, however,  
15 and discovered a man's coat with a methamphetamine pipe in the pocket. At trial,  
16 defendant claimed that he was in Baker City to hunt, fish, and possibly buy car parts.

17 Officer Rilee testified at trial that, based on his training and experience,  
18 defendant's pauses during their conversation indicated deception:

19 "I asked \* \* \* if he'd ever been with somebody that had purchased  
20 methamphetamine or if he has ever purchased methamphetamine. I asked  
21 [defendant] if he had ever sold methamphetamine. And then after another  
22 pause I received a reply of, 'No.'"

23 After answering questions about his training in analyzing answers to interview questions,

1 Riley gave the following testimony:

2 "[Prosecutor]: Given [your interrogation] training and experience,  
3 did you use any of that education as it relates to what you saw in  
4 [defendant's] responses to you?"

5 "[Rilee]: Yes. I have been trained to look at all facets of a person's  
6 answers that they give; the verbal cues, the tone and pitch of their voice,  
7 the, you know--whether or not they're sitting closed up and they're not  
8 accepting anything you tell them or whether they're open and looking at  
9 you and they seem receptive to your questioning.

10 "As far as when I interview somebody and I'm getting answers right  
11 away and keep getting answers right away--there's no pausing--as soon as I  
12 ask another question and there's a pause--

13 "\* \* \* \* \*

14 "When I asked a question, after numerous immediate answers and  
15 somebody pauses, *that's an indicator to me that there's a deceptive*  
16 *answer.*"

17 (Emphasis added). Defendant's counsel unsuccessfully objected to those statements. The  
18 judge later instructed the jury that the testimony was Rilee's "opinion" and "[i]t may be  
19 worth something, [or] it may be worth nothing," and that they should consider it and draw  
20 their own opinions. Defendant testified later in the trial regarding his version of events.

21 On appeal, defendant contends that Rilee's testimony was an improper  
22 comment on credibility. *See State v. Lowell*, 249 Or App 364, 368, 277 P3d 588, *rev den*,  
23 352 Or 378 (2012) (explaining that a witness may not give an opinion as to whether or  
24 not he believes another witness, or that another witness is honest or truthful). He argues  
25 that the admission of that testimony was not harmless, and that the court's jury instruction  
26 did not cure--but actually worsened--the resulting prejudice. The state concedes that  
27 Rilee's testimony was erroneously admitted. We agree with the state's concession in that

1 regard. *See id.* The state argues, however, that the error was harmless. In support of its  
2 position, the state points to Connor's and Rilee's observation of defendant's activities in  
3 the restaurant, the methamphetamine and paraphernalia found in the bag that defendant  
4 had taken from his truck, and the methamphetamine paraphernalia found in defendant's  
5 truck during the search.

6           A judgment of conviction will be affirmed, despite the erroneous admission  
7 of evidence, if there is little likelihood that the error affected the verdict. *State v. Davis*,  
8 336 Or 19, 32, 77 P3d 1111 (2003). In evaluating whether evidentiary error is harmless,  
9 we do not weigh the evidence or act as factfinder, but instead look at the likely effect of  
10 error on the verdict. *Id.* We first determine the issue to which our harmless error  
11 analysis applies and then analyze the erroneously admitted evidence in light of other  
12 evidence in the record pertaining to that issue. *State v. Johnson*, 225 Or App 545, 550,  
13 202 P3d 225 (2009) (citing *State v. Ennis*, 212 Or App 240, 262, 158 P3d 510, *rev den*,  
14 343 Or 223 (2007)).

15           Here, we cannot conclude that the erroneous admission of Rilee's testimony  
16 was harmless. The focus of our harmless error analysis is the jury's determination that  
17 defendant *knowingly* possessed and delivered methamphetamine under ORS 475.892. As  
18 the jury was instructed, a necessary element of both counts is a finding that defendant  
19 acted with knowledge.<sup>2</sup> The erroneous admission of evidence that relates to such a

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<sup>2</sup> The court's jury instruction defined "knowingly" as an act carried out "with an awareness either that his conduct is of a particular nature or that a particular circumstance exists."

1 "central factual issue" is more likely to affect the jury's determination and less likely to be  
2 harmless. *State v. Roller*, 201 Or App 166, 173, 118 P3d 804 (2005) (citing *State v.*  
3 *Marrington*, 335 Or 555, 566, 73 P3d 911 (2003)).

4 To find defendant guilty, the jury must have found that defendant acted  
5 with knowledge. If the jury believed Chase, it would believe that defendant acted with  
6 full knowledge that the bag contained methamphetamine. However, if the jury believed  
7 defendant, it would believe that defendant had no knowledge of the methamphetamine or  
8 paraphernalia recovered that day. Thus, the jury had to assess credibility in order to  
9 determine whether or not defendant acted with the requisite knowledge. In these  
10 circumstances, Rilee's testimony regarding defendant's credibility was likely to be  
11 harmful. *See Lowell*, 249 Or App at 370 (explaining that, because the case hinged on a  
12 credibility contest between the parties, testimony regarding the credibility of either was  
13 likely to be harmful).

14 Further, the jury's determination was likely affected by Rilee's testimony  
15 that he had the training and experience to make such a credibility determination. *See id.*  
16 (explaining that there was a significant risk that a detective's testimony that a defendant  
17 was not credible affected the jury's verdict because it was couched in terms of his  
18 expertise and training in detecting untruthfulness). In view of those circumstances, we  
19 cannot conclude that there is little likelihood that the error affected the verdict.

20 Convictions for unlawful possession of methamphetamine and unlawful  
21 delivery of methamphetamine within 1,000 feet of a school reversed and remanded;

1 otherwise affirmed.