IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

DANIEL MORGAN KEITH,
Defendant-Appellant.

Washington County Circuit Court
C150616CR; A162242

James Lee Fun, Jr., Judge.

On respondent's petition for reconsideration filed November 14, 2018, and appellant's response to respondent's petition for reconsideration filed December 12, 2018. Opinion filed October 3, 2018. 294 Or App 265, 431 P3d 94 (2018).

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jennifer S. Lloyd, Assistant Attorney General, for petition.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Meredith Allen, Deputy Public Defender, Office of Public Defense Services, for response.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

JAMES, J.

Reconsideration allowed; former opinion modified and adhered to as modified; former disposition withdrawn; convictions on Counts 6, 8, 9, and 10 reversed; remanded for entry of judgment allowing the demurrer.

JAMES, J.

The state petitions for reconsideration of this court's decision in *State v. Keith*, 294 Or App 265, 431 P3d 94 (2018), wherein we reversed defendant's convictions on Counts 6, 8, 9, and 10 due to improper joinder under *State v. Poston*, 277 Or App 137, 145, 370 P3d 904 (2016), *adh'd to on recons*, 285 Or App 750, 399 P3d 488, *rev den*, 361 Or 886 (2017), and otherwise affirmed. In its petition, the state does not challenge our holding that the indictment was improperly joined. However, the state argues that this court failed to fully apply the harmless error analysis to the improper joinder conclusion. Specifically, the state argues that "[t]his court rejected the state's harmless-error argument based solely on the ground that the evidence would not have been admissible in separate trials. In doing so, it did not consider the state's argument that, as the particular evidence unfolded at trial, defendant in fact was not harmed by the admission of the evidence." After the state filed its petition, but before defendant filed his response, the Oregon Supreme Court issued its opinion in *State v. Warren*, 364 Or 105, 430 P3d 1036 (2018), in which the court discussed harmless error in the context of improper joinder. Given *Warren*, we allow the petition for reconsideration, modify our opinion as to the harmless error analysis, reaffirm our original disposition reversing Counts 6, 8, 9, and 10, but modify our disposition to remand for entry of judgment allowing the demurrer.

In *Poston*, we held that "whether improper joinder of charges affected the verdict depends on whether joinder led to the admission of evidence that would not have been admissible but for the joinder *** and, if so, whether that evidence affected the verdict on those charges." 277 Or App at 145. *Poston*'s evidentiary cross-admissibility focus was employed in numerous subsequent joinder cases by this court. Then, in *Warren*, the Oregon Supreme Court endorsed that cross-admissibility inquiry, but clarified that harm from improper joinder extends beyond just evidentiary concerns.

> "Certainly, the disallowance of a demurrer based on improper joinder can be prejudicial. The Court of Appeals recognized that in *Poston I*, when it held that the disallowance of a demurrer based on improper joinder is harmful if

> the improper joinder resulted in the admission of unfairly prejudicial evidence. But to the extent that *Poston I*'s harmless-error test is limited to whether unfairly prejudicial evidence was admitted, it is incomplete. As the primary proponent to the 1989 amendment of the joinder statute explained to the legislature, improper joinder can prejudice a defendant in several ways, including if the defendant would testify regarding some charges but not others, if the defendant's defenses to the charges could be viewed as inconsistent, if the evidence of one charge might improperly influence the jury's verdicts on other charges, or if the evidence could confuse the jury. Therefore, if the disallowance of a demurrer allows charges to be tried together improperly and the joint trial affects the defense in any of those ways, the disallowance may be prejudicial."

Warren, 364 Or at 132-33 (internal citations omitted).

With *Warren* in mind, we now turn to this case. As we noted originally,

> "our review of the record does not show that all of the evidence admitted in the improperly joined counts would have been admissible in stand-alone trials. It is highly unlikely that evidence of assault and domestic violence would have been admissible in a trial for possession of methamphetamine, nor would the evidence of possession the day after have been relevant."

Keith, 294 Or App at 272. We continue to adhere to that holding.

But, that is not the end of the inquiry. The final step in our harmless error analysis is to ask whether that evidence affected the verdict on those charges. We have noted the difficulty in making such a determination:

> "In making that assessment, we recognize that, by relying on multitiered assumptions about hypothetical trials, we encounter increasing difficulty in determining the likely effect of evidence and, accordingly, in concluding whether, as a matter of law, there is little likelihood that the evidence would have affected an imagined verdict."

State v. Walsh, 288 Or App 331, 337, 406 P3d 152 (2017), *rev den*, 364 Or 680 (2019).

In *State v. Marks*, 286 Or App 775, 784, 400 P3d 951 (2017), which arose in the context of a bench trial, we held that "[t]he error could be harmless if the trial court did not consider the evidence related to the other charges when it found the defendant guilty." There, we found that "[b]ecause it is not clear that the trial court conducted a separate analysis of the evidence, the trial court's error in disallowing defendant's demurrer based on the improper joinder of charges was not harmless." *Id*. at 785.

Likewise, here, "it is not clear" that the factfinder—in this case, the jury—was asked to, or did, conduct "a separate analysis of the evidence." *Id*. Further, as *Warren* cautions, "if the evidence of one charge might improperly influence the jury's verdicts on other charges" the disallowance of a demurrer "may be prejudicial." 364 Or at 133. In this case, evidence of defendant's possession of methamphetamine might easily influence a jury's verdict on the other counts—particularly the robbery and theft counts as it implies addiction and current drug use as a potential motive.

In addition to the evidentiary basis of our original holding, and in light of *Warren*, we now see an additional harm resulting from the improper joinder in this case. Before the trial court, counsel articulated two ways in which his trial strategy would change if the counts were properly severed. First, counsel indicated that, were the counts severed into separate trials, he would challenge the admissibility of evidence that would not be subject to challenge in a trial of all the charges, stating,

> "if the first incident is severed from the second, whether the evidence of the second, I guess, wouldn't be admissible as to the first.
>
> "And I—I don't believe that it would be. I believe because they are separate events that it would be simply just prejudicial to [defendant] to introduce evidence of that second incident as supporting or as being relevant at all to the first incident. So I think that summarizes where I'm at right now, Your Honor."

Next, counsel indicated that defendant would choose to exercise his right to testify differently in separate

trials, resulting in "substantial prejudice [from defendant's] desire to testify as to November 22nd incident, but exercise his right to remain silent, if you will, as to the other two incidents." Therefore, in addition to the evidentiary cross-admissibility problems set forth in *Poston*, this case presents one of the additional concerns expressed in *Warren*, namely that "if the defendant would testify regarding some charges but not others, *** the disallowance may be prejudicial." 364 Or at 133.

Finally, the state argues that even if defendant was harmed by the improper joinder, our disposition of reversal was incorrect and this case should have been remanded to the trial court. We agree. It appears that our dispositional tagline in these cases has varied. In some, we have reversed without a remand. *See, e.g.*, *Walsh*, 288 Or App at 340 ("Convictions on Counts 7, 8, 9, 10, and 11 reversed."). In others, we have reversed and remanded for entry of judgment allowing demurrer. *See, e.g.*, *Marks*, 286 Or App at 785 ("Reversed and remanded for entry of judgment allowing demurrer.").

ORS 135.660 provides, "[u]pon considering the demurrer, the court shall give judgment, either allowing or disallowing it, and an entry to that effect shall be made in the register." Additionally, ORS 135.670(1) provides that "[i]f the demurrer is allowed, the judgment is final upon the accusatory instrument demurred to." As *Warren* indicated, "when a defendant establishes a proper ground for a demurrer to an indictment, the defendant is entitled to entry of a judgment on the indictment." 364 Or at 129-30. In this case, defendant is entitled to a judgment on the indictment, and the current post-trial judgment does not suffice.

Reconsideration allowed; former opinion modified and adhered to as modified; former disposition withdrawn; convictions on Counts 6, 8, 9, and 10 reversed; remanded for entry of judgment allowing the demurrer.