IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
MICHAEL DAVID SHINNICK,
Defendant-Appellant.

Wasco County Circuit Court
1400067CR; A157034

Janet L. Stauffer, Judge.

Argued and submitted March 16, 2016.

Erin Snyder, Deputy Public Defender, argued the cause for appellant. With her on the opening brief was Peter Gartlan, Chief Defender, Office of Public Defense Services. With her on the supplemental brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Patrick M. Ebbett, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Lagesen, Presiding Judge, and James, Judge, and Duncan, Judge pro tempore.*

PER CURIAM

Affirmed.

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* Lagesen, P. J., *vice* Haselton, S. J.; James, J., *vice* Flynn, J. pro tempore.

PER CURIAM

Defendant was charged with aggravated harassment, ORS 166.070, for spitting at a police officer, Jones. To prove the crime, the state was required to prove that defendant knew Jones was a police officer. Before trial, defendant stated he would stipulate that he knew Jones was a police officer. Based on the stipulation, defendant moved to exclude evidence of his prior contacts with Jones, on the ground that, given his stipulation, the evidence was irrelevant and unfairly prejudicial. The state contended that, despite defendant's stipulation, the evidence was admissible to prove that defendant knew Jones was a police officer. The trial court agreed with the state and denied defendant's motion.

At the subsequent jury trial, it was undisputed that defendant was homeless and lived in the city where Jones was a police officer. On direct examination, Jones testified that he had had contact with defendant approximately 12 times in the eight months before the charged incident. Jones further testified that his contact with defendant was not unusual, because defendant was homeless. At the close of the trial, the trial court instructed the jury that it could consider the evidence of Jones' prior contacts with defendant only "for its bearing, if any, on whether the defendant knew Officer Jones was a peace officer," and that it could not use the evidence "for the purpose of drawing the inference that because defendant had been previously contacted by law enforcement the defendant may be guilty of the crime charged in this case." The jury found defendant guilty.

Defendant appeals, arguing that the trial court erred in admitting evidence of his prior contacts with Jones and that the error was not harmless because the jury could have misused the evidence, specifically, the jury could have used the evidence "to conclude that defendant had intentionally spit on Jones because defendant was a bad person" or "to conclude that defendant was worthy of punishment regardless of whether he had committed the crime or that he was not worthy of the presumption of innocence."

We need not address whether the trial court erred in admitting the evidence, because we conclude that any error was harmless, given the trial court's instruction. "We

presume that jurors follow their instructions, 'absent an overwhelming probability that they would have been unable to do so.'" *State v. Williams*, 276 Or App 688, 695, 368 P3d 459, *rev den*, 360 Or 423 (2016) (quoting *State v. Smith*, 310 Or 1, 26, 791 P2d 836 (1990)). "A defendant's 'bare assertion' that a jury would not be able to follow an instruction does not establish an overwhelming probability that the jury could not follow it, particularly when the trial court tailors the instruction to the specific error alleged." *Id*. Here, the evidence of the prior contacts, which Jones testified were not unusual, was not so prejudicial that there was an "overwhelming probability" that the jury could not follow the trial court's specific instruction regarding its proper use.

Affirmed.