IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. JUSTIN JAMES SCHILLER-MUNNEMAN, Defendant-Appellant Petitioner on Review.	Josephine County Circuit Court Case No. 11CR0002 CA A152061 SC S063526

PETITIONER'S REPLY BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Josephine County
Honorable Pat Wolke, Judge

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

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
ANNE FUJITA MUNSEY #994080
Senior Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
anne.munsey@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
PEENESH H. SHAH #112131
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
peenesh.h.shah@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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STATEMENT OF THE CASE

This court granted defendant leave to file a reply brief by order dated April 7, 2014.

Summary of Argument

A criminal defendant has an absolute right not to incriminate himself at trial. That right is embodied in Article I, section 12, of the Oregon Constitution. The state may not use a defendant's exercise of that right against him to prove his guilt. Thus, when the state attempts to use a defendant's nonresponse to a (police-instigated) accusation as evidence of guilt, that evidence is an inadmissible violation of his Article I, section 12 rights. And because the use of the evidence is a comment on the defendant's exercise of his constitutional rights, it must be excluded under the evidence code. Finally, the erroneous admission of the challenged evidence in this case is harmful, because of the adverse and impermissible inference that a jury is likely to draw from a defendant's nonresponse to an accusation.

Argument

I. Defendant cannot be compelled to testify against himself under any circumstances, and commenting on his exercise of that Article I, section 12, right is an impermissible burden on that right.

Article I, section 12, of the Oregon Constitution provides that "[n]o person shall be * * * compelled in any criminal prosecution to testify against himself." The classic example of that right occurs at trial; under Article I, section 12, a defendant may not be required to testify. Furthermore, he may not be required to take the stand and invoke his Article I, section 12, rights, because the jury might infer from his exercise of his constitutional right that he is guilty. And finally, the state may not comment upon a defendant's failure to testify. *State v. Wederski*, 230 Or 57, 62, 368 P2d 393, 395 (1962) ("Article I, § 12, of the Oregon Constitution guarantees the privilege of the defendant to remain silent. The privilege is meaningless if the state may refer to the defendant's silence with impunity." (citation omitted)).

A defendant's Article I, section 12, rights extend beyond his trial testimony to any compelled out-of-court statements that the state attempts to use at trial. Compelling a person to speak outside of court and then admitting those statements at trial is functionally equivalent to requiring him to testify against himself. Similarly, any comment on a defendant's decision to remain silent would render the privilege "meaningless." *Wederski*, 230 Or at 62.

Custody or compelling circumstances are significant in an Article I, section 12, analysis, because they create an unequal playing field, making it likely that a person might involuntarily or unknowingly waive his Article I, section 12, rights. As this court explained in *State v. Vondehn*, 348 Or 462, 236 P3d 691 (2010):

> "Article I, section 12, affords a constitutional right to remain silent. That right is, however, subject to waiver. Because a custodial interrogation is inherently compelling, and to ensure the validity of a waiver of the right against self-incrimination, Article I, section 12, requires that the police inform a person subjected to custodial interrogation that he or she has a right to remain silent and to consult with counsel and that any statements that the person makes may be used against the person in a criminal prosecution. Article I, section 12, requires those *Miranda* warnings to ensure that a person's waiver is knowing as well as voluntary. If the police conduct a custodial interrogation without first obtaining a knowing and voluntary waiver of the suspect's rights, then they violate the suspect's Article I, section 12, rights. To give effect to those constitutional rights, the state is precluded from using, in a criminal prosecution, statements made in response to the interrogation."

Id. at 474. And if the defendant chooses not to waive his Article I, section 12, right by remaining silent, the state may not comment on his decision. *See Miranda v. Arizona*, 384 US 436, 468 n 37, 86 S Ct 1602, 16 L Ed 2d 694 (1966) (holding that prosecution may not use at trial the fact that defendant "stood mute" in the face of *Miranda* warnings).

Nothing about that analysis suggests that a person does not have an Article I, section 12, right to remain silent when *not* in custody or compelling

circumstances. Any rule to the contrary would eviscerate the right. If a person did not have the right to remain silent when not in custody, he could be compelled to speak and his compelled statements could be used against him at trial as the statements of a party-opponent. He would thereby be compelled to testify against himself. That is exactly what Article I, section 12, forbids.

The only difference between custody and non-custody is the presumption of compulsion, as illustrated by the following:

1) A person in custody or compelling circumstances: If he is not given *Miranda* warnings and makes incriminating statements, those statements are presumed to be compelled and are therefore inadmissible. If he is given is given *Miranda* warnings and makes incriminating statements, he is presumed to have voluntarily waived his Article I, section 12, rights, and his statements may be used at trial. Whether or not the police give *Miranda* warnings, if he remains silent, he is presumed to be exercising his Article I, section 12, right to remain silent, which may not be admitted at trial.

2) A person not in custody or compelling circumstances is questioned by police. If he makes incriminating statements, he is presumed to have voluntarily waived his Article I, section 12, rights, and his statements may be used at trial,

exactly like the custodial person who receives *Miranda* warnings.[1] If he remains silent, he is presumed to be exercising his Article I, section 12, right to remain silent, which may not be admitted at trial. In either situation, when the state *uses* the person's nonresponse as evidence of guilt, that is an impermissible comment on his Article I, section 12, right.[2]

This court faced an analogous situation in *State v. Gressel*, 276 Or 333, 554 P2d 1014 (1976). In that case the state argued that the defendant's refusal to consent to a search contributed to a finding of probable cause. This court explained:

> "The search cannot be sustained on defendant's refusal to be searched nor on his response of 'Nothing' when asked what was in his pockets. If refusal to be searched were to furnish probable cause to search, anyone could be searched against his will. A mere ascertion of one's constitutional rights cannot be a basis for depriving an individual of those rights."

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[1] That is the situation in *State v. Davis*, 350 Or 440, 256 P3d 1075 (2011). The defendant made incriminating statements in response to noncustodial police questioning. Because defendant remained silent in this case, *Davis* does not apply.

Davis involved the additional question of whether a defendant could invoke his Article I, section 12, rights prospectively. *Id*. at 446-47. Here, defendant invoked his right to silence in direct response to police-instigated questioning. Again, because his invocation was contemporaneous with the police attempt to elicit incriminating statements, *Davis* does not apply.

[2] Contrary to the state's suggestion, the Article I, section 12, violation did not occur when the state "obtained" defendant's nonresponse. Resp BOM at 6 n 1. It occurred when the state attempted to use defendant's nonresponse at trial.

Id. at 337-38. Similarly, a person's refusal to talk (to avoid incriminating himself) cannot be used as incriminating evidence against him.

Justice Breyer explained the predicament that a person faces:

> "Particularly in the context of police interrogation, a contrary rule would undermine the basic protection that the Fifth Amendment provides. Cf. *Kastigar v. United States*, 406 US 441, 461, 92 S Ct 1653, 32 L Ed 2d 212 (1972) ('The privilege ... usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer'). To permit a prosecutor to comment on a defendant's constitutionally protected silence would put that defendant in an impossible predicament. He must either answer the question or remain silent. If he answers the question, he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent. *See, e.g., Griffin, supra*, at 613, 85 S Ct 1229; Kassin, Inside Interrogation: Why Innocent People Confess, 32 Am. J. Trial Advoc. 525, 537 (2009). If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt. And if the defendant then takes the witness stand in order to explain either his speech or his silence, the prosecution may introduce, say for impeachment purposes, a prior conviction that the law would otherwise make inadmissible. Thus, where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as 'a witness against himself'—very much what the Fifth Amendment forbids. Cf. *Pennsylvania v. Muniz*, 496 US 582, 596–597, 110 S Ct 2638, 110 L Ed 2d 528 (1990) (definition of 'testimonial' includes responses to questions that require a suspect to communicate an express or implied assertion of fact or belief). And that is similarly so whether the questioned individual, as part of his decision to remain silent, invokes the Fifth Amendment explicitly or implicitly, through words, through deeds, or through reference to surrounding circumstances."

Salinas v. Texas, __ US __, 133 S Ct 2174, 2185-86, 186 L Ed 2d 376 (2013) (Breyer, J., dissenting).

In this case, the state offered defendant's nonresponse to the victim's text messages (sent at the instigation of police) in the hope that the jury would infer a guilty mind. Inferring guilt from defendant's silence is a violation of defendant's Article I, section 12, right not to incriminate himself.

II. Because of the prejudicial and constitutionally impermissible inferences that a jury is likely to draw from a defendant's silence in the face of accusations, admission of evidence to that effect violates OEC 403.

The state argues that "this court should not consider [defendant's OEC 403] argument because defendant never presented it to the trial court and because the court never made an OEC 403 ruling." Resp BOM at 38.

However, as explained in the opening brief, defendant continuously argued to the trial court that admission of the challenged evidence trampled on his constitutional right to silence. Pet BOM at 8-13, 22. And several provisions of the evidence code indicate that commenting on a defendant's exercise of a constitutional privilege is impermissible. *See* Legislative Commentary to OEC 801(4)(b)(B), reprinted in Laird C. Kirkpatrick, *Oregon Evidence* § 801.03[2], 724 (6th ed 2013) (stating that the use of adoptive admissions in criminal trials is problematic because "Encroachment upon the privilege against self-incrimination seems inescapable"); OEC 513 (prohibiting the court or counsel from commenting on a party's or witness's claim of privilege, including constitutional privileges); *State v. White*, 303 Or 333, 341 n 5 and 6, 736 P2d

552 (1987) (noting that "[a]t a subconstitutional level, the Oregon Evidence Code would seem to prohibit a prosecutor's drawing to the jury's attention the claim of a privilege," citing OEC 513, but resting it decision on the constitutional rule that a prosecutor may not draw the jury's attention to a defendant's exercise of the right to remain silent); OEC 403 (excluding unfairly prejudicial evidence).

This is not a situation in which a trial court may "balance" the probative value of the evidence against the danger of unfair prejudice. When the state seeks to use a defendant's exercise of his Article I, section 12, right to remain silent as evidence of guilt, the "probative" use of the evidence is simply not allowed. Because the trial court has no discretion to admit the evidence, there is no need for the trial court to explicitly rule on the issue in the first instance. This is one of those rare situations in which the probative value of the evidence is substantially outweighed by unfair prejudice in *every* case. *See State v. Southard*, 347 Or 127, 142, 218 P3d 104 (2009) (holding that a diagnosis of "sexual abuse" is not admissible under OEC 403); *State v. Lyon*, 304 Or 221, 225, 744 P2d 231 (1987) (holding that OEC 403 bars the introduction of polygraph test results in evidence even when the parties have stipulated to its admissibility).

Here, the state offered evidence of defendant's silence in the face of accusations in the hope that the jury would use it to infer defendant's guilt. Because that is an impermissible use of the evidence, this court should hold that the evidence should have been excluded under OEC 403.

III. The erroneous admission of the challenged evidence was harmful.

Under the Oregon Constitution, evidentiary error is harmless if there is little likelihood that the error affected the verdict. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). However,

> "Where a prosecutor has introduced evidence of a defendant's invocation of the right to remain silent, this court has stated the following rule:
>
> > 'There is no doubt that it is usually reversible error to admit evidence of the exercise by a defendant of the rights which the constitution gives him if it is done in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury.'"

State v. White, 303 Or 333, 341-42, 736 P2d 552, 556 (1987) (quoting *State v. Smallwood*, 277 Or 503, 505-06, 561 P2d 600 (1977)).

Here, it was likely the jury drew the inference that defendant was guilty based upon his silence. That was the purpose for which the state offered the evidence (see Pet BOM at 8-13), and that was the first line of questioning the state pursued on its cross-examination of defendant. Tr 645-46; *see also White*, 303 Or at 342 n 7 (noting that "the connection between silence and guilt is often too direct and too natural to be resisted" in holding that a curative jury

instruction was insufficient to remedy the prosecutor's reference to the defendant's exercise of his right to remain silent) (quoting *Lakeside v. Oregon*, 435 US 333, 345, 98 S Ct 1091, 55 L Ed 2d 319 (1978) (Stevens, J., dissenting).

Furthermore, the fact that defendant testified and addressed the reason for his silence may not be used in this court's harmful error analysis. In *State v. Moore/Coen*, 349 Or 371, 245 P3d 101 (2010), this court examined the effect of a defendant's testimony after the state had introduced the defendant's post-*Miranda* statements, and it crafted the following rule:

> "Given the difficulty of 'unravelling' all the factors that may have contributed to a defendant's decision to testify at trial—and because the state has gained an advantage over a defendant at trial when it unconstitutionally obtains the defendant's statements and then introduces them into evidence—we conclude that it is more appropriate to assume that a defendant's trial testimony is *tainted* by the erroneously admitted pretrial statements. Therefore, a defendant's trial testimony must be excluded on retrial or from harmless error review by an appellate court unless the court can determine from the record before it that a defendant's trial testimony did not refute, explain, or qualify the erroneously admitted pretrial statements."

Id. at 385 (footnote omitted).[3] Here, as in *Moore/Coen*, defendant's testimony explained the reasons for his silence—the victim's messages made no sense to him. Therefore, defendant's testimony does not enter into the harmful error

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[3] The footnote states that the rule only applies "to issues involving the erroneous admission of unconstitutionally obtained pretrial statements." *Moore/Coen*, 349 Or at 385 n 8. However, the erroneous admission of a defendant's silence in violation of his Article I, section 12, rights that occurred here is so similar to the error in those cases that the rule should be no different.

analysis, and the inherently prejudicial nature of the challenged evidence requires reversal.

CONCLUSION

For the foregoing reasons (and those contained in the petitioner's brief on the merits), defendant respectfully prays that this court reverse the decision of the Court of Appeals, vacate the judgment, and remand to the trial court for further proceedings.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

ANNE FUJITA MUNSEY OSB #994080
SENIOR DEPUTY PUBLIC DEFENDER
Anne.Munsey@opds.state.or.us

Attorneys for Defendant-Appellant
Justin James Schiller-Munneman

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

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 2,672 words.

Type size

I 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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 12, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, attorney for Respondent on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINIAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

ANNE FUJITA MUNSEY OSB #994080
SENIOR DEPUTY PUBLIC DEFENDER
Anne.Munsey@opds.state.or.us

Attorneys for Petitioner on Review
Justin James Schiller-Munneman