IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. CELSO AVILA-NAVA, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court No. C092845CR CA A146527 SC S061802

BRIEF ON THE MERITS OF PETITIONER ON REVIEW ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Washington County
Honorable RICK KNAPP, Judge

Opinion Filed: July 3, 2013
Reversed/Invalid
Author: Haselton, Chief Judge
Before: Ortega, Presiding Judge;
Haselton, Chief Judge; and Sercombe, Judge

Continued…

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INTRODUCTION

During a back-and-forth discussion in which an officer was explaining, in Spanish, the meaning of standard *Miranda* warnings, defendant uttered the words, "I won't answer any questions." At trial, the officer testified that those words were uttered "as a question that [defendant] was pondering * * * from lack of understanding," rather than as a declaratory statement. Consistent with that testimony, the trial court found that when defendant uttered those words, he "wasn't saying, 'I won't answer any questions.' * * * * * [I]t was posed as more of a – as a quandary."

The Court of Appeals concluded otherwise, holding that defendant had unequivocally invoked his right to remain silent under Article I, section 12, of the Oregon Constitution. In reaching that conclusion, the Court of Appeals considered nothing more than the "ordinary meaning" of the words "I won't answer any questions," which the Court of Appeals held were "susceptible to only one reasonable understanding." For that reason, it gave little or no consideration to the words' context.

But the relevant inquiry is whether a reasonable officer would have understood—under *all* the circumstances, including any factual context beyond the words themselves—that defendant was unequivocally invoking his rights.

Because spoken words draw meaning from such context, their "ordinary meaning" should never preclude consideration of context—including demeanor, intonation, gestures, the surrounding conversation, and any other circumstances that a reasonable officer would consider when hearing those words spoken.

Question Presented

Custodial interrogation must cease once a suspect unequivocally invokes a right protected under Article I, section 12, of the Oregon Constitution. If a suspect's words are equivocal, however, officers may ask clarifying questions. But when a suspect says words that would, when considered out of context, reflect an unequivocal invocation of one of those rights, should a court consider whether the words were nevertheless equivocal when viewed in context?[1]

Proposed Rule of Law

Yes. In determining whether a suspect unequivocally invoked a right under Article I, section 12, a reviewing court must examine the suspect's words in context to determine whether a reasonable officer would have understood the suspect to be unequivocally invoking one of those rights. Pertinent context includes not just surrounding conversation, intonation, demeanor, and gestures

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[1] The state presented two questions in its petition for review, but the second question was essentially a fact-specific refinement of the first question. The second question served only to highlight one circumstance—the language that the officer and suspect are speaking—that is highly relevant to whether a suspect's words are unequivocal.

but also any other circumstances that would color a reasonable listener's understanding of those words. Examples of such other circumstances include whether the words were asked as a question and the language in which the suspect was speaking. Even when the suspect's words would be—when divorced from context—unequivocal, no "ordinary meaning" exception relieves a court of its obligation to consider context. If, under all the pertinent circumstances, a reasonable officer would not understand a suspect to be clearly invoking an Article I, section 12, right, the officer may ask clarifying questions to determine whether the suspect has, in fact, invoked one of those rights.

Summary of Argument

Article I, section 12, of the Oregon Constitution affords individuals a right to avoid self-incrimination. Under that provision, custodial interrogation must cease after a criminal suspect unequivocally invokes the right to remain silent. When a suspect's words are instead equivocal, however, officers may ask clarifying questions. Whether words are unequivocal turns on whether a reasonable officer, under the totality of the circumstances, would understand those words to be an invocation of the right to remain silent.

The totality of circumstances test requires courts to consider more than just the "ordinary meaning" of the words at issue; instead, courts must consider all relevant facts, including demeanor, intonation, gestures, the surrounding conversation, and any other circumstances that a reasonable officer would

consider when hearing those words spoken. Among those other circumstances is whether the words were perceived as a question and whether a language barrier hampered communication. All of those circumstances are historical facts, and a reviewing court is bound by a trial court's findings on those facts if supported by evidence.

The facts here support the trial court's finding that defendant uttered the words "I won't answer any questions" as a question by which he was seeking to clarify, not assert, his rights. Because those words were not a declaration, a reasonable officer would not have understood them to be an unequivocal invocation of the right to remain silent. This court should affirm the trial court's judgment.

Statement of Facts

A. Following a conversation about his rights, defendant agreed to talk to police.

Police arrested defendant following a "felony car stop" or "high risk traffic stop" of two stolen vehicles. (Tr 7, 214, 223, 249, 251–53). After defendant's arrest, a Spanish-speaking officer read him a set of *Miranda* warnings, in Spanish, from a standard pre-printed card. (Tr 7–8). Those warnings advised defendant of his right to remain silent and of his right to counsel. (Tr 8–9). When asked whether he understood those rights, defendant

responded in the affirmative. (Tr 9). Police then transported defendant from the scene of the stop to the police department. (Tr 9).

At the police department, another officer—Detective Ganete—began a conversation with defendant, again in Spanish. (Tr 11–13). The conversation between Detective Ganete and defendant unfolded entirely in Spanish. (Tr 13). In pre-trial testimony, Detective Ganete recounted, in English, both sides of that conversation. The record contains no other evidence of that conversation. The substance of Detective Ganete's testimony can be found in the transcript excerpt attached as Appendix A to this brief.

At the outset of their conversation, Detective Ganete introduced himself and again read defendant a set of *Miranda* warnings, "from a prepared card in Spanish." (App 1–2; Tr 11–12). After advising defendant of his rights, Detective Ganete asked if defendant understood those rights. (App 2–3; Tr 12–13). Defendant responded, "'I have a question. Do I have to answer your questions?'" (App 3; Tr 13). Detective Ganete told defendant that he did not have to answer any questions if he did not want to do so. (App 3; Tr 13). Defendant then changed the topic and asked Detective Ganete, "'Why did mister call the police?'" (App 3; Tr 13). Detective Ganete responded that he needed to make sure that defendant understood his rights before the conversation could continue, and that defendant needed to decide whether or not to talk to the police. (App 3; Tr 13).

Detective Ganete then repeated the *Miranda* warnings to defendant, line by line, asking defendant if he understood each right.[2] (App 3–4; Tr 13–14). As they worked through those warnings, defendant told Detective Ganete that he did not understand the warning that "anything you say may be used against you in a court of law." (App 4; Tr 14). Detective Ganete asked, "'What is it you don't understand[?]'" (App 4; Tr 14). In response, defendant said, "'Anything I say can be used against me.'" (App 4; Tr 14). Detective Ganete, in turn, responded by saying, "'That's correct. Anything you say can be used against you.'" (App 4; Tr 14). Defendant then said, "'I won't answer any questions.'" (App 5; Tr 15). Although the court reporter did not include a question mark when transcribing Detective Ganete's recounting of defendant's words, Detective Ganete testified that he interpreted those words "as a question that [defendant] was pondering * * *." (App 14; Tr 24). Detective Ganete further testified that he did not understand those words as a statement declaring defendant's unwillingness to talk to the police. (App 14; Tr 24).

Having understood defendant's words as a question, Detective Ganete continued the conversation. He asked if defendant meant that he did not want

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[2] Detective Ganete's testimony about the *Miranda* warnings was not fully chronological, meaning that the dialogue set forth in the Court of Appeals opinion, *Avila-Nava*, 257 Or App 364, 366–67, 306 P3d 752 (2013), is a reconstruction rather than a verbatim reproduction of a single portion of the transcript.

to talk to Detective Ganete and that he wanted the detective to leave. (App 14; Tr 24). Defendant responded, "No, I can't talk to you if I don't understand what this right means because you're telling me I have the right to remain silent. I don't understand what this right means." (App 14; Tr 24). Detective Ganete again read to defendant the warning that "anything you say can be used against you in a court of law." (App 5; Tr 15). Defendant interrupted, stating "'Pardon. I'm not trying to be disrespectful. How can I say this?'" (App 5; Tr 15). After pausing, defendant continued, "'Anything I say can be used against me. It's like I'm lying?'" (App 5; Tr 15).

Because defendant did not seem to understand that particular *Miranda* warning, Detective Ganete told him that they would discuss the other *Miranda* warnings and return later to the one defendant could not understand. (App 4–6; Tr 14–16). Detective Ganete then gave defendant the other *Miranda* warnings—relating to the right to an attorney and the right to have an appointed attorney if defendant could not afford an attorney—and defendant confirmed that he understood those rights. (App 4–6; Tr 14–16).

Detective Ganete then asked defendant "if he understood all of the rights with the exception that anything that he may say could be used against him in a court of law?" (App 6–7; Tr 16–17). Defendant responded, "'That's exactly what I don't understand.'" (App 7; Tr 17). Detective Ganete asked defendant about his level of education, and if he could read Spanish. (App 7; Tr 17).

Defendant confirmed that he could read "a little bit." (App 7; Tr 17). After defendant said that he would be able to read the *Miranda* warnings and understand them, Detective Ganete gave him the pre-printed card, and defendant read the warnings out loud. (App 7; Tr 17). After doing so, defendant asked Detective Ganete, "'You can – you can just ask questions then?'" (App 7; Tr 17). Detective Ganete responded, "'if you tell me you wish to remain silent, I can't question you.'" (App 7; Tr 17). Defendant then told Detective Ganete, "'Now, I understand.'" (App 8; Tr 18).

Detective Ganete next told defendant that he had to establish whether defendant wanted to speak to him. (App 8; Tr 18). Detective Ganete explained that "[defendant] may choose to answer or not to answer specific questions, and that was fine with [Detective Ganete]." (App 8; Tr 18). Detective Ganete then asked defendant whether he understood his rights. (App 8; Tr 18). Defendant stated that he did. (App 8; Tr 18). Detective Ganete asked if defendant understood the *Miranda* warning card that defendant had read. (App 8; Tr 18). Defendant responded that he did. Detective Ganete then asked defendant if he wanted to speak to Detective Ganete "freely." (App 8; Tr 18). Defendant again said, "'Yes.'" (App 8; Tr 18). Detective Ganete also informed defendant that he could choose to stop speaking with him at any time that he wanted. (App 8; Tr 18).

After defendant waived his rights, Detective Ganete interviewed defendant about his role in a reported robbery. (App 9; Tr 19). Defendant spoke freely and never indicated that he wanted to stop talking or that he wanted a lawyer. (App 9; Tr 19). The state later used defendant's custodial statements to impeach his trial testimony. (Tr 354–63).

B. The trial court concluded that defendant did not unequivocally invoke his right to remain silent.

Pre-trial, defendant moved to suppress his statements to Detective Ganete about the robbery. He argued that Detective Ganete should have terminated the conversation once defendant said the words, "I won't answer any questions." (Tr 28–30). The trial court concluded that defendant's words were not an unequivocal invocation of the right to remain silent, and it therefore denied defendant's motion. (Tr 32–33).

In denying defendant's motion, the trial court relied on the totality of the relevant facts. (Tr 31). Specifically, the trial court found as fact that, when defendant said, "I won't answer any questions," the words were "posed more of a – as a quandary. The defendant didn't quite understand what was going on at the time." (Tr 31–32). The trial court further found that when defendant uttered those words, he "wasn't saying, 'I won't answer any questions.' It was that he didn't know if he wasn't supposed to answer any questions or not, and so there's this – he was – it was apparent that the defendant was confused about

what his rights were * * *." (Tr 31). The trial court therefore concluded that, because defendant did not unequivocally invoke his right to remain silent, Detective Ganete acted lawfully when he asked clarifying questions and discussed the remaining *Miranda* warnings. Defendant's subsequent waiver of his rights was knowing and voluntary. (Tr 31–33).

C. The Court of Appeals reversed, concluding that defendant had unequivocally invoked his right to remain silent.

The Court of Appeals reversed, agreeing with defendant's contention that Detective Ganete should have terminated the conversation once defendant said the words, "I won't answer any questions." *Avila-Nava*, 257 Or App 364, 371–73, 306 P3d 752 (2013). The Court of Appeals concluded that "[t]he words that defendant used were unambiguous; that is, they were susceptible to only one reasonable understanding—an unqualified declaration that defendant would not answer any questions." *Id*. at 371. For that reason, it rejected the trial court's finding that the pertinent words were posed as a question, stating that any such understanding was "unreasonable." *Id*. The Court of Appeals held that the trial court erred by denying defendant's motion to suppress. *Id*. at 365.

ARGUMENT

This case involves the admissibility of statements made during a custodial interrogation during which police provided *Miranda* warnings. The dispute centers on whether, by uttering the words, "I won't answer any

questions," defendant unequivocally invoked his Article I, section 12, right to remain silent.

Article I, section 12, of the Oregon Constitution provides, in part: "No person shall * * * be compelled in any criminal prosecution to testify against himself." That provision "affords a constitutional right to remain silent," *State v. Vondehn*, 348 Or 462, 474, 236 P3d 691 (2010), as well as a "right to the assistance of counsel during custodial interrogation," *State v. Meade*, 327 Or 335, 339, 963 P2d 656 (1998).[3] To protect those rights, this court "has held that, before questioning, police must give *Miranda* warnings to a person who is in 'full custody' * * *." *State v. Roble-Baker*, 340 Or 631, 638, 136 P3d 22 (2006). Moreover, police interrogation must cease when a suspect in police custody makes an "unequivocal" invocation of an Article I, section 12, right. *Meade*, 327 Or at 339 (discussing right to assistance of counsel). If the invocation is "equivocal," by contrast, "police may follow up with questions

[3] Because it protects those two rights, "Article I, section 12, is an independent source for warnings similar to those required under the Fifth Amendment to the United States Constitution by *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966)." *State v. Moore*, 349 Or 371, 382, 245 P3d 101 (2010), *cert den sub nom Coen v. Oregon*, 131 S Ct 2461, 179 L Ed 2d 1225 (2011). For that reason, Oregon courts frequently use the term "*Miranda* rights" as a shorthand to describe suspect's Article I, section 12, rights during a custodial interrogation. *See, e.g.*, *Meade*, 327 Or at 342.

Although this brief adopts that same shorthand, this case involves only state constitutional issues, under Article I, section 12, of the Oregon Constitution.

intended to clarify whether the suspect meant to invoke" a right afforded under Article I, section 12. *Id.* If officers violate those principles, any resulting statements must be suppressed. *State v. Isom*, 306 Or 587, 595, 761 P2d 524 (1988).

Here, the police asked clarifying questions after defendant uttered words that defendant argues were an unequivocal invocation of his right to remain silent. Thus, the admissibility of his later statements turns on whether those words amounted to an unequivocal invocation of that right. As discussed below, this court should resolve that question by asking whether a reasonable officer would have understood—in view of the totality of factual circumstances—that defendant was invoking his right to remain silent. At issue is whether those factual circumstances include the context in which a suspect spoke the relevant words, and whether the "ordinary meaning" of those words can ever limit the circumstances that a court must consider.

A. Whether a suspect unequivocally invoked an Article I, section 12, right turns on whether a reasonable officer, under the totality of factual circumstances, would have understood that the suspect was invoking his rights.

Neither party disputes that three relatively settled principles guide a court's analysis of whether a suspect's statements are an unequivocal invocation of a right under Article I, section 12.

First, words are unequivocal only if a reasonable officer would have

understood that the suspect was invoking a right under Article I, section 12. Although this court has never articulated that particular "reasonable officer" standard, neither the state nor defendant has ever disputed whether that standard applies to these proceedings. This court should formally adopt that standard here because "a rule addressed to public officers must describe the conditions in which it applies from the perspective of the officer who is to follow it. *State v. Smith*, 301 Or 681, 713, 725 P2d 894 (1986) (Linde, J., dissenting).[4] That is, if the ultimate purpose of the rule is to govern when officers must cease interrogation, the rule should turn on objective factors perceivable by officers, rather than subjective intent about which officers can only speculate. Consistent with that reasoning, this court has adopted a reasonable-officer standard in assessing a related question—whether police activity amounts to "interrogation" for the purposes of Article I, section 12. *State v. Scott*, 343 Or 195, 203, 166 P3d 528 (2007) ("[I]nterrogation extends to the type of police conduct that the police should know [is] reasonably likely to elicit an incriminating response." (internal quotation marks omitted, second revision in

[4] Although Justice Linde's views did not carry the day in *Smith*, they were prescient. A plurality in *Smith* held that the Oregon Constitution did not require *Miranda* warnings, over Justice Linde's dissent to the contrary. One year later, the Oregon Supreme Court reversed course and sided with Justice Linde, "reject[ing] the views of the plurality in *Smith*." *State v. Brown*, 100 Or App 204, 208–09, 785 P2d 790, *rev den*, 309 Or 698 (1990) (discussing *State v. Magee*, 304 Or 261, 744 P2d 250 (1987)).

original)); *Vondehn*, 348 Or at 489 (Linder, J., concurring) ("Any reasonable officer * * * would know that the question could elicit an incriminating response * * *."). Moreover, the Court of Appeals has consistently applied a reasonable-officer standard in this context, *see Avila-Nava*, 257 Or App at 371,[5] and that is the standard that controls under federal *Miranda* analysis, *see Davis v. United States*, 512 US 452, 458–59, 114 S Ct 2350, 129 L Ed 2d 362 (1994). This court should conclude that the federal approach satisfies the requirements of the Oregon Constitution because this court has typically adopted the federal approach in this context. *See, e.g.*, *Scott*, 343 Or at 203; *State v. Kell*, 303 Or 89, 95, 734 P2d 334 (1987) (holding that "the federal *Edwards* waiver rule should be utilized in interpreting similar waiver issues under Oregon law"

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[5] As authority for the "reasonable officer standard," the Court of Appeals relied on a line of cases leading to an opinion decided under the federal constitutional standard, *Davis v. United States*, 512 US 452, 458–59, 114 S Ct 2350, 129 L Ed 2d 362 (1994). *See Avila-Nava*, 257 Or App at 371. *Avila-Nava* relied on *State v. Harding*, 221 Or App 294, 300–01, 189 P3d 1259, *rev den*, 345 Or 503 (2008), which in turn cited *State v. Holcomb*, 213 Or App 168, 176, 159 P3d 1271, *rev den*, 343 Or 224 (2007), which in turn cited *Davis*, 512 US at 458–59, and *State v. Dahlen*, 209 Or App 110, 117, 146 P3d 359, *modified on recons*, 210 Or App 362, 149 P3d 1234 (2006). *Dahlen*, in turn, cited *Charboneau*, 323 Or at 60, as citing *Davis* "with approval."

But *Charboneau* did not adopt any "reasonable officer standard." Nor did *State v. Montez*, 309 Or 564, 572–73, 789 P2d 1352 (1990), or *State v. Acremant*, 338 Or 302, 322, 108 P3d 1139, *cert den*, 546 US 864 (2005), the only other cases the state has found in which this court reviewed whether a particular statement was an unequivocal invocation of an Article I, section 12, right.

because "there is no value in being different merely for the sake of the difference" (citing *Edwards v. Arizona*, 451 US 477, 101 S Ct 1880, 68 L Ed 2d 378 (1981)). Indeed, *Kell* adopted a holding from *Edwards*, the decision which underlies the reasonable-officer standard adopted by the United States Supreme Court in *Davis*. 512 US at 454.

Second, the court must consider the "totality of the circumstances" when determining whether a suspect's words amount to an unequivocal invocation of a relevant right. *See State v. Charboneau*, 323 Or 38, 55, 913 P2d 308 (1996). ("In the totality of the circumstances, [the] defendant's question simply does not constitute, as a matter of law, an unequivocal request for a lawyer.").

Third, because the reasonable-officer inquiry is so circumstance-specific, it will frequently turn on the facts found by the trial court: "The question of what transpired during a custodial interrogation * * * is an issue of fact for the trial court and the facts found may be—*indeed, usually are*—dispositive of the legal inquiry." *State v. James*, 339 Or 476, 481, 123 P3d 251 (2005) (emphasis added). As to those facts—the circumstances and events of a custodial interrogation—appellate courts are "bound by the trial court's findings of historical fact if evidence in the record supports them." *Id.*

Proceeding from those principles, this case presents the question of precisely which facts a court must consider when applying the reasonable-officer standard. As explained below, because courts must review the *totality*

of the circumstances when applying that standard, they must consider facts beyond the "ordinary meaning" of the words at issue. And because a reasonable officer would not ignore the context in which a suspect's words were spoken, any standard based on a reasonable officer must also consider that context. That context, in turn, includes demeanor, intonation, gestures, the surrounding conversation, and any other circumstances that would color a reasonable officer's understanding of spoken words. Those additional circumstances include whether the words were asked as a question, which is a factual issue. They also include whether a language barrier hampered understanding between the officer and the suspect. Moreover, no exception permits a court to ignore any of that context when the words at issue seem unequivocal under a decontextualized "ordinary meaning" analysis.

1. Any determination of a reasonable officer's understanding of a suspect's spoken words, under the totality of the circumstances, must include context.

One point is clear from this court's few decisions reviewing whether an invocation is unequivocal—that the determination must involve the "totality of the circumstances." *Charboneau*, 323 Or at 55. Those circumstances must include more than just the meaning of words—any determination confining the inquiry to words alone would not be considering the *totality* of the circumstances. Thus, for a court to properly consider the totality of the circumstances, it must consider the context in which the pertinent words were

spoken.

Such context is particularly important because the focus of the inquiry here is the objective determination of how a reasonable officer would have understood *spoken* words. Unlike written words, the meaning of spoken words—and therefore their reasonable understanding by a listener—depends largely on such context as demeanor, intonation, gestures, the surrounding conversation, and any other circumstances that would color a reasonable listener's understanding of the speaker's meaning.[6] *See Chatterton v. Chatterton*, 208 Or 434, 435, 301 P2d 1034 (1956) ("Ofttimes the tone of voice

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[6] This distinction between the spoken word and the written word fueled the plot of the popular film—and CLE teaching tool—"My Cousin Vinny." In the film, one character transforms—through a deadpan reading, devoid of intonation—a character's astounded response to an unfounded accusation of murder ("*I* shot the clerk?") into a confession to murder ("I shot the clerk"). "My Cousin Vinny." (20th Century Fox 1992) (motion picture). As one court describing the film observed, "Although the transcript was completely accurate in reporting the words said, it was totally inaccurate in conveying the *message* of the speaker because it did not report the intonation." *Riley v. Murdock*, 156 FRD 130, 131 n 3 (ED NC 1994) (emphasis in original). Just as importantly, a court cannot, without considering intonation, accurately determine the reasonable understanding of spoken words.

Filmmakers are not the only ones to have recognized the significance of context in spoken language. Academic linguists recognize that "almost all sentences are ambiguous when taken out of context." Jenny Thomas, *Cross-Cultural Pragmatic Failure*, Applied Linguistics, Vol 4, No 2, 92–93 (1983) (providing examples of ambiguity in seemingly unambiguous sentences). That is, decontextualized rules of language can only identify the range of possible meanings of an utterance, and context is needed to assign meaning to spoken words. *Id.* (discussing the difference between "semantics" and "pragmatics," and between "sentence meaning" and "speaker meaning").

is more eloquent than the spoken word * * *."). No reasonable listener would ignore context when hearing spoken words. For example, a reasonable officer should be reluctant to accept, without clarification, the word "yes" as an affirmative response if the speaker is simultaneously shaking his head in the negative. Thus, if the rule turns on a reasonable officer's understanding of spoken words, that rule must account for context. Indeed, this court has recognized that an officer's "demeanor" and "tone of voice" is relevant to whether an officer's verbal requests would have made "a reasonable person * * * believe[] that his liberty had been temporarily restrained"—the key inquiry in determining whether and when a conversation with police becomes, for constitutional purposes, a seizure. *State v. Ehly*, 317 Or 66, 76–77, 854 P2d 421 (1993). If intonation and demeanor are relevant to determining how a reasonable suspect would understand an officer's spoken words, such context is equally relevant to determining how a reasonable officer would understand a suspect's spoken words.

For those reasons, a court must always consider context when determining whether a suspect's words amount to an unequivocal invocation of a pertinent right. Unsurprisingly, that is precisely the approach that courts in

other jurisdictions have applied under these circumstances.[7]

2. The relevant context includes any circumstances that would color a reasonable listener's understanding of the speaker's meaning.

As discussed above, context includes demeanor, intonation, gestures, and the substance of the surrounding conversation. For the purposes of the reasonable-officer standard, however, the relevant context should not be limited to any finite set of considerations. As particularly relevant in this case, context should include other matters of historical fact themselves built on context—such as whether the words were uttered as a question. And it should also include other circumstances such as the presence of a language barrier between

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[7] *See, e.g.*, *People v. Williams*, 233 P3d 1000, 1020 (Cal 2010), *cert den*, 131 S Ct 1602 (2011) (recognizing the importance of "context" to determining whether "it would not be clear to a reasonable listener what the defendant intends"); *Medina v. Singletary*, 59 F3d 1095, 1104 (11th Cir 1995), *cert den*, 517 US 1247 (1996) (recognizing the importance of "'events preceding the [response]' or 'nuances inherent in the [response] itself'" (quoting *Smith v. Illinois*, 469 US 91, 100 (1984))); *People v. Arroya*, 988 P2d 1124, 1132–33 (Colo 1999) (when assessing the totality of the circumstances, trial courts should consider "the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect invoked the right to remain silent," as well as the "suspect's experience with the criminal justice system, her ability to understand questions, and her ability to verbalize her wants and needs"); *People v. Glover*, 661 NE2d 155, 156 (NY 1995) ("Whether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression, and the particular words found to have been used by the defendant.").

an officer and a suspect.

a. The relevant context includes whether the words were uttered as a question, which is an issue of historical fact.

To understand a suspect's words, a reasonable officer would consider the function of the sentence—declaratory, interrogatory, imperative, or exclamatory—containing the words at issue. To do otherwise would be unreasonable because two identical phrases can mean very different things depending on the function in which they are used: compare (1) "I need a lawyer?" to (2) "I need a lawyer."

Sentence function is, like all other matters of context, a matter of historical fact regarding "what transpired during a custodial interrogation." *James*, 339 Or at 481. That conclusion follows even though sentence function may itself turn on other predicate historical facts: for example, whether the suspect used rising intonation when uttering the pertinent words or whether the suspect behaved quizzically (*e.g.*, by raising his eyebrows) when uttering the words. As with all matters of historical fact—and as discussed above on page 15—an appellate court is bound by a trial court's finding that particular words were uttered as a question, so long as evidence in the record supports that finding. *James*, 339 Or at 481. *Accord Medina v. Singletary*, 59 F3d 1095, 1104 (11th Cir 1995), *cert den*, 517 US 1247 (1996) (deferring to trial court's finding that a suspect had answered a question negatively, even when the

transcription of the word "No" did not "exactly reflect" the tape recording in which the suspect said neither "No" nor "Nah"). Such evidence could include an officer's testimony that the pertinent words were uttered as a question, but a trial court need not accept that conclusion if the testimony is not credible or if other evidence in the record contradicts it. *Cf. Jensen v. Gladden*, 250 Or 499, 504–05, 443 P2d 626 (1968) (trial court record contained conflicting testimony from officers and the suspect as to whether officers used loud or harsh voices during interrogation). Ultimately, it is the fact-finder's task to consider the evidence and decide what version of historical facts occurred.

Moreover, the fact-finder's role is owed no less deference simply because a factual issue (here, whether the pertinent words were uttered as a question) may prove dispositive to the ultimate legal inquiry (here, whether a reasonable officer would have understood the words as an unequivocal invocation of a relevant right). *See, e.g.*, *Charboneau*, 323 Or at 55 (concluding that, when asking "Will I have an opportunity to call an attorney tonight?" the defendant "asked about the future" rather than unequivocally saying "that he wished to speak with a lawyer at the time"). A question of historical fact does not transmute into a legal issue simply because the fact is dispositive of a relevant legal inquiry. *See James*, 339 Or at 481 (observing that, in the context of rights under Article I, section 12, "the facts found may be—indeed, usually are—dispositive of the legal inquiry"). Regardless, whether the pertinent words were

uttered as a question is not always dispositive of the legal inquiry here. For example, the question, "Why don't you understand that I don't want to answer any questions?" unequivocally expresses a desire to answer no further questions. *See also State v. Dahlen*, 209 Or App 110, 117, 146 P3d 359, *modified on recons*, 210 Or App 362, 149 P3d 1234 (2006) (concluding that the "request, 'When can I call an attorney?' cannot reasonably be said to be equivocal").

In short, when a trial court concludes that a suspect uttered the pertinent words as a question, that conclusion is a finding of historical fact, not a legal conclusion. Therefore, if evidence in the record (such as the testimony of the officer who heard the words) supports that finding, an appellate court may not disturb it.

b. The relevant context also includes the language being spoken.

A reasonable officer's understanding may also be affected by other circumstances, such as the existence of a language barrier. When an officer and a suspect are discussing rights in a language other than English, confusion is more likely because *Miranda* warnings may—due to syntactic idiosyncrasies or otherwise—simply translate poorly.[8] Even when *Miranda* warnings are

[8] For examples of the difficulties that can arise in communicating *Miranda* warnings to a non-English speaker, see *United States v. Botello-*

Footnote continued…

properly translated, a suspect's response may not be easily understood, especially when the conversation occurs in a language foreign to the officer—unequivocal words might, upon reasonable but faulty translation, come to sound more equivocal. Or even upon correct translation, equivocal words might come to appear unequivocal even though a reasonable listener would not understand them that way in their original language. For those reasons and more, confusion will frequently arise in conversations involving non-native speakers of a language, and the need for clarification may be more reasonable in that circumstance.

3. The reasonable-officer standard is incompatible with an "ordinary meaning" exception that would relieve a court of its obligation to consider context.

Although some phrases or words may, when presented in a decontextualized written transcript, seem capable of only one reasonable understanding under an "ordinary meaning" analysis, the reasonable-officer standard is incompatible with an "ordinary meaning" exception that would relieve a court of its obligation to consider the context discussed above.

Although this court has recognized the primacy of "ordinary meaning"

(…continued)
Rosales, 728 F3d 865, 867 (9th Cir 2013), *People v. Van Huynh*, No. D062250, 2013 WL 5202798 (Cal Ct App Sep 17, 2013) (unpublished), and *Albarran v. State*, 96 So3d 131, 150–51 (Ala Crim App 2011), *cert den*, 133 S Ct 657, 184 L Ed 2d 468 (2012).

when interpreting the *written* words of a statute, *see, e.g.*, *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009), that mode of analysis is not useful to determining the objective meaning of *spoken* words. That is so because, for spoken words, context is more than a merely secondary source of meaning. *Contrast with Gaines*, 346 Or at 171–72 (discussing textual sources as primary to statutory interpretation, with non-textual sources such as legislative history relegated to a secondary interpretive step). Unlike written words, spoken words draw meaning from non-textual communication, such as demeanor, intonation, gestures and more, as discussed above on page 17 and in footnote 6.

More importantly—and leaving aside the differences between spoken and written words—statutory interpretation requires determination of the legislature's *subjective* intent, *Gaines*, 346 Or at 164, whereas the Article I, section 12 inquiry requires determination of a reasonable officer's *objective* understanding. Gestures, intonation, and demeanor bear primary interpretive relevance here because they—as much as the words themselves—*create* objective meaning for those who hear spoken words. When interpreting a written statute, by contrast, legislative history can do nothing more than *inform* an exploration of the legislature's subjective intent. For that reason as well, a court should never confine the reasonable-officer inquiry to purely textual sources or the "ordinary meaning" of a suspect's words, no matter how unequivocal they might seem when viewed in a decontextualized transcript.

Thus, to the extent that the Court of Appeals adopted an "ordinary meaning" exception to the consideration of context, this court should reject that rule and join courts that similarly recognize no such exception.[9]

B. Under the totality of the circumstances in this case—including the trial court's finding that defendant uttered the pertinent words as a question—a reasonable officer would not have understood defendant to be unequivocally invoking his right to remain silent.

This case requires the court to determine whether a reasonable officer, under the totality of the circumstances, would have understood defendant's words—"I won't answer any questions"—to be an unequivocal invocation of his right to remain silent." *Avila-Nava*, 257 Or App at 371. Because those words were uttered as a question and because other contextual circumstances suggest that defendant was asking for clarification, those words were not an unequivocal invocation of any right.

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[9] *See, e.g.*, *Williams*, 233 P3d at 1020 ("In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that *in context*, it would not be clear to a reasonable listener what the defendant intends." (emphasis original)); *Medina*, 59 F3d at 1104–05 ("declin[ing] to adopt a *per se* rule" that words that seem unambiguous are, as a matter of law, an unequivocal invocation; recognizing "that 'events preceding the [response]' or 'nuances inherent in the [response] itself' can create ambiguity and make the response equivocal" (quoting *Smith v. Illinois*, 469 US 91, 100 (1984))); *Arroya*, 988 P2d at 1132 ("The scope of a trial court's analysis should not be limited to the words as they appear on their face. A trial court should consider the words spoken by the defendant and the plain meaning of those words, but the court should also consider the totality of the circumstances surrounding the statement in order to assess the words in context.").

1. The record supported the trial court's finding that defendant was posing a query when he uttered the words "I won't answer any questions."

Here, the trial court found—as historical fact and contrary to the version of facts relied upon by the Court of Appeals—that, "even though [defendant] did say, 'I won't answer any questions,'" those words were "posed more of a – as a quandary. The defendant didn't quite understand what was going on at the time." (Tr 31–32).

That finding is supported by evidence. First, Detective Ganete testified that he "interpreted [defendant's words] as a question that he was pondering to me from lack of understanding." (App 14; Tr 24). Defendant posed that question during a back-and-forth conversation that appeared to take a question-and-answer format. The Court of Appeals improperly reconstructed that conversation as follows, treating questions as statements:

> Ganete: "Anything you say may be used against you in a court of law."
>
> Defendant: "I don't understand what this means."
>
> Ganete: "What is it that you don't understand?"
>
> Defendant: "Anything I say can be used against me."
>
> Ganete: "That's correct. Anything you say can be used against you."
>
> Defendant: "I won't answer any questions."

Avila-Nava, 257 Or App at 366–67 (emphasis omitted); (App 4–5, 15–16; Tr

14–15, 25–26).

In creating that reconstruction, the Court of Appeals seems to have relied on the absence of a question mark in the transcript of Detective Ganete's testimony recounting the conversation. Notably, however, the rest of the transcript shows that its punctuation is unreliable and that it omits question marks where context clearly calls for them. (*See, e.g.*, App 4; Tr 14 (transcribing Detective Ganete's testimony that he "*asked* [defendant] 'What is it that you don't understand.'" (emphasis added, punctuation as in original))). Reliability aside, the transcript's punctuation cannot be determinative because the trial court issued its findings from the bench, (Tr 30–33), meaning that the court relied on live testimony, not on a transcript produced for appeal.

Most importantly, the punctuation above is inconsistent with Detective Ganete's testimony that defendant's words were uttered "as a question that [defendant] was pondering * * * from lack of understanding." (App 14; Tr 24). That testimony entitled the trial court to view defendant's last two utterances as questions, correctly reconstructed as follows:

> Ganete: "Anything you say may be used against you in a court of law."
>
> Defendant: "I don't understand what this means."
>
> Ganete: "What is it that you don't understand?"
>
> Defendant: "Anything I say can be used against me?"

> Ganete: "That's correct. Anything you say can be used against you."
>
> Defendant: "I won't answer any questions?"

(App 4–5, 15–16; Tr 14–15, 25–26).

In other words, the trial court was free to choose between the two versions of historical facts identified above, and it necessarily chose the latter. *See Ball v. Gladden*, 250 Or 485, 487–88, 443 P2d 621 (1968) (where there is evidence from which the facts could be decided in more than one way, appellate courts must presume that the trial court decided the facts in a manner consistent with its ultimate conclusion). Furthermore, the second of the two versions above makes more sense in view of defendant's stated difficulty in understanding Detective Ganete's warnings. The trial court also necessarily found that Detective Ganete was credible. That is, Detective Ganete genuinely perceived defendant's words as a question, presumably due to defendant's intonation and demeanor, which Detective Ganete may well have mimicked for the trial court when repeating them in his testimony.

In light of those factual findings, the Court of Appeals erred in holding, essentially as a matter of law, that defendant's words were a "declaration" and that any contrary understanding—specifically, that the words were "a 'question' inviting further inquiry"—was "not reasonable." *Avila-Nava*, 257 Or App at 371. Moreover, because the trial court's findings likely relied on Detective

Ganete's demeanor, they are particularly worthy of deference. *Cf. In re Conduct of Obert*, 352 Or 231, 233, 244–45, 282 P3d 825 (2012) (observing deference owed, even on *de novo* review, to findings based on demeanor).

2. Because defendant's words were uttered as a question, and in light of the language barrier, Detective Ganete reasonably did not understand defendant to be unequivocally invoking his right to remain silent.

Here, a reasonable officer would not have understood the *question* "I won't answer any questions?" as an unequivocal invocation of the right to remain silent. Most importantly, the non-textual cues—whatever intonation or demeanor supported Detective Ganete's conclusion that the words were a question—prevented a reasonable officer from being certain that defendant was invoking any rights.

Another relevant contextual circumstance was the language barrier, as the trial court pragmatically recognized:

> It's a bit different than we typically see, but obviously, there was a Spanish speaking issue here that they had to work through in terms of the *Miranda* rights. And obviously, the *Miranda* rights aren't really clearly interpreted from English into Spanish anyway, and so you can see where there's a process that has to take place where these rights are explained in detail to someone who doesn't speak English to be able to make sure that they clearly understand[.]

(Tr 33). That circumstance further permitted a reasonable officer to be unsure whether defendant was invoking any rights rather than merely trying to clarify their nature.

Finally, the conversation preceding defendant's question further suggests that defendant was not invoking his rights when uttering the words at issue. He asked the question in the course of trying to understand the *Miranda* warnings, particularly the warning that anything he said could be used against him. Defendant had already expressed confusion regarding that warning and his question was the latest in a series of inquiries or statements seeking further clarification. (*See, e.g.*, App 4; Tr 14 ("I don't understand what this means.")). In that context, a reasonable officer could not have been certain whether defendant was continuing to seek clarification or whether he was switching gears and now invoking a right.

In the totality of those circumstances—including all relevant context—a reasonable officer would not have concluded that defendant was unequivocally invoking his rights. Detective Ganete thus was permitted to ask the clarifying questions to which defendant objects. Following those questions, defendant knowingly and voluntarily waived his rights under Article I, section 12. For that reason, none of his later statements are suppressible, and the trial court correctly denied defendant's motion to suppress.

CONCLUSION

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

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 15, 2014, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jed Peterson, attorney for respondent on review, by using the court's 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 7,428 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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