IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JEFFREY WILLIAM McDOUGAL,
Defendant-Appellant.

Multnomah County Circuit Court
17CN00767; A165997

Christopher A. Ramras, Judge.

Submitted May 30, 2019.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Kristin A. Carveth, Deputy Public Defender, Office of Public Defense Services, filed the briefs for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Patrick M. Ebbett, Assistant Attorney General, filed the briefs for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

HADLOCK, P. J.

Reversed and remanded.

HADLOCK, P. J.

Defendant appeals a judgment of contempt based on his alleged violation of a restraining order issued under the Family Abuse Prevention Act (FAPA). For the reasons set out below, we reverse and remand.

Defendant was charged with violating a FAPA restraining order by willfully contacting and attempting to contact the victim, M, by telephone. The case was tried to the court. M testified that, after the FAPA order had issued, she received a notification on her telephone indicating that she had an incoming call from defendant. M did not answer, and defendant left a brief voicemail message that included M's first name. Defendant also testified, asserting that he had not intended to call M, but had instead attempted to call a different person who has the same first name as M; he did so by speaking to his telephone and asking it to call that name.

The court found defendant guilty. In explaining its verdict, the court emphasized defendant's testimony that he made the call by asking his telephone to call M. The court described that testimony as "fairly critical." The court then described its own understanding of telephone technology as its reason for finding that events could not have transpired as defendant described them:

> "I think his testimony was that he told his phone or [B]luetooth to call [M]. If, in fact, there were more than one [M] in his phone contacts, typically Siri, or whatever Siri-like device is being used, will ask someone which [M] the person should call.
>
> "So if that's the way you really made the call, then it would seem to me that you would have been given the option of which [M] to call and would have called the one that he wished to."

Despite defendant's objection that the record included no evidence regarding how that telephone technology would function, the court stated that, if the telephone was asked to place the call, it was "common sense that if a person has more than one [M], there's got to be some method of picking which one the person is calling."

On appeal, defendant contends that the trial court erred in relying on facts not in evidence (or speculation) when rendering its verdict. The state concedes that the trial court erred in relying on facts that were not in evidence. We agree. The court's explanation of its verdict reveals that it relied on its own understanding of technology, which was unsupported by the record. Moreover, the court's reliance on its own understanding did not constitute proper judicial notice either of facts "[g]enerally known within the territorial jurisdiction of the trial court" or of facts that were determined "by resort to sources whose accuracy cannot reasonably be questioned." OEC 201(b).

The real dispute in this appeal concerns the proper disposition. Both parties agree that reversal is necessary. Defendant advocates for reversal and remand for a new trial. The state advocates for a more limited remand, asserting that, because the trial court served as factfinder, it may determine that no new trial is necessary "if it would still find that defendant committed a willful restraining order violation, without considering any assumptions about how the voice-activated application on defendant's phone may have worked." Accordingly, the state asks us to reverse and remand with instructions for the trial court to perform that evaluation of the remaining evidence. In response, defendant contends that "permitting the factfinder to reweigh the evidence many years after the trial does not comport with due process," as memories will have faded and the court, sitting as factfinder, will have only a cold record in front of it.

Our caselaw is such that both parties have found support for the positions they assert. The state relies on our per curiam opinions in *State v. Chelson*, 212 Or App 132, 157 P3d 258 (2007), and *State v. Irving*, 74 Or App 600, 703 P2d 983 (1985). In *Chelson*, the defendant was charged with unlawful use of a weapon. 212 Or App at 133. He waived jury and was tried to the court. *Id.* At trial, the defendant asserted a defense of protection of property. *Id.* However, the trial court ruled that the defense was unavailable to the defendant as a matter of law under the circumstances present in that case, and it found the defendant guilty. *Id.* On appeal, we reversed, accepting the state's

concession that the trial court's ruling on the "protection of property" defense was erroneous. Moreover—and as pertinent here—we remanded *without* requiring a new trial:

> "The state suggests that, because the trial court rejected the defense at the close of the evidence, there is no need for a new trial, and the trial court should simply reconsider the case—now including the defense—in light of the testimony in the record. We agree. *Cf. State v. Irving*, 74 Or App 600, 703 P2d 983 (1985) (proper remedy in bench trial in which trial court misstated key testimony is to remand for court to reconsider in light of testimony in the record)."

Id. at 134.

In *Irving*, the case on which we relied in *Chelson*, the defendant was convicted, following a bench trial, of furnishing alcohol to a minor. 74 Or App at 601. On appeal, the parties agreed that the trial court's verdict was based on the court's misunderstanding of a key piece of evidence (the court stated that the minor at issue had testified that he obtained beer from a keg at the defendant's home; in fact, the minor did not testify that he obtained any beer from the keg). *Id.* However, other evidence in the record would have been legally sufficient to support the conviction, if the trial court credited it. *Id.* Accordingly, instead of reversing and remanding for a new trial outright, we remanded for the trial court to reconsider its guilty verdict based on a correct understanding of the evidence:

> "The judgment is vacated and the case is remanded for reconsideration of the evidence. If the trial court again finds defendant guilty, it shall reinstate the judgment. If, on the other hand, the court determines its original view of the facts to be the only basis on which it could convict defendant, then he shall be acquitted."

Id.

The state relies on *Chelson* and *Irving* here, arguing that we should, as we did in *Irving*, remand for the trial court to reconsider its verdict without taking into account the offending "evidence" (in *Irving*, the court's mistaken understanding of the minor witness's testimony; here, the court's mistaken reliance on its own understanding of telephone technology).

Defendant, however, also can point to published opinions supporting his point of view, *viz.*, that the appropriate disposition is reversal and remand for a new trial. Defendant cites, among other cases, *State v. Barboe*, 253 Or App 367, 290 P3d 833 (2012), *rev den*, 353 Or 714 (2013), and *State v. Wilson*, 240 Or App 475, 248 P3d 10 (2011). In *Barboe*, the defendant was convicted, following a bench trial, of fraudulent use of a credit card. 253 Or App at 369. The trial court's speaking verdict indicated that the court had improperly based its verdict on a theory that the defendant had aided and abetted another person's commission of the crime after the fact, that is, "after the crime was complete." *Id.* at 376. In considering the appropriate disposition, we assessed whether we should reverse and remand for a new trial or, instead, reverse the conviction outright. *Id.* at 378-79. We determined that reversal and remand for a new trial was appropriate because the record included evidence that would support a conviction on a proper understanding of the law and the trial court had not made factual findings that would defeat a guilty verdict on that correct understanding. *Id.* at 380. In doing so, we noted that "[w]e have consistently held that, under such circumstances, *i.e.*, where factual issues pertinent to a material element of the crime remain unresolved, the proper disposition is to reverse and remand for a new trial." *Id.* at 378 (internal quotation marks and brackets omitted).

Wilson also involved a conviction, following a bench trial, based on an impermissible "aiding or abetting after the fact" theory. 240 Or App at 477, 487. As in *Barboe*, we did not reverse outright because the record included evidence "on which, depending on the trial court's determination of (as yet) unresolved factual issues, the court could properly convict defendant of the charged offense." Instead, we reversed and remanded for a new trial. *Id.* at 489.

Defendant relies on *Barboe* and similar cases as authority for the proposition that the appropriate disposition in this case is reversal and remand for a new trial. In response, the state notes that this court did not address the possibility of a more limited remand in those cases. It contends, therefore, that those cases do not provide the answer to the dispositional question posed here.

As it turns out, however, we *have* answered that dispositional question. Most recently, in *State v. Heal*, 298 Or App 806, ___ P3d ___ (2019) we reversed and remanded a trial court's contempt judgment because the trial court had applied an incorrect standard in determining that the defendant had violated a restraining order. A remand was necessary, instead of an outright reversal, because the record included evidence that would support a finding that the defendant had, in fact, violated the restraining order. The state argued that the remand should be limited, for the trial court to reconsider its ruling under the correct legal standard. *Id.* at 807-08. We disagreed and, citing *Barboe*, reversed and remanded for a new trial.

Notwithstanding *Heal*, which resolves the dispositional question, we take the opportunity in this case to further explain that result and to expressly disavow the older cases, like *Chelson* and *Irving*, that call for a different remedy. We first note that *Barboe*—and now *Heal*—exemplify what has become this court's common practice. We have routinely reversed and remanded for new trials in other cases in which trial courts, sitting as factfinders, have based verdicts on a misunderstanding of the law or of the evidence—or on erroneously admitted evidence—and that error is not harmless. For example, in *State v. Bevil*, 280 Or App 92, 376 P3d 294 (2016), the trial court, sitting as factfinder, convicted the defendant of criminal mistreatment based on a mistaken understanding of one aspect of the criminal-mistreatment statute. *Id.* at 105. We reversed and remanded for a new trial, noting that the defendant had not developed any argument that the evidence would be insufficient to convict under a correct understanding of the law. *Id.* at 105-06, 106 n 4. We did not address whether it might be appropriate for the trial court, on remand, merely to reconsider its verdict on the existing record, applying a correct understanding of the law. *See also, e.g.*, *State v. Schodrow*, 187 Or App 224, 232, 66 P3d 547 (2003) (reversing and remanding for new trial when trial court's guilty verdict was premised on a misunderstanding of law but the record included evidence sufficient for a conviction).

We also observe that—even before *Heal*—we had at least once rejected an argument by the state that a more

limited remand is appropriate in circumstances analogous to those present here. In *State v. Massey*, 249 Or App 689, 690, 278 P3d 130 (2012), *rev den*, 353 Or 203 (2013), the defendant waived jury and was tried to the court on a charge of driving under the influence of intoxicants. The trial court applied the law incorrectly in reaching its guilty verdict, and that error was not harmless. *Id.* at 692-94. The state argued that the appropriate remedy, in those circumstances, was to "remand the case to the trial court for reconsideration to determine, based on the record already adduced, whether defendant was guilty of DUII." *Id.* at 694. We disagreed and, instead, reversed and remanded for a new trial. *Id.*[1]

In our view—as is confirmed by our recent holding in *Heal*—our rejection of the "limited remand" argument was appropriate in *Massey*. To be sure, there are many circumstances in which a trial court's error will lead an appellate court to reverse and remand so that the trial court may reconsider a specific issue, like an evidentiary ruling, based on a corrected understanding of the law. For example, in *State v. Baughman*, 361 Or 386, 393 P3d 1132 (2017), the Supreme Court ruled that the trial court had erred in evaluating the purposes for which certain evidence was relevant. That error, in turn, had affected the trial court's assessment of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, under OEC 403. *Id.* at 405, 407. In the Supreme Court, the state argued for a specific limited remand that would (1) instruct the trial court to apply a correct analysis to determine whether the evidence would be admitted and (2) require that, if the trial court again determined that the evidence was admissible, no new trial would be needed. *Id.* at 408. The defendant argued that retrial necessarily was required because, if the trial court admitted the evidence for a different purpose, the parties might wish to adjust their strategies and arguments. *Id.* at 408-09. The Supreme Court did not accept either party's position. Instead, it explained

[1] The state petitioned for review in *Massey*, arguing that the Supreme Court should address multiple questions related to bench trials, including about the appropriate scope of remand when a court's verdict appears to be based on a misunderstanding of the pertinent law. The Supreme Court denied the petition, but its order indicates that Justices Balmer and Linder would have allowed review.

that, on remand, the trial court would be in the best position to determine what steps to take if it again admitted the evidence and "whether a new trial [would be] required or appropriate" in that circumstance. *Id.* at 410.

In cases like *Baughman*, however, the trial court has to revisit only a relatively narrow aspect of its own thinking on remand—its assessment of the admissibility of particular evidence. That is a discrete task that requires the trial court to reconsider only a specific part of the record to make only a specific ruling on the law. The court then assesses, if the evidence previously admitted is going to be admitted again, how best to ensure that the parties will receive (or already have received) a fair trial. In that situation, the trial court is not asked to reassess its own determination of the defendant's guilt or innocence; rather, it reconsiders only an evidentiary issue and then—as "is the daily stuff of our trial courts"—takes any steps needed to ensure that the parties' rights are protected. *Id.*

A remand like the state seeks here would demand far more of the trial court—more than we think is reasonable to ask. Such a remand would necessarily follow an error that was not harmless, *i.e.*, an error that we could not say had "little likelihood" of affecting the verdict. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). Thus, a trial court that was required to reconsider its verdict in a criminal case on remand would have to reassess all of the evidence admitted at trial (with the exception of any erroneously admitted), on a cold record, to determine—possibly years after the fact—whether it again was persuaded beyond a reasonable doubt that the defendant was guilty of the crime charged, despite the error that occurred at the original trial. In our view, it is not realistic to ask the court to perform that *factfinding* task on remand in the context of determining whether the state has proved the defendant's guilt beyond a reasonable doubt.

Accordingly, as we did recently in *Heal*, we adhere to our decisions in *Barboe*, *Massey*, and similar cases holding that the appropriate remedy in these circumstances is reversal and remand for a new trial. We disavow *Chelson* and *Irving* to the extent they suggest otherwise.

Reversed and remanded.