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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ROBERT DARNELL BOYD, Defendant-Appellant, Petitioner on Review.	Lane County Circuit Court No. 201026332 CA A151157 SC S063260

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW STATE OF OREGON

Review of the Decision of the Court of Appeals on Appeal
from a Judgment of the Circuit Court for Lane County
Honorable LAUREN S. HOLLAND, Judge

Opinion Filed: March 25, 2015
Author of Opinion: Egan, J.
Before: Armstrong, Presiding Judge,
and Nakamoto, Judge, and Egan, Judge

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STATEMENT OF THE CASE

Once an individual in custody invokes his or her right to counsel, police must cease all interrogation unless the individual reinitiates contact with police. At issue in this case is whether a police officer improperly "interrogated" defendant when defendant asked a confusing question, and the officer responded by seeking clarification. Several hours after defendant had invoked his right to counsel, defendant asked Sergeant Lewis why he was being held and if he could call his "baby girl." The sergeant, knowing that defendant had been told earlier that he was under arrest for killing his girlfriend, responded with clarifying questions. Because asking clarifying questions in response to a suspect's inquiry does not constitute improper "interrogation," the trial court correctly denied defendant's motion to suppress. In any event, even if the officer violated defendant's rights by asking those clarifying questions, that violation did not taint defendant's later statements to another officer, which were made after a knowing and voluntary waiver of his rights. For that additional reason, this court should affirm the decisions of the trial court and the Court of Appeals.

LEGAL QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Does a police officer "interrogate" a suspect under Article I, section 12, or the Fifth Amendment when the suspect asks the officer a confusing question and the officer responds to that inquiry by seeking clarification to determine how to respond to the suspect's question?

First Proposed Rule of Law

When a suspect who has previously invoked his right to counsel approaches an officer and asks a confusing question, the officer's attempt to clarify that question is not interrogation.

Second Question Presented

Can a suspect validly initiate a conversation with police after a constitutional violation?

Second Proposed Rule of Law

If a suspect initiates a conversation without police prompting, the suspect may then validly waive his or her rights and engage in a conversation with police. To determine the validity of such an initiation following a violation, this court looks to whether the initiation is the product of that violation.

Third Question Presented

Did the trial court plainly err by denying defendant's motion to suppress his initial statements to police?

Third Proposed Rule of Law

Any error is not plain, and, in any event, this court should not exercise its discretion to review any error.

SUMMARY OF ARGUMENT

The issue in this case is whether police violated defendant's rights under the Fifth Amendment or Article I, section 12, when—several hours after defendant had invoked his right to counsel—defendant asked Sergeant Lewis a question, and the sergeant responded with two clarifying questions. Because those two questions did not constitute "interrogation," they were permissible. In any event, even if Sergeant Lewis violated defendant's rights, defendant subsequently initiated an interview with a different officer (Detective Myers), and that initiation was not the product of the earlier violation. As a result, this court should affirm.

Sergeant Lewis's clarifying questions did not constitute interrogation for two independent reasons. First, they were not reasonably likely to elicit an incriminating response, meaning a response that the *prosecution* may have offered at trial. Although defendant argues that any question constitutes interrogation, whether or not it is reasonably likely to elicit an incriminating response, that argument is inconsistent with United States Supreme Court case law and the policies underlying the Fifth Amendment and Article I, section 12. Second, even if the questions might constitute interrogation in a different

circumstance, they were not initiated by police and thus did not constitute interrogation. Instead, defendant initiated the conversation by asking Sergeant Lewis a question, and Sergeant Lewis gave a reasonable response to defendant's question.

In any event, even if Sergeant Lewis's two clarifying questions constituted interrogation, defendant later chose to initiate contact with Detective Myers. He then validly waived his *Miranda* rights and spoke with the detective. Because defendant's initiation and waiver were not the product of the earlier alleged violation, they were valid.

Defendant also argues that the trial court plainly erred by admitting his initial statements to police, arguing that the *Miranda* warnings that the officer described in his testimony, if given in those precise terms, would not have been complete. However, any error is not "plain" because it is not based on indisputable facts in the record. In any event, this court should not exercise its discretion to correct any error, because the alleged error is harmless and the record would have developed differently had defendant raised the issue below.

SUMMARY OF FACTS

A. Defendant beat his girlfriend to death, and police interviewed him about the crime twice.

Defendant's girlfriend (the victim) died from a severe beating, mostly to the head. (Tr 565, 567). Shortly before her death, several passers-by saw the

victim and defendant in an altercation on the street; when the witnesses returned roughly five minutes later, they saw the victim on the ground and defendant running away. (Tr 226–27, 252, 256–57, 286; *see also* Tr 201–02, 820–21 (describing timing)). Police found defendant shortly thereafter with the victim's blood on his hands, shoes, and pants. (Tr 389–90, 396, 482–89, 511–12). Police interviewed defendant about the crime twice.

1. During initial police interviews, defendant denied memory of the assault.

Officer Robert Conrad arrested defendant and spoke to him on the scene. Defendant told Officer Conrad that he was not sure what had happened. (Tr 55). He realized that his hand was bleeding and "figured" he must have been in a fight or punched a car window. (Tr 61–62). Over the course of their conversation, defendant remembered some details—having an argument with the victim over cigarettes, the victim falling down, the victim striking him, "holding or hugging" the victim, and later attempting to use leaves to stop his hand from bleeding—but he did not remember the altercation with the victim. (Tr 64, 67). He also repeatedly asked about the victim's welfare. (Tr 65).

Another officer then transported defendant to the police station. (Tr 67). Detective Donald Myers contacted defendant in an interview room. (Tr 140). After a brief exchange about a swab that defendant was holding, Detective

Myers asked defendant why he was there; defendant responded that he did not know and asked for a lawyer:

> Q. Okay. All right, well fine. What went on tonight? What brings you here tonight?
>
> A. I really don't know, but I figure I either punched somebody's car or punched somebody because my hand is f****d up and I know I was pissed off because I was arguing with my girl—
>
> Q. Uh-huh.
>
> A. And evidently started off because I f*****g realized where I was when she wasn't with me, so other than that, I have nothing else to say. I don't know why I'm here, so — please don't talk to me anymore on that aspect until you bring me a lawyer.
>
> Q. Okay, fair enough.

(Tr 148). Detective Myers then ceased the interrogation. He told defendant that he was under arrest for homicide and asked defendant to change his clothes. (*Id.*). Defendant expressed disbelief that the victim was dead but ultimately complied with the detective's requests. (Tr 149–50).

2. Several hours later, defendant made incriminating statements to Detective Myers.

About seven hours later, Sergeant David Lewis learned that jail staff had improperly moved defendant to a cell with a toilet and running water. (Tr 117). He went to defendant's cell to ensure that defendant had not washed his hands, destroying potential evidence. (*Id.*). After looking at defendant's hands,

Sergeant Lewis started to leave. (Tr 119). The following exchange then occurred:

> [SERGEANT LEWIS:] That was it. He showed me the hands and palms and I started to leave and he said to me, "is anybody going to tell me why I'm here, I need to call my baby girl because she's going to wonder where I'm at?"
>
> Q. Okay and then what?
>
> A. I asked him if he didn't remember Detective Myers telling him why he was here, and he replied, "no, I don't remember nothing about that or talking to nobody."
>
> Q. Then what?
>
> A. I asked him, when he was talking about his baby girl, if he was referring to and and he said that it was, and then I just told him that I was present when Detective Myers told him that she was dead and he was under arrest for killing her, and he got real agitated and started breathing heavy and clenching his fists and told me, "no, no, she ain't dead, you're lying" and then he tells me "I want to talk to the detective that you said I talked to."

(Tr 119).

Within about ten minutes, Detective Myers arrived. (Tr 120). Detective Myers reminded defendant that he had asked to speak with an attorney and asked if he still want to talk to one. (Tr 152). Defendant responded that he did not want an attorney and wanted to talk with Detective Myers about what had happened. (*Id.*). Detective Myers then advised defendant of his *Miranda* rights, and defendant acknowledged that he understood those rights. (Tr 152–53). Detective Myers then interviewed defendant for about 35 minutes. (Tr

159). During that interview, defendant described more details surrounding his assault of the victim. He told Detective Myers that when the victim hit him, it made him angry and "he felt like bashing her f*****g head." (Tr 156). Defendant told Detective Myers that he had pinned the victim against a van and "that he did hit her," but he remembered hitting her only one time. (*Id.*). Defendant said that after he hit the victim, "he blacked out and just took off walking." (*Id.*). He said that "he knew what he did was bad" but that "he was under so much stress that he could not control himself." (Tr 156–57).

B. The state charged defendant with murder, and he moved to suppress his statements to police.

The state charged defendant with murder. (ER-1[1]). Before trial, defendant moved to suppress the two sets of statements that he had made to police: (1) the statements made to Officer Conrad at the scene and to Detective Myers at the police station just before defendant's arrest, and (2) the statements made to Detective Myers at the jail several hours later.

As to his initial statements, defendant argued that he had not knowingly waived his *Miranda* rights, based largely on his state of mind at the time of questioning. (ER-7–8; Tr 180). He did not challenge the adequacy of the advice of rights that Officer Conrad had given him. Ultimately, the trial court

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[1] "ER" refers to the excerpt of record attached to defendant's opening brief in the Court of Appeals.

denied defendant's motion to suppress. (Tr 183–84). At trial, Officer Conrad did not testify, and the state did not offer defendant's initial statements in its case-in-chief. Defendant, however, called an expert to testify as to defendant's mental state at the time of the assault. In his testimony, defendant's expert referred to defendant's initial statements to police, noting that he had relied on them in reaching his conclusions. (Tr 787). In rebuttal, the state's expert described how those initial statements were inconsistent with later statements that defendant had made. (Tr 1185–86). The state's expert opined that defendant was "trying out" his story with those initial statements. (Tr 1187).

As to the second interview with Detective Myers, defendant argued in his motion to suppress that police had improperly questioned him after he had invoked his right to counsel. (ER-7–8). The trial court denied defendant's motion, and the state offered defendant's statements to Myers in its case-in-chief. (Tr 184, 525–29). Defendant testified that Detective Myers had misunderstood or misremembered their conversation. (Tr 985–86). Defendant's expert testified that he relied more heavily on defendant's statements to Officer Conrad than those to Detective Myers. (Tr 786–89). The state's expert, in contrast, found defendant's statements to Detective Myers to be very valuable in his evaluation of defendant. (Tr 1187–91, 1281, 1305).

After a bench trial, the trial court found defendant guilty of murder. (ER-25). The Court of Appeals affirmed the conviction, *State v. Boyd*, 270 Or App 41, 346 P3d 626 (2015), and this court allowed defendant's petition for review.

ARGUMENT

The primary issue in this case is whether defendant's statements to Detective Myers were obtained in violation of defendant's right against self-incrimination. Defendant asked Sergeant Lewis a confusing question, and the sergeant responded by seeking clarification from defendant so that he could respond to that question. Because the sergeant did not interrogate defendant, he did not violate defendant's rights. In any event, even if Sergeant Lewis violated defendant's rights, defendant then reinitiated contact with Detective Myers and validly waived his *Miranda* rights. The secondary issue is whether the trial court plainly erred by admitting defendant's initial statements to police. But the trial court did not plainly err, and this court should not exercise its discretion to review any error.

A. The trial court correctly admitted defendant's statements to Detective Myers.

At issue is whether police violated defendant's right against self-incrimination under the Fifth Amendment to the United States Constitution[2] or

[2] The Fifth Amendment provides, in relevant part, "No person * * * shall be compelled in any criminal case to be a witness against himself[.]"

Article I, section 12, of the Oregon Constitution.[3] To protect those rights, police must inform suspects of their right to remain silent and their "derivative right to counsel" before subjecting them to custodial interrogation. *State v. Acremant*, 338 Or 302, 318 n 13, 108 P3d 1139 (2005). In *Edwards v. Arizona*, the Court added a second layer of protection by requiring that, once an accused has invoked his right to counsel, police may not subject him to further interrogation "unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 US 477, 484–85, 101 S Ct 1880, 68 L Ed 2d 378 (1981). The *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 US 344, 350, 110 S Ct 1176, 108 L Ed 2d 293 (1990). The *Edwards* rule also applies, for the same reasons, under the Oregon Constitution. *State v. Kell*, 303 Or 89, 95–100, 734 P2d 334 (1987) (adopting *Edwards* rule under Article I, section 12); *Acremant*, 338 Or at 321–22 (describing purpose under Oregon Constitution).

Here, defendant invoked his right to counsel, and police immediately ceased the interrogation. (Tr 148). About seven hours later, Sergeant Lewis went to defendant's cell to ensure that defendant had not washed his hands,

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[3] Article I, section 12, provides, in relevant part, "No person shall * * * be compelled in any criminal prosecution to testify against himself."

destroying potential evidence. (Tr 118). After looking at defendant's hands, Sergeant Lewis started to leave. (Tr 119). Defendant then asked if anyone was going to tell him why he was there and stated that he needed to call his "baby girl." (*Id.*). Sergeant Lewis, knowing that Detective Myers had told defendant that he was under arrest for murdering his girlfriend, asked two clarifying questions: (1) if defendant did not remember the detective telling him why he was there and (2) if he was referring to the victim, when he said he wanted to call his "baby girl." (*Id.*). Defendant responded that he did not remember and that he was referring to the victim. (*Id.*). Sergeant Lewis therefore answered defendant's question, by telling him that Detective Myers had already told defendant that he was under arrest for killing the victim. (*Id.*). Defendant grew agitated and said that he wanted to talk to Detective Myers. (*Id.*). Detective Myers arrived, confirmed that defendant wished to speak to him, obtained a waiver of defendant's *Miranda* rights, and questioned him about the crime. (Tr 150–53).

The trial court correctly admitted defendant's statements to Detective Myers. As an initial matter, Sergeant Lewis did not "interrogate" defendant by asking him clarifying questions, because those clarifying questions were not reasonably likely to elicit an incriminating response. In addition, because Sergeant Lewis's questions were initiated by defendant—not by police—they did not constitute interrogation. In any event, even if Sergeant Lewis violated

defendant's rights by asking the two clarifying questions, that violation did not induce defendant's later initiation of contact with Detective Myers.[4]

1. Sergeant Lewis did not "interrogate" defendant by responding to defendant's inquiry with clarifying questions, because those clarifying questions were not reasonably likely to elicit an incriminating response.

The initial question presented in this case is whether Sergeant Lewis subjected defendant to "interrogation" after defendant had invoked his right to counsel. Because Sergeant Lewis's two clarifying questions were not reasonably likely to elicit an incriminating response, they did not constitute interrogation. Defendant's alternative argument, that *all* questions constitute interrogation, is unsupported by United States Supreme Court case law and the policies underlying the Fifth Amendment and Article I, section 12.

a. Sergeant Lewis's two clarifying questions were not reasonably likely to elicit an incriminating response.

"Interrogation" means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the

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[4] The state concedes that defendant's graphic explanation of his intent—that he "he felt like, 'bashing [the victim's] f*****g head in'" (Tr 526)—was the only direct evidence of defendant's intent and that the prosecutor relied on that statement to Detective Myers in opening statement and closing argument. (Tr 193–94, 1337, 1340). Thus, in the context of this case, any error in admitting defendant's statements to Detective Myers during the second interview would not be harmless. *See State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) (describing harmless error analysis).

suspect." *Rhode Island v. Innis*, 446 US 291, 301, 100 S Ct 1682, 64 L Ed 2d 297 (1980) (footnotes omitted); *State v. Scott*, 343 Or 195, 203, 166 P3d 528 (2007) (applying *Innis* under Oregon Constitution when parties did not argue otherwise). An "incriminating response," in turn, refers to "any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." *Innis*, 446 US at 301 n 5 (emphasis in original). In other words, an incriminating response could include statements that were originally intended by the suspect to be exculpatory, but may later be used by the prosecution "to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication." *Id.* (quoting *Miranda v. Arizona*, 384 US 436, 477, 86 S Ct 1602, 16 L Ed 2d 694 (1966)). In all events, a statement is incriminating only if the *prosecution* may seek to introduce it at trial.

In determining whether particular police conduct is "reasonably likely to elicit an incriminating response," the court focuses "primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, 446 US at 301. The police officer's intent may come into play, however. On the one hand, if "a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Innis*, 446 US at 301 n 7. On the other hand, "[o]fficers do not interrogate a suspect simply by

hoping that he will incriminate himself." *Arizona v. Mauro*, 481 US 520, 529, 107 S Ct 1931, 95 L Ed 2d 458 (1987). The mere "possibility" that particular police conduct may elicit an incriminating response does not render that conduct "interrogation." *Id.* at 528–29.

Here, Sergeant Lewis asked defendant two clarifying questions, neither of which was reasonably likely to elicit an incriminating response. Defendant asked Sergeant Lewis, "is anybody going to tell me why I'm here, I need to call my baby girl because she's going to wonder where I'm at?" (Tr 119). Sergeant Lewis, however, knew that defendant had already been told why he was in jail. And although defendant had expressed lack of memory concerning the assault itself, defendant had not claimed complete amnesia for the entire night or for earlier conversations with police. (Tr 61–65, 148–49). Indeed, defendant had remembered many of the circumstances leading up to and following the assault when speaking with Officer Conrad. (Tr 61–65).

Given that confusing set of circumstances, Sergeant Lewis asked a clarifying question: "if [defendant] didn't remember Detective Myers telling him why he was here." (Tr 119). Given the context—that defendant had just asked why he was there—a reasonable officer could expect one of two responses: "No, I don't remember"; or "Yes, I remember," with a clarification of what defendant meant by "Is anybody going to tell me why I'm here?"

Neither response would be incriminating—that is, an answer that the prosecution may seek to introduce at trial.

Defendant nonetheless argues that Sergeant Lewis would have recognized that defendant's memory was "at the crux of the murder investigation." (BOM 37). But, again, defendant had claimed to lack memory only of the crime itself. Sergeant Lewis had no reason to believe that defendant's general ability to form memories was ever in question. Defendant fails to explain why Sergeant Lewis should have known that defendant's memory *of the interview with Detective Myers* would be essential or even helpful to the prosecution's case. In other words, if defendant had explained to Sergeant Lewis that he had remembered the interview with Detective Myers, that would not have undercut his claim that he did not remember committing the crime. Thus, the prosecution would not offer that evidence in support of its case at trial. Conversely, if defendant had explained—as he did—that he did not remember the conversation with Detective Myers, that also would not support the prosecution's case (although it might tangentially support the *defense* case). As a result, Sergeant Lewis could not have expected an "incriminating response" to his clarifying question.

Sergeant Lewis also asked a clarifying question in response to defendant's statement that he needed to call his "baby girl." The sergeant—knowing that defendant had been told that his girlfriend was dead—again was

understandably confused by defendant's apparent request to call her. He therefore sought to clarify whom defendant wished to call. He asked if defendant was referring to the victim. Again, a reasonable officer could have expected one of two responses, neither of which would be incriminating: "Yes"; or "No," with an explanation of whom he wished to call. Defendant claims that the sergeant inquired into his "memory and mental status," but again does not explain how the information sought could have been used by the prosecution at trial. (BOM 38). If defendant was referring to someone else, that would not undercut his claim that he did not remember killing the victim. Alternatively, if he was referring to the victim and did not remember that she was dead, that might help the defense case, but not the prosecution.

Defendant also argues that, because Sergeant Lewis asked defendant a question "about the victim of the homicide," that question necessarily was likely to elicit an incriminating response. (BOM 38). Although it may have been possible that defendant would spontaneously disclose some details about the crime upon hearing the victim's name, that does not render Sergeant Lewis's clarifying question interrogation. *Mauro*, 481 US at 528–29. Moreover, the circumstances demonstrate that Sergeant Lewis was not investigating defendant's relationship with the victim and instead was genuinely confused and seeking clarification so that he could respond to defendant's

questions. *Cf. Innis*, 446 US at 301 n 7 (police practice designed to elicit incriminating response likely to constitute interrogation).

In sum, defendant asked Sergeant Lewis a question, and the sergeant responded with two clarifying questions. Because neither clarifying question was reasonably likely to elicit an incriminating response, Sergeant Lewis did not interrogate defendant.

b. Sergeant Lewis's questions did not constitute interrogation merely because they were questions.

Defendant contends that, even if Sergeant Lewis's questions were not likely to elicit an incriminating response, they constituted interrogation merely because they were questions. (BOM 31–34). As an initial matter, defendant failed to raise that argument in the trial court or the Court of Appeals, and his argument is therefore unpreserved. He nonetheless does not ask this court for plain-error review. For that reason alone, this court should not address it. In any event, defendant's proposed rule is inconsistent with the policies underlying *Miranda* and *Edwards* and with recent United States Supreme Court case law. This court should therefore reject it.

The rule prohibiting "custodial interrogation" without adequate safeguards is intended to prevent police from using the "coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Mauro*, 481 US at 529–30. "The concern of the Court in

Miranda was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Innis*, 446 US at 299. The same concerns underlie the prohibition on interrogation under the Oregon Constitution.[5] *State v. Meade*, 327 Or 335, 339, 963 P2d 656 (1998).

Given the concerns underlying *Miranda* and its progeny, the "interrogation" contemplated by that case law "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Innis*, 446 US at 300. "Many sorts of questions do not, by their very nature, involve the psychological intimidation that *Miranda* is designed to prevent." *United States v. Booth*, 669 F2d 1231, 1237 (9th Cir 1981). As a result, police conduct should not be considered "interrogation" simply because it involves a question.

Indeed, defendant's proposed rule would encourage officers to attempt to phrase their clarifications as statements, rather than questions. *Cf. Innis*, 446

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[5] Defendant does not argue that this court should interpret Article I, section 12, differently from the Fifth Amendment as to the meaning of "interrogation." The state agrees. In fact, in *State v. Scott*, this court applied the *Innis* test to police questioning when applying Article I, section 12. The court also reasoned that some questions—those clarifying whether the defendant prefers a particular attorney—may not constitute interrogation. *Scott*, 343 Or at 204. Although defendant is correct that *Scott* does not control the resolution of this case, it nonetheless supports the analysis described in the text.

US at 299 n 3 ("To limit the ambit of *Miranda* to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.'"). Here, for example, if Sergeant Lewis had said "so, what you're saying is that you don't remember talking to Detective Myers" or "I can't believe you don't remember talking to Detective Myers," this court would analyze whether a reasonable officer should know that those statements were reasonably likely to elicit an incriminating response. But because Sergeant Lewis phrased his clarification as a question, defendant argues that the same test does not apply. *Miranda* and *Innis* do not countenance such an illogical result.

Defendant nonetheless argues that *Innis*, by its terms, defines interrogation as *either* (1) questioning or (2) its "functional equivalent," *i.e.*, conduct that is reasonably likely to elicit an incriminating response. (BOM 32). Although *Innis* does appear to distinguish between "express questioning" and its "functional equivalent," the issue in *Innis* was whether certain statements—not questions—constituted "interrogation." Thus, the Court was not presented

with the issue of whether all questions constitute interrogation.[6] Indeed, in later cases the Court has suggested that *not* all questions constitute interrogation.

In *Pennsylvania v. Muniz*, 496 US 582, 601, 110 S Ct 2638, 110 L Ed 2d 528 (1990), a plurality of the Court applied the *Innis* test in determining whether certain questions constituted interrogation. The plurality first rejected the state's argument that certain background questions did not qualify as interrogation "merely because the questions were not intended to elicit information for investigatory purposes." *Id.* at 601 (plurality opinion). The plurality reasoned that "the *Innis* test focuses primarily upon 'the perspective of the suspect.'" *Id*. (quoting *Illinois v. Perkins*, 496 US 292, 296, 110 S Ct 2394, 110 L Ed 2d 243 (1990)). In other words, the plurality did not conclude that the *Innis* test did not apply (*see* BOM 33–34 (so arguing)); it instead reasoned that the state had simply applied the *Innis* test incorrectly. The plurality then concluded that the questions nonetheless fell within an exception for "routine

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[6] Moreover, if *all* questioning constituted "interrogation," then any statement or conduct that was likely to elicit *any* response would be the "functional equivalent" of such questioning. Instead, the Court reasoned that only those statements that are reasonably likely to elicit an incriminating response constitute the "functional equivalent" of the type of questioning that constitutes interrogation.

booking questions."[7] *Muniz*, 496 US at 601.

A majority of the *Muniz* Court also applied the *Innis* test when analyzing an officer's questions to the defendant concerning whether he wished to submit to a breathalyzer test. The Court reasoned that the questions "were necessarily 'attendant to' the legitimate police procedure, and *were not likely to be perceived as calling for any incriminating response*."[8] *Muniz*, 496 US at 605 (citation omitted; emphasis added).

Oregon v. Bradshaw, 462 US 1039, 103 S Ct 2830, 77 L Ed 2d 405 (1983), also undercuts defendant's argument that all questions constitute interrogation. In *Bradshaw*, the Court determined whether a suspect "initiated" further conversation with police after invoking his right to counsel. In describing whether the suspect had initiated further conversation, the Court explained that some questions—by a suspect *or* by the police—"should not be held to 'initiate' any conversation or dialogue":

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[7] Four justices made up the plurality. Four other justices would have held that the suspect's answers to the questions were not "testimonial," and they therefore did not determine whether the questions constituted interrogation. *Muniz*, 496 US at 606–08 (Rehnquist, J., concurring in part and dissenting in part). Justice Marshall dissented in part because he disagreed with the plurality's recognition of a routine booking exception to *Miranda*. *Muniz*, 496 US at 608 (Marshall, J., concurring in part and dissenting in part).

[8] The four other justices joined in this part of the primary opinion. *Muniz*, 496 US at 606 (Rehnquist, J., concurring in part and dissenting in part).

> There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, *by either an accused or a police officer*, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

Id. at 1045 (emphasis added). In other words, the Court reasoned that—at a minimum—police questions that are not related to the investigation do not qualify as an initiation of an interrogation.

In sum, the policies underlying *Miranda* and *Innis* demonstrate that not all questions constitute "interrogation" as defined by those cases. Although *Innis* may suggest that express questioning automatically qualifies as interrogation, later case law clarifies that it does not. Instead, questioning

qualifies as interrogation only if it is reasonably likely to elicit an incriminating response.[9]

2. In any event, Sergeant Lewis's two clarifying questions did not constitute "interrogation" because they were not initiated by police.

Even if Sergeant Lewis's two questions might constitute interrogation in different circumstances, they did not constitute interrogation here because they were not "initiated by law enforcement." Instead, they were made in response to defendant's question.

The Supreme Court has repeatedly referred to interrogation as "questioning initiated by law enforcement officers." *Muniz*, 496 US at 600 (quoting *Miranda*, 384 US at 444). *See also Edwards*, 451 US at 485 ("We reconfirm these views and, to lend them substance, emphasize that it is

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[9] Defendant notes that the circuits are split as to whether all questions constitute interrogation. *Compare United States v. Lopez-Garcia*, 565 F3d 1306, 1317 (11th Cir 2009) (assuming *Innis* test applies to questions); *United States v. Avery*, 717 F2d 1020, 1024–25 (6th Cir 1983) (holding that routine gathering of biographical data for booking purposes is not "interrogation" and relying at least in part on *Innis* framework); *Booth*, 669 F2d at 1237 (questions must be reasonably likely to elicit an incriminating response to constitute interrogation), *with Smiley v. Thurmer*, 542 F3d 574, 583 (7th Cir 2008) ("Because [defendant] was in custody and was subject to *express* questioning, the state court of appeals had no reason to apply the rule for 'the functional equivalent' of express questioning." (Emphasis in original)); *United States v. Montgomery*, 714 F2d 201, 202 (1st Cir 1983) (refusing to apply *Innis* test to express questioning). However, both *Smiley* and *Montgomery* relied almost exclusively on *Innis*, and did not address *Muniz*, *Bradshaw*, or the policies underlying the *Miranda* rule. Therefore, they are of questionable, if any, persuasive value.

inconsistent with *Miranda* and its progeny for the authorities, *at their instance*, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." (Emphasis added.)). Although the Court has not since expanded on the requirement that questioning must be "initiated by" police, that requirement is consistent with the purpose underlying the *Miranda* and *Edwards* rule: preventing police from coercing or "badgering" a suspect into speaking. *See Maryland v. Shatzer*, 559 US 98, 105, 130 S Ct 1213, 175 L Ed 2d 1045 (2010) ("The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of 'prolonged police custody,' by repeatedly attempting to question a suspect who previously requested counsel until the suspect is 'badgered into submission[.]'" (Citations omitted.)); *Acremant*, 338 Or at 321–22 (applying Oregon Constitution and noting that purpose of rule is to "protect a suspect in custody from being 'badgered' by the police" (citation omitted)).

As long as a police officer's questioning is a reasonable response to the suspect's question to police, the officer has not "initiated" the questions. Instead, the suspect triggers the officer's response by asking the initial question. In such circumstances, the concerns underlying *Miranda* and *Edwards* do not arise—a suspect is unlikely to feel coerced by a police officer providing a reasonable response to his question, and the police conduct cannot be considered "badgering" the suspect into submission. As a result, such

clarifying questions are permissible. *See State v. McAnulty*, 356 Or 432, 456–57, 338 P3d 653 (2014) (reasoning that defendant reinitiated contact with police after unequivocal invocation of right to silence and that police did not violate her rights by seeking to clarify whether defendant wanted to speak with them; noting that police "did not ask investigative questions at that time and offered limited responses to questions that defendant posed to them").

Here, Sergeant Lewis's two clarifying questions were not "initiated by law enforcement"; they were initiated by defendant. Sergeant Lewis went to defendant's cell and asked to look at his hands. After he looked at defendant's hands, the sergeant began to walk away. (Tr 119). At that point, *defendant* initiated a conversation with the sergeant by asking, "is anybody going to tell me why I'm here, I need to call my baby girl because she's going to wonder where I'm at?" (*Id.*). As described above, the sergeant provided a reasonable response by first asking two clarifying questions. Once Sergeant Lewis understood that defendant did not remember why he was there and thought that the victim was still alive, he explained to defendant why he was in jail and that the victim was dead. (*Id.*). Even if the sergeant's questions might be considered "interrogation" in different circumstances, they did not constitute interrogation here, because they were a reasonable response to defendant's question.

3. Even if Sergeant Lewis's clarifying questions violated defendant's rights, defendant ultimately initiated the interrogation with Detective Myers, and that initiation is not the product of any earlier violation.

Defendant does not appear to dispute that, ultimately, he "initiated" the conversation with Detective Myers by stating, "I want to talk to the detective that you said I talked to."[10] (Tr 119). As a result, defendant's statements to Detective Myers are admissible regardless of any earlier violation by Sergeant Lewis, as long as defendant's later initiation was not the product of that violation. Because defendant's initiation was independent of any violation, the trial court correctly admitted defendant's statements to Detective Myers.[11]

Even if police violate a suspect's rights under *Edwards*, the suspect may nevertheless later initiate contact with police and validly waive his or her *Miranda* rights. *See Acremant*, 338 Or at 322–23 (holding, under Article I, section 12, and Fifth Amendment, that police conduct in unlawfully continuing first interrogation after defendant had invoked right to counsel did not induce

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[10] Instead, defendant argues only that, "because Lewis interrogated defendant in violation of the rule of *Edwards* and *Kell*, defendant's subsequent 'waiver' of his right to counsel is invalid as a matter of law." (BOM 39). As described in the text, defendant is incorrect.

[11] Defendant has never argued that admitting defendant's statements to *Sergeant Lewis* (that he did not remember talking to Detective Myers and that he referred to the victim as his baby girl) constitutes reversible error. The state did not offer those statements in its case-in-chief, although defendant mentioned them briefly during his testimony. (Tr 983–84).

subsequent statements that defendant made after he had reinitiated conversation with other detectives). *See also Mack v. State*, 296 Ga 239, 247–48, 765 SE2d 896, 903–04 (2014) (collecting cases from other states and federal circuits and noting that "[t]he consensus among these authorities is that, where law enforcement officers have disregarded a suspect's previously-invoked rights by continuing to interrogate him, a renewal of contact by the defendant will be considered an 'initiation' only if the decision to renew contact was not a 'response to' or 'product of' the prior unlawful interrogation"). In such cases, the question becomes whether the earlier violation induced or tainted the later initiation. *Id.*[12]

Here, no causal connection exists between the alleged violation—Sergeant Lewis's two clarifying questions—and defendant's initiation of police contact. Instead, defendant responded to those clarifying questions simply by explaining that he did not remember talking to Detective Myers and that he wished to call the victim. Defendant did not ask to speak with Detective Myers

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[12] When the violation is solely a failure to give *Miranda* warnings altogether, statements made after belated *Miranda* warnings are admissible as long as the belated warnings are "effective and accomplish the purpose for which they are intended." *State v. Vondehn*, 348 Or 462, 480, 236 P3d 691 (2010). Under the *Edwards* analysis, in contrast, the court assumes that the defendant's later *Miranda* waiver is invalid unless the defendant reinitiated contact with police. Thus, effective *Miranda* warnings alone are insufficient to render the evidence admissible, and the court must determine whether the defendant's initiation is valid.

until Sergeant Lewis answered defendant's question, by telling him that he was under arrest for killing the victim. At that point, defendant "got real agitated and started breathing heavy and clenching his fists and told [Sergeant Lewis], 'no, no, she ain't dead, you're lying'"; he then asked to speak with Detective Myers. (Tr 119). In other words, it was Sergeant Lewis's ultimate answer to defendant's inquiry—not his two clarifying questions—that prompted defendant to initiate the conversation with Detective Myers.[13] Defendant has never argued that Sergeant Lewis's direct answer to defendant's question was improper "interrogation." (*See* BOM 27 (suggesting that an appropriate response to defendant's question would be, "Yes, you have been charged with this crime"); BOM 36 ("rather than answering defendant's questions, Lewis questioned defendant")).

Moreover, defendant does not argue—and the record does not reflect—that the alleged violation was so egregious as to indicate to defendant that the police would refuse to honor his rights, so that he had no choice but to reinitiate contact. *Cf. Collazo v. Estelle*, 940 F2d 411, 416, 418, 423 (9th Cir 1991) (where officer's coercive tactics, "calculated to pressure [defendant] into

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[13] Indeed, later at trial, defendant testified that he had asked to speak with Detective Myers because he thought Sergeant Lewis was lying about the victim being dead, he "wanted to know what was going on," and Sergeant Lewis had told him that Detective Myers had talked to him earlier. (Tr 983–84, 1095–96).

changing his mind about remaining silent, and into talking without counsel," were an "egregious violation of *Miranda*," defendant's request to speak with police three hours later was "nothing less than the delayed product" of the officer's coercion); *Mack*, 296 Ga at 249 (request to speak with police invalid when it "was made just minutes after the cessation of more than one-and-a-half hours of police questioning, conducted in violation of [defendant's] previously invoked right to remain silent, during which [the officer] repeatedly implored, badgered, and cajoled [defendant] to tell the truth" (footnote omitted)).

To the contrary, when defendant invoked his right to counsel during his first conversation with Detective Myers, the police immediately ceased questioning, thereby expressing to defendant that they would comply with his request. (Tr 148). Seven hours later, Sergeant Lewis visited defendant to see his hands. (Tr 117). After completing his task, Lewis began to walk away. (Tr 119). When defendant asked why he was there and indicated that he wanted to call his "baby girl," Sergeant Lewis responded with two clarifying questions—whether defendant remembered Detective Myers telling him why he was there and if his "baby girl" was the victim. (*Id.*). Even if those two questions constituted improper interrogation, they were not coercive. Sergeant Lewis did not ask defendant to speak about the crime itself or otherwise indicate that defendant should speak with police more about the crime. In short, defendant would not have understood Sergeant Lewis's two clarifying questions as an

indication that police would not stop "badgering" him until he agreed to speak with them.

Finally, defendant did not reveal any incriminating information in response to Sergeant Lewis's questions, such that the "cat was out of the bag" and defendant no longer had an incentive to remain silent. *See McAnulty*, 356 Or at 458 (where defendant made "qualitatively different" statements in second interview, that interview "was not a repeat of earlier violation"); *see also Missouri v. Seibert*, 542 US 600, 124 S Ct 2601, 159 L Ed 2d 643 (2004) (holding invalid police protocol in which police elicit an unwarned confession, then provide *Miranda* warnings and obtain the same confession). Defendant provided no incriminating information in response to Sergeant Lewis's two clarifying questions.

Defendant initiated contact with Detective Myers by asking to speak with him. (Tr 119). Detective Myers came to defendant's cell and confirmed that defendant wanted to speak with him. (Tr 152). Detective Myers reminded defendant that he had asked to talk to an attorney and asked if he still wanted to talk to one; defendant responded that he did not want a lawyer and that he wanted to talk about what had happened. (*Id.*). Detective Myers readvised defendant of his *Miranda* rights, and defendant acknowledged that he understood them. (Tr 152–53). Even if Sergeant Lewis's earlier clarifying questions constituted interrogation, they did not induce defendant's reinitiation

of contact with Detective Myers, and defendant subsequently waived his *Miranda* rights. As a result, the trial court correctly admitted defendant's statements to Detective Myers.[14]

B. This court should not review defendant's argument that the trial court plainly erred by admitting defendant's initial statements to police.

Defendant also argues that Officer Conrad did not adequately advise defendant of his *Miranda* rights and that the trial court therefore plainly erred by admitting defendant's initial statements to police. Defendant does not argue that he preserved this claim of error, but asks this court to review for "plain error." (BOM 56). This court should not do so, both because any error is not "plain" and because the facts of this case counsel against exercising the court's discretion to review any plain error.

1. Any error is not "plain," because it is not "apparent from the record."

To review an unpreserved error as "plain error," (1) the error must be "one of law," (2) the legal point must be "obvious" or "not reasonably in dispute," and (3) the facts that comprise the error must be "irrefutable," such

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[14] Because the trial court and the Court of Appeals reasoned that police did not violate defendant's rights, those courts were not presented with the issue of whether any violation tainted defendant's later initiation. However, the record demonstrates the lack of any causal link between the alleged violation and defendant's later initiation, and this court may therefore affirm on that basis. *See Outdoor Media Dimensions Inc. v. State*, 331 Or 634, 659–60, 20 P3d 180 (2001) (describing right for the wrong reason doctrine).

that this court "need not go outside the record or choose between competing inferences to find it." *State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990). Here, defendant's claim of error is not apparent from the record and is therefore unreviewable as plain error.

Defendant claims that the trial court plainly erred by admitting his statements during the initial interrogations, because—he claims—Officer Conrad did not adequately advise him of his *Miranda* rights. (BOM 55–58). But any error is not apparent from the record because it is not based on "irrefutable" facts. To the contrary, Officer Conrad testified that he *did* provide defendant with advice of his *Miranda* rights. (Tr 53. *See also* Tr 16 (another officer's testimony that he heard Officer Conrad "Mirandize" defendant)). As a result, the state met its burden of proving that defendant was given *Miranda* warnings. At a minimum, it is not "obvious" that the state failed to do so. *See Brown*, 310 Or at 355 (requiring that any error be "obvious").

Defendant nonetheless argues that when Officer Conrad described the particular warnings he gave, he left out the warning that defendant had a right to an attorney during questioning. When asked what he advised defendant, Officer Conrad responded:

> I said he had the right to remain silent. That anything he said could and would be used against him in a Court of law. That if he could not afford an attorney, one would be appointed to him by the Court.

> He indicated that he understood these rights and at no time during my conversation did he ever request Counsel.

(Tr 54). That testimony, however, appears inconsistent with the officer's testimony that he provided defendant "with advice of his *Miranda* rights" (Tr 53), which would ordinarily include a specific warning that defendant had a right to an attorney during questioning.

In other words, the record is ambiguous as to the advice that Officer Conrad gave. It is possible that Officer Conrad gave defendant the advice set forth in *Miranda* and then made a mistake when reciting the advice in court. It is also possible that Officer Conrad's in-court recitation is precisely what he told defendant. Had defendant objected, the record could have been clarified on that point; because he did not, the record does not demonstrate whether Officer Conrad failed to adequately advise defendant of his *Miranda* rights. As a result, any error in admitting the statements that defendant made after those warnings is not "plain."

2. This court should not exercise its discretion to correct any error.

Even if this court determines that the trial court plainly erred, this court should not exercise its discretion to review that error. "A court's decision to recognize unpreserved or unraised error in this manner should be made with utmost caution" because "[s]uch an action is contrary to the strong policies requiring preservation and raising of error." *Ailes v. Portland Meadows Inc.*,

312 Or 376, 382, 823 P2d 956 (1991). Here, this court should not exercise its discretion because any error in admitting the evidence actually benefitted defendant's case, and the record likely would have developed differently had defendant raised the issue below.[15]

Defendant concedes that the challenged statements were helpful to his case and that the state's use of those statements on rebuttal therefore "was not harmful as the case was tried." (BOM 58–59). For that reason alone, this court should not exercise its discretion to consider any error. Defendant nonetheless argues that, "should this court agree with defendant's preceding arguments and conclude that the erroneous pretrial ruling affected the entirety of defendant's defense strategy," admission of the statements was harmful. (BOM 59). That argument appears to hinge on whether defendant is correct as to his arguments concerning defendant's statements during his *second* interview with Detective

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[15] If this court determines that the trial court plainly erred, it may make the discretionary assessment in the first instance, or it may remand to the Court of Appeals to do so. *State v. Vanornum*, 354 Or 614, 631, 317 P3d 889 (2013). Defendant asks this court to exercise its discretion (BOM 57), and the state agrees that this court should make the discretionary decision.

Myers. For the reasons discussed above, those arguments fail.[16]

Further, if defendant had objected below, the record likely would have developed differently in any number of ways. Thus, the policies of preservation were not served, and the ends of justice do not merit review of defendant's claim. *See Ailes*, 312 Or at 382 n 6 (describing factors).

As an initial matter, had defendant challenged Officer Conrad's description of the *Miranda* warnings that he gave, the state could have asked Officer Conrad to clarify whether he, in fact, advised defendant of his right to have an attorney present during questioning. Indeed, the record demonstrates that defendant knew of his right to an attorney before and during questioning, because he expressly invoked that right when Detective Myers first began questioning him. (Tr 148). Had Officer Conrad clarified that the *Miranda* warnings he gave were complete, defendant could claim no error in admitting his statements following those warnings. *See State v. McDonnell*, 343 Or 557, 577, 176 P3d 1236 (2007) (declining to exercise discretion to review error in

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[16] In any event, to the extent that defendant argues that, had the court suppressed only the first set of statements, defendant would have changed his defense strategy entirely, that argument strains credulity. Defendant fails to identify any alternative defense that he might have offered, and the state can think of none. Given the overwhelming evidence that defendant killed the victim, the only potential defense was lack of intent. Defendant's initial statements were consistent with such a defense, because defendant denied any memory of the actual assault. Those statements were helpful to the state only inasmuch as they were inconsistent with defendant's later statements.

admitting transcripts, because state might have been able to show admissibility had defendant raised the issue below).

Moreover, had defendant challenged Officer Conrad's *Miranda* warnings, the state likely would have simply declined to offer defendant's statements to Officer Conrad. *See State v. Cox*, 337 Or 477, 500, 98 P3d 1103 (2004) (declining to exercise discretion because, "if defendant had raised a timely objection, the state could have found other ways to prove the facts that defendant now challenges, or it could have chosen to forego the testimony and avoid the issue"). Indeed, the state did not offer those statements during its case-in-chief, demonstrating that the state did not believe that those statements were particularly important. Instead, defendant's expert referred to those statements during his case (Tr 787), thereby waiving any objection to the state exploring those statements on rebuttal. *See State v. Miranda*, 309 Or 121, 128, 786 P2d 155 (1990) ("A defendant's own inquiry on direct examination into the contents of otherwise inadmissible statements opens the door to further inquiry on cross-examination relating to those same statements.").

Given those considerations, even if this court determines that the trial court plainly erred, this is not the type of extraordinary case in which this court should exercise its discretion to review that error. To the contrary, the factors described above counsel against reviewing any error.

CONCLUSION

This court should affirm the decision of the Court of Appeals and the trial court's judgment of conviction.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 8, 2015, I directed the original Brief on the Merits of Respondent on Review State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, to be served upon Ernest Lannet and Laura A. Frikert, attorneys for appellant, by using the 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 8,758 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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