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 No. 11CR0002 CA A152061 SC S063526

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 Josephine County
Honorable PAT WOLKE, Judge

Opinion Filed: March 25, 2015
Affirmed/Valid
Before: ARMSTRONG, Presiding Judge, and NAKAMOTO, Judge, and EGAN, Judge.
Author of Opinion: NAKAMOTO, Judge

Continued…

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STATEMENT OF THE CASE

Defendant was convicted of first-degree rape following a trial in which his victim testified about the specific conduct underlying that charge. The victim also testified about events that occurred after she reported the rape to police. Specifically, the victim testified that defendant did not respond when, at a detective's encouragement, she sent two text messages to defendant's phone. The victim also testified about the content of those text messages, which were introduced into evidence as exhibits. The first of those two text messages read, "I don't understand how this happened we've been friends for along time why did u do that to me?" The other read, "I really want to know why? idk what to do but I was passed out what made what u did ok?" In this challenge to the admission of the text messages and his non-response, this court must resolve questions of both constitutional and evidentiary dimension.

In defendant's view, the challenged evidence was constitutionally inadmissible under Article I, section 12, of the Oregon Constitution. He is mistaken because the rights protected by that provision had not yet attached when the victim sent the text messages and because his non-response was voluntary and not compelled.

Defendant also raises an evidentiary issue, arguing that the hearsay rule barred the challenged evidence. He is mistaken because the challenged evidence contained no out-of-court assertions offered for their truth.

Finally, any error here—whether constitutional or evidentiary—was harmless.

Questions Presented and Proposed Rules of Law

FIRST QUESTION PRESENTED

Does Article I, section 12, of the Oregon Constitution prevent the state from introducing evidence of a defendant's silence in response to questions from a non-police actor, when the defendant has no reason to believe that police are involved in the questioning?

FIRST PROPOSED RULE OF LAW

No. Article I, section 12, contains no freestanding right to remain silent and it protects only the right not to be compelled into self-incrimination. Thus, that constitutional provision bars evidence of a defendant's silence only when that silence reflects an exercise of the right not to respond to questions posed in circumstances that amount to compulsion. Although such compulsion arises from interrogation during custody or under circumstances deemed "compelling" enough to require *Miranda* warnings, such compulsion does not arise when a defendant has no reason to suspect police involvement. Thus, in the absence of custody or compelling circumstances, evidence of a defendant's silence is

admissible unless that silence was somehow induced by threats or promises that rendered it involuntary.

SECOND QUESTION PRESENTED

Do the evidentiary rules governing hearsay bar the admission of a victim's text messages to a defendant?

SECOND PROPOSED RULE OF LAW

If the text messages contain only questions, they contain no assertions and are therefore not hearsay. And if the text messages are offered for a purpose other than their truth—such as their effect on the recipient—they are also not hearsay.

THIRD QUESTION PRESENTED

Do the evidentiary rules governing hearsay bar the admission of a defendant's non-response to a victim's text messages asking the defendant to explain his behavior?

THIRD PROPOSED RULE OF LAW

No. If the circumstances show that the defendant's non-response qualifies as an "assertion," and thus as an out-of-court "statement" for OEC 801's purposes, it constitutes a statement by a party-opponent; hence, OEC 801(4)(b) defines it as non-hearsay. And if the circumstances show that the non-response cannot be deemed an "assertion," it does not fall within OEC

801(3)'s hearsay definition. Under either scenario, the non-response is not hearsay, and OEC 802 cannot require exclusion.

Summary of Arguments

Defendant argues that Article I, section 12, of the Oregon Constitution bars evidence that he failed to respond to text messages sent to him by the victim at a time when defendant had no reason to believe that police were involved. In his view, that provision protects a right to remain silent at all times, and his non-response amounts to an exercise of that right. But such a broad right to remain silent is foreclosed by this court's decision in *State v. Davis*, 350 Or 440, 256 P3d 1075 (2011), which held that Article I, section 12, protects only a defendant's right to be free from compelled self-incrimination. Because defendant was not in circumstances that could be viewed as compelling when he received the victim's text messages, his non-response to the messages was not an exercise of his Article I, section 12 rights, and admitting evidence of his non-response could not have automatically violated that provision.

In the alternative, defendant argues that his non-response was involuntarily compelled because he was put in a position where he had no choice but to incriminate himself. That is, defendant views his receipt of the text messages as putting him to a choice of incriminating himself by either responding or not responding. But he is mistaken for two reasons. First,

because no such choice was ever communicated to defendant, no unconstitutional compulsion occurred. Second, and in any event, nothing about the circumstances forced defendant to incriminate himself: he could have responded in a non-incriminating manner and even a non-response was not necessarily incriminating. Thus, any choice put to defendant did not amount to compulsion.

Defendant also raises an evidentiary argument that the victim's text messages and his non-response were inadmissible hearsay. He is mistaken because none of the challenged statements amounts to a statement admitted for the truth of the matter asserted. The text messages were questions largely devoid of assertive content, and if any assertions might have been embedded within those questions, those assertions were, at most, implicit and vague. Moreover, those text messages were offered for a purpose other than their truth. Similarly, defendant's non-response was no statement at all, and even if it was a statement, it was a statement by party opponent; under either scenario, the non-response does not qualify as hearsay. And although defendant also presents an OEC 403 argument, this court may not consider that question when, as here, the trial court never ruled on the issue. Finally, any error in admitting the challenged evidence was harmless.

Statement of Facts

The state agrees that the Court of Appeals adequately summarized the historical and procedural facts in the opinion on review. (*See* Pet Br 3–5).

ARGUMENT

Defendant's arguments are constitutional and evidentiary in nature. Both arguments are meritless. Regardless, reversal would not be appropriate in this case because any error was harmless.

I. The state did not obtain the challenged evidence in violation of Article I, section 12, of the Oregon Constitution.[1]

Defendant first argues that his non-response to the victim's text messages amounted to an exercise or invocation of the Article I, section 12 right not to incriminate himself and that evidence of that non-response was obtained in violation of that constitutional provision. (Pet Br 25–39). In support of that position, he raises two distinct lines of argument. First, he argues that a person "always has an Article I, section 12, right not to incriminate himself," that a

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[1] The state addresses the Article I, section 12 issue before it addresses the evidentiary issue because the state views the proper analysis as chronological. Under a chronological analysis, the constitutional violation, if any, occurred before any evidentiary error because an Article I, section 12, violation occurs when challenged evidence is obtained in violation of those rights. *See State v. Vondehn*, 348 Or 462, 475–76, 236 P3d 691 (2010) ("When the police violate Article I, section 12, whether that violation consists of 'actual coercion' or the failure to give the warnings necessary to a knowing and voluntary waiver, the state is precluded from using evidence derived from that violation to obtain a criminal conviction.").

non-response thus qualifies as an exercise of that right, and that admitting evidence of his non-response thus violated Article I, section 12. (Pet Br 25–30). Second, he argues that, even if evidence of a non-response can be admitted under some circumstances, his non-response here was nevertheless involuntary and inadmissible because whether defendant responded to the texts or not, the result would have been the creation of incriminating evidence. (Pet Br 31–39). Both arguments are without merit for the reasons explained below.

A. Article I, section 12, protects a right to avoid self-incrimination only in settings that are custodial or otherwise raise an equivalent specter of compulsion.

Article I, section 12, of the Oregon Constitution provides only that a defendant shall not "be compelled * * * to testify against himself." This court has, at times, characterized that provision as enshrining a "right to remain silent." *See, e.g.*, *State v. Larson*, 325 Or 15 & n 1, 933 P2d 958 (1997). More recently, however, this court clarified that the provision does not "state a broad 'right to remain silent'"; instead, "it states a much more specific right not to be 'compelled' to testify" against oneself. *State v. Davis*, 350 Or 440, 447, 454, 256 P3d 1075 (2011).

Accordingly, "if there is a right to remain silent that is guaranteed by Article I, section 12, it is a right to insist that the police refrain from interrogation after a person who is in custody or otherwise in compelling circumstances has invoked the right to remain silent." *Id*. at 459. In other

words, a person's silence qualifies as an exercise of his or her Article I, section 12 rights only if the person is in custody or compelling circumstances.

Davis squarely defeats defendant's argument that he has a freestanding, constitutionally protected right to remain silent at all times, irrespective of custody, compelling circumstances, or any other specter of compulsion. In that case—much as in this one—the police "employed a measure of subterfuge in obtaining, through pretextual instant messaging and telephone communications with the victim," incriminating statements from the defendant at a time when he was neither in custody nor in compelling circumstances. *Id*. at 461. This court rejected the defendant's contention that the police violated his Article I, section 12, rights because he had invoked "a right to remain silent some months before he was placed in custody or in circumstances that could be regarded as compelling." *Id*. at 459–61. Because the defendant's incriminating statements were not in any way compelled, no constitutional violation occurred. *Id*. at 461.

The unescapable upshot of *Davis* is that Article I, section 12's protections do not attach until a person finds himself or herself in custodial or compelling circumstances or unless the circumstances otherwise compel the person to produce incriminating evidence involuntarily. *See Davis*, 350 Or at 461 (no constitutional violation because defendant was not "in custody or in compelling circumstances" and because the defendant did not contend that his "incriminating statements were induced by threats or promises or that in any

other way defendant's self-incriminating statements were not voluntarily made"); *see also State v. Carlson*, 311 Or 201, 204–05, 808 P2d 1002 (1991) (because the police questioned the defendant in a "familiar setting"—the parking lot of his apartment—and because the defendant was not arrested, "coerced," or otherwise "pressured" into answering questions, his responses were admissible).

Although the defendant in *Davis* had purported to invoke "a right to remain silent," that invocation was constitutionally ineffective because it did not occur in custody or compelling circumstances. *See Davis*, 350 Or at 458 n 8 (citing *Wilson v. Com.*, 199 SW3d 175, 179 (Ky 2006), as explaining the "ineffective[ness]" of any attempt to invoke the parallel Fifth Amendment right against incrimination "prior to custodial interrogation").[2]

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[2] Consistent with *Davis*'s view that not all silence is constitutionally protected, federal appellate courts similarly have refused to view the Fifth Amendment as a categorical prohibition on any evidence relating to a defendant's silence, frequently allowing such evidence to be used substantively when elicited in non-custodial circumstances. *See, e.g., United States v. Oplinger*, 150 F3d 1061, 1066–67 & n 6 (9th Cir 1998), *overruled on other grounds by United States v. Contreras*, 593 F3d 1135 (9th Cir 2010) (en banc) (per curiam) (explaining that neither "due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of the silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior"; citing opinions to that effect from the Fifth and Eleventh Circuits; citing contrary opinions from the First, Seventh, and Tenth Circuits, but noting that those involved silence in the face of questions posed by a government official); *see also United States v. Quinn*, 359 F3d 666, 677–78 (4th Cir 2004) (state permitted to comment on pre-arrest

Footnote continued…

Contending that an invocation of a right to remain silent can be effective even in the absence of custody or compelling circumstances, defendant here mistakenly relies on this court's statement that "[a]n individual always may invoke a 'right to remain silent' and refuse to speak with police without the presence of counsel." *Davis*, 350 Or at 446. But the internal quotation marks reveal that the cited statement means only that a person is always free to speak words that profess to invoke a "right to remain silent"; it does not mean that such words are effective to entitle their speaker to the protections of Article I, section 12. *Davis* held that, notwithstanding defendant's attempt "to invoke his right against self-incrimination under Article I, section 12," police permissibly obtained incriminating information from the defendant by asking the victim to engage him in electronic and voice conversations. 350 Or at 460–61.

In short, *Davis* held that, despite the defendant's unequivocal attempt to invoke an Article I, section 12, right, police were permitted to continue soliciting incriminating information from him. The only reasonable

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(…continued)
silence in the absence of *Miranda* warnings); *United States v. Kilbourne*, 559 F2d 1263, 1265 (4th Cir), *cert den*, 434 US 873 (1977) (rejecting Fifth Amendment challenge to defendant's silence in response to a friend's inquiry, admitted as an adoptive admission); *see also Salinas v. Texas*, 133 S Ct 2174, 2178, 570 US __ (2013) (plurality opinion concluding that, in the absence of an express invocation of a right to silence, the Fifth Amendment did not prohibit a prosecutor from inviting the jury to infer guilt from a defendant's silence in response to a question posed by police officers during a non-custodial interview).

understanding of that case is that the defendant's attempted invocation was ineffective for lack of custody or compelling circumstances. Otherwise, the police could not have continued questioning the defendant in any way. *See State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014) ("[U]nder Article I, section 12, police must cease interrogation when a person in police custody unequivocally invokes the right against self-incrimination."). Defendant's attempt to read *Davis* any more narrowly asks this court to effectively overrule that case. This court should refuse to do so, especially because defendant has provided no good reason for this court to depart from the rule of *stare decisis*. *See generally Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015) (discussing considerations relevant to whether this court should revisit its precedents).

Here, just as in *Davis*, the record contains no evidence that defendant was in custody or compelling circumstances, nor does it contain any evidence suggesting any specter of comparable compulsion. Defendant has never contended that he was under arrest or otherwise in custody or even in the presence of police when he received the text messages. And nothing in the record suggests that he knew that the messages were sent at the request of the police or that the police were involved at that time. Accordingly, no Article I, section 12 right had attached, and his non-response to the text messages could not have reflected the exercise of a constitutionally protected right. As a result,

the state was free to offer that non-response into evidence. *Contrast State v. Wederski*, 230 Or 57, 368 P2d 393 (1962) (concluding that the state may not refer to a defendant's silence in circumstances where that privilege was protected by Article I, section 12).

The foregoing discussion also reveals the flaw in a fundamental premise underlying defendant's argument. Defendant contends that if he had replied to the text messages with a message stating, "I am exercising my right to remain silent," that response could not be admitted at trial. (Pet Br 36). That contention is flatly wrong—such an attempted invocation would be no more effective than the one in *Davis*; in the absence of custody or compelling circumstances, it would not prevent the police from continuing their efforts to obtain incriminating information, and it would not prevent the state from introducing that attempted invocation at trial. *Cf. Jenkins v. Anderson*, 447 US 231, 243–44, 100 S Ct 2124 (1980), (Stevens, J., concurring) ("When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment").

B. Using a defendant's non-response as evidence of guilt does not elevate otherwise non-compelling circumstances into constitutionally impermissible compulsion.

Defendant also mistakenly argues that his non-response was compelled testimonial evidence obtained in violation of Article I, section 12. (Pet Br 35–36). The state understands that argument to be made in the alternative: that is, even if defendant had no freestanding constitutionally protected right to remain silent in the absence of custody or compelling circumstances, his non-response was nonetheless inadmissible as testimonial evidence that was involuntary and therefore compelled.

Defendant's involuntariness argument lacks merit for two reasons. First, the facts of his case do not come close to satisfying this court's test for involuntariness under Article I, section 12. Second, he is mistaken to assert that his non-response was the involuntary result of a choice similar to the one that led this court to conclude that refusal to take field sobriety tests was compelled in *State v. Fish*, 321 Or 48, 893 P2d 1023 (1995).

1. The facts of this case do not satisfy the test for involuntariness under Article I, section 12.

The test for voluntariness under Article I, section 12 requires assessing "whether, under the totality of the circumstances, it is apparent that the defendant's will was not overborne and his capacity for self-determination was

not critically impaired."[3] *State v. Acremant*, 338 Or 302, 324, 108 P3d 1139, *cert den*, 546 US 864 (2005) (internal quotation marks omitted).

But the record here reveals no circumstances that impaired defendant's capacity for self-determination—critically or otherwise. As explained above, when defendant received the text messages, he was not under arrest, otherwise in custody, or even in the presence of police officers or under any impression that the police were involved in sending the text messages. Those facts cannot support the conclusion that defendant's capacity for self-determination was impaired, let alone overborne. *Contrast State v. Smith*, 301 Or 681, 696–97, 725 P2d 894 (1986) (explaining that a confession is involuntary for the purposes of Article I, section 12, if induced by "fear or promises").

2. This court's decision in *Fish* requires no different result.

Seeking to escape the conclusion required by a straightforward voluntariness analysis, defendant analogizes to this court's decision in *State v. Fish*, 321 Or 48, 893 P2d 1023 (1995). Relying on that case, he argues that the state creates a form of unconstitutional compulsion when it puts a defendant to

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[3] Circumstances that satisfy the quoted standard will generally also amount to the sort of custodial or compelling circumstances that give rise to Article I, section 12's protections. As defendant notes, custodial or compelling circumstances create a presumption of involuntariness in the absence of *Miranda* warnings. (Pet Br 30). But where circumstances meet the *Acremant* standard for involuntariness, even *Miranda* warnings will not remedy the involuntariness.

a choice such as the one that was purportedly created by defendant's receipt of the victim's text messages here. But *Fish* does not support defendant's compulsion argument.

In *Fish*, this court concluded, after focusing its analysis on a particular statutory framework, that a defendant's refusal to perform field sobriety tests (FSTs) was compelled (that is, involuntary) testimonial evidence for Article I, section 12's purposes. *Fish*, 321 Or at 63; *see also id*. at 57 (explaining that the Article I, section 12, "compulsion analysis in this case focuses on a statute, namely ORS 813.136").

This court should reject defendant's reliance on *Fish*. As explained below, the concern animating *Fish* was a statutory framework that essentially compelled the performance of FSTs by confronting drivers with an express and coercively communicated choice between two forms of incrimination, leaving no non-incriminating option. This case is distinguishable first because no such choice was communicated to defendant. Second, this case is distinguishable because defendant's receipt of the text messages left him with options that did not require him to incriminate himself.

a. This case does not present the sort of coercively communicated choice that drove the outcome in *Fish*.

The choice in *Fish* flowed from a statutory framework that first deemed drivers to have consented to performing FSTs and then allowed the state to

present, at an ensuing DUII trial, evidence of a refusal to perform those tests. *Fish*, 321 Or at 51 & n 1 (discussing ORS 813.135 and ORS 813.136). As this court explained, those circumstances presented the defendant with no "choice as to *whether* he would incriminate himself," leaving him to choose only "*how* he would incriminate himself." 321 Or at 60 (emphasis in *Fish*).

Importantly, those same statutes required officers to warn drivers of the evidentiary consequences of refusing FSTs. *Id*. at 52. Indeed, the "main purpose" of that warning requirement was "to *compel* drivers to take field sobriety tests" by bringing "pressure" upon them, thereby overbearing their capacity for self-determination. *See id*. (internal quotation marks omitted; emphasis added). In compliance with that requirement, the officer in *Fish* expressly told the defendant that, if he refused to take the field sobriety tests, the "refusal could be used against him as evidence in court." 321 Or at 50. Because defendant was informed that he would produce incriminating evidence no matter which choice he made, a form of unconstitutional compulsion occurred. That is, the compulsion in *Fish* arose as much from the officer's communication of the choice as from the choice itself.

Although *Fish* did not clearly link the statutorily-required warning to its ultimate conclusion that a refusal to perform FSTs was compelled, *Fish* was ultimately concerned with the voluntariness of the defendant's refusal, and voluntariness—though often a legal question—is necessarily a subjective

inquiry. That is, for certain circumstances to render a person's actions legally involuntary, those circumstances must have been known to the person at the time the actions occurred.

In short, the outcome in *Fish* must have turned on the officer's communication—through statutorily-required warnings that were intended to "compel drivers" to perform FSTs by bringing "pressure" on them to do so—of the defendant's choice to him. That choice reflected unconstitutional compulsion because the defendant was informed, in essence, that he would be producing incriminating evidence no matter what choice he made.

But here, even if the victim's text messages confronted defendant with a choice analogous to the one in *Fish*, no such choice was expressly communicated to defendant in any way, let alone in a way intended to create any sort of pressure or compulsion. In fact, the victim's text messages did not necessarily force any choice at all if defendant did not see them. Moreover, even if defendant had seen the text messages, no one advised defendant that he must either respond or not respond, or suggested that—no matter which choice he made—he would be creating evidence that would be admissible against him at a criminal trial. Defendant thus received no advice or information that was genuinely analogous to the advice that the officer in *Fish* gave to the defendant there, nor did defendant here receive any advice that, like the advice in *Fish*, brought pressure on him to take any particular action. In those circumstances,

defendant's non-response cannot be viewed as involuntary or compelled.

b. The choice that defendant faced in this case left him able to avoid self-incrimination.

Moreover, even if this court concludes that communication of the choice was immaterial to the result in *Fish*, the choice in this case remains distinguishable from the choice in that case. As *Fish* recognized, "[t]he right against self-incrimination does not preclude the state from requiring an individual to make certain choices," 321 Or at 57.

Here, even if defendant was put in a position to choose between responding and not responding, that choice did not—unlike the choice in *Fish*—invariably lead to the production of incriminating testimonial evidence. The defendant in *Fish* had no course of action by which he could avoid incriminating himself. *See* 321 Or at 60 ("[D]efendant was not given a choice as to *whether* he would incriminate himself, but only as to *how* he would incriminate himself." (emphasis in *Fish*)). In *Fish*, the defendant's only choices were "(1) to testify against himself by performing the field sobriety tests, or (2) to testify against himself by refusing to perform the tests." *Id*. at 60 & n 7. That is, he could not perform FSTs without incriminating himself, and his refusal to perform them—during a traffic stop, after having impliedly consented to performing them and after having been advised of the consequences of refusal—supported a strong inference that he believed that his performance

would be incriminating; indeed, ORS 813.130 made any refusal admissible against him at a DUII trial. *See id*. at 56. And that inference was equally strong whether he expressly refused or whether he simply walked away from the scene, because a failure to submit to FSTs was legally equivalent to a refusal to do so. *Id*. at 60 n 7.

Here, by contrast, defendant had at least three options: (1) respond in an incriminating manner; (2) respond in a non-incriminating manner; or (3) not respond at all. Because at least the second of those options was non-incriminating, defendant did have the ability to choose whether to incriminate himself, not simply how to incriminate himself. Defendant seems to assume that a non-incriminating response would be impossible because a denial could lead to "impeachment with the state's evidence that he committed the rape." (*See* Pet Br 36 n 7).

But nothing forced defendant to respond with a denial; rather, he could have avoided impeachment by answering more generally, "I don't know what you're talking about." The availability of that non-incriminating (and not even impeachable) response defeats defendant's argument that he was forced to incriminate himself. That option also demonstrates a fundamental difference between the receipt of a text message and a traffic stop where a driver is being asked to submit to FSTs: a guilty individual has no ability to perform FSTs without incriminating himself because those tests involve matters outside the

individual's control; by contrast, a guilty individual can easily respond to a text message without incriminating himself. Importantly, *Fish* assumed that the defendant in that case could not have performed FSTs without incriminating himself—that assumption is necessary to this court's conclusion that the choice to take FSTs presented the defendant with a choice as to how to incriminate himself, but not as to whether to incriminate himself. *See Fish*, 321 Or at 60.

Moreover, even if a response would have opened defendant to the possibility of impeachment, defendant's theory of impeachment fails to explain how a denial would have led to the introduction of any incriminating evidence beyond what the state ultimately did adduce at trial.

And the third of those options—not responding—is also not necessarily incriminating. In *Fish*, a non-response, or failure to submit to FSTs, was legally the same as a testimonial refusal to perform FSTs. 321 Or at 60 n 7. And that refusal was admissible, as evidence in a DUII prosecution, as a matter of statute. 321 Or at 51 (citing ORS 813.136). Here, by contrast, a non-response was not tantamount to any kind of testimonial response nor was it *per se* admissible—it remained subject to potential exclusion under evidentiary principles. In short, because only one of defendant's options necessarily would have produced incriminating testimonial evidence, his choice here was unlike the one at issue in *Fish*.

For all the foregoing reasons, this court should reject defendant's

argument that *Fish* requires concluding that defendant's non-response to text messages was involuntary and compelled in violation of Article I, section 12. Instead, this court should conclude that defendant's non-response was voluntary, and that it cannot have reflected an invocation of a right protected by Article I, section 12, because those protections had not yet attached when he received the text messages.

II. The rules of evidence did not bar admission of the challenged evidence.

Defendant also argues that, even if no Article I, section 12, violation occurred in connection with the victim's text messages, the hearsay rules bar admission of those messages and his non-response. (Pet Br 14–20). But because none of that evidence was hearsay, the trial court correctly admitted it. And although defendant also presents an OEC 403 argument, this court may not consider that question because the trial court never ruled on the issue.

A. None of the challenged evidence was hearsay.

Defendant's evidentiary arguments fail because none of the evidence he challenges was hearsay. Under OEC 801(3), hearsay is "a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis added.) A "statement" is defined, in turn, under OEC 801(1) as either an "oral or written assertion" or "[n]onverbal conduct of a person, if intended as an assertion."

The text messages contain no assertive content, and to the extent they do, that content was not admitted for the truth of the matter asserted. And defendant's non-response similarly contains no assertive content, and to the extent it does, that assertive content falls within the hearsay definition's exclusion of a party's statements. Finally, defendant is mistaken that the two categories of evidence must be assessed together solely under the adoptive admission framework.

1. The text messages contain little, if any, probative substance.

Assessing the evidentiary nature of the text messages requires first parsing out precisely what little substance they contained.

The first of the messages read:

> I don't understand how this happened we've been friends for along time why did u do that to me?

(Ex 22). That message contains, at most, the vague and implicit assertion that defendant did something to the victim: "why did u do that to me?" That is, it reads as the equivalent of a question asking, "Why did you behave to me as you did?"

The second text message read:

> I really want to know why? idk what to do but I was passed out what made what u did ok?

(Ex 23). That message, contains, at most, the vague and implicit assertion that defendant did something to the victim and that such conduct might or might not

have been acceptable: "what made what u did OK?" That is, it reads as the equivalent of two separate questions asking "Why did you behave to me as you did?" and "Did you behave toward me in a manner that can be considered 'OK'?"

In short, both of those text messages were vague indeed. They do not attempt to attribute any particular conduct to defendant. Even taken at face value regarding the assertions that—in addition to the vague conduct alluded to in the interrogatories—the victim was passed out or that she and defendant had been friends for a long time, they establish no element of the charged crime or crimes. And, in fact the state never suggested (in offering the texts or in closing argument) that the victim's texts, by themselves, somehow established any of the elements that the state needed to prove. (*See* Tr 661–89, 715–21 (closing argument making no mention of these text messages)).

2. The questions in the text messages were not statements for hearsay purposes.

As to the questions in the text messages, they were not hearsay because questions do not expressly assert anything. *See* OEC 801(3) (defining hearsay as a "statement," in part); OEC 801(1) (defining statement as an "assertion").

In the absence of expressly assertive content, an out-of-court statement does not implicate "the dangers necessitating the hearsay rule." *See United States v. Oguns*, 921 F2d 442, 449 (2d Cir 1990). The state is aware of no

Oregon cases holding that questions qualify as statements for the purposes of the hearsay rule, and any such holding would be contrary to a substantial body of cases in which federal courts have held that the parallel federal rule's definition of "statement" categorically excludes questions. *See, e.g.*, *United States v. Love*, 706 F3d 832, 840 (7th Cir 2013) ("[Q]uestions are not 'statements' and therefore are not hearsay.").[4] In fact, the state is aware of no federal decision holding that questions generally qualify as assertions.

Defendant cites no Oregon case holding that the hearsay exclusion applies to questions. Defendant discusses an "adoptive admission" case, but that case did not involve a question. (*See* Pet Br 15–18 (discussing *State v. Carlson*, 311 Or 201, 203, 214, 808 P2d 1002 (1991))). Instead, *Carlson* involved the admissibility of an out-of-court statement by the defendant's wife,

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[4] *See also United States v. Thomas*, 453 F3d 838, 845 (7th Cir 2006) ("Thomas's first remark was not a statement, it was a question"); *United States v. Thomas*, 451 F3d 543, 548 (8th Cir 2006), *cert den*, 549 US 1144 (2007) ("Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay."); *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F3d 318, 330 (3d Cir 2005) ("Courts have held that questions and inquiries are generally not hearsay because the declarant does not have the requisite assertive intent * * *."); *United States v. Wright*, 343 F3d 849, 865–66 (6th Cir 2003), *cert den*, 541 US 990 (2004) ("[A] question is typically not hearsay because it does not assert the truth or falsity of a fact."); *Quartararo v. Hanslmaier*, 186 F3d 91, 98 (2d Cir 1999), *cert den*, 528 US 1170 (2000) ("'An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement.'" (quoting *United States v. Oguns*, 921 F2d 442, 449 (2d Cir 1990))); *United States v. Vest*, 842 F2d 1319, 1330 (1st Cir), *cert den*, 488 US 965 (1988) (statements in a recorded conversation were not hearsay because they were "merely questions").

who overheard his attempt to explain needle marks on his arm and exclaimed, "You liar, you got them from shooting up in the bedroom with all your stupid friends." 311 Or at 203. That is, *Carlson* presented hearsay issues only because they involved *assertive* statements, as opposed to questions. The adoptive admission analysis was necessary in *Carlson* only because the evidence at issue was otherwise inadmissible as hearsay. Again, the state is aware of no case in which this court has squarely addressed this particular issue.

To resolve this issue of first impression, this court should adopt a categorical rule that never treats questions as hearsay under OEC 801. Alternatively, this court should adopt a more circumstance-specific rule that focuses on the intent of the speaker. Regardless, this court should not interpret the Oregon hearsay rule to categorically *include* questions. And under either a categorical rule or a circumstance-specific rule, the victim's text messages here were admissible.

a. This court should categorically conclude that questions are never hearsay.

This court should conclude, categorically, that questions are not statements because only "assertions" are "statements" for hearsay purposes. *See* OEC 801(1) (defining "statement" as either an "oral or written assertion" or "[n]onverbal conduct of a person, if intended as an assertion"). As a matter both of grammar and common sense, a question does not assert anything:

rather than conveying information in the manner that an assertion does, a question elicits information.

A categorical approach to analyzing questions under the hearsay rule would also be consistent with many federal decisions rejecting the notion that a question—even one containing an implicit message—can ever be an assertion. *See Love*, 706 F3d at 840 (observing that federal courts have "overwhelming[ly]" adopted the conclusion that questions are not hearsay); *see also United States v. Jackson*, 88 F3d 845, 848 (10th Cir 1996) ("The mere fact, however, that the declarant conveyed a message with her question does not make the question hearsay."); *United States v. Lewis*, 902 F2d 1176, 1179 (5th Cir 1990) (rejecting argument that a question is a statement because it contains an implicit assertion); *United States v. Long*, 905 F2d 1572, 1580 (DC Cir), *cert den*, 498 US 948 (1990) (explaining that questions are not assertions even though "[i]t is difficult to imagine any question, or for that matter any act, that does not in some way convey an implicit message").[5]

The cited federal cases are persuasive because the parallel federal rule contains a definition of "statement" that is materially identical to the one in

[5] *But see Harris v. Commonwealth*, 384 SW 3d 117, 128 (Ky 2012) (rejecting federal approach in favor of one that treats implied assertions as hearsay).

OEC 801.[6] Accordingly, it is "appropriate to look to federal cases in construing [the] Oregon counterpart." *Carlson*, 311 Or at 209 n 8 (citing cases looking to federal authorities to help interpret an OEC rule that was identical to the federal counterpart).

Here, the most that defendant can argue is that the text messages conveyed some implicit information in the form of questions. (*See* Pet Br 17). For example, defendant argues that the text messages contain an assertion that "you did that to me." (Pet Br 17). But that assertion is only implicit in the question, "why did u do that to me?" Similarly, defendant argues that the text messages contain an assertion that "what you did was not okay." (Pet Br 17). Again, that assertion is only implicit in the question, "what made what u did ok?" Finally, defendant argues that the text messages contain an assertion that "this happened." (Pet Br 17). But that assertion is only implicit in the statement, "I don't understand how this happened," which is interrogative rather than assertive because it seeks an explanation. That is, the only express assertion in that interrogative statement is a lack of understanding.

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[6] Under Federal Rule of Evidence 801(a), statement "means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion."

As the federal authorities explain, questions are not statements. Under a categorical approach, no further analysis is necessary here, because the text messages were both questions and therefore not hearsay.

b. Alternatively, this court should conclude that questions are hearsay only when they are intended as assertions.

Alternatively, a circumstance-specific approach to analyzing questions under the hearsay rule finds support in the legislative commentary to the hearsay rule, which explains that "[t]he key to the definition is that nothing is an assertion unless intended to be one." Legislative Commentary to OEC 801, quoted in Laird C. Kirkpatrick, *Oregon Evidence* § 801.01[2] (6th ed 2013). Under that approach, questions are generally non-assertive, but they may yet be viewed as hearsay if the circumstances demonstrate that the speaker intended to make an assertion. Even under that alternative rule, the victim's texts are admissible.

A circumstance-specific rule remains faithful to the text of OEC 801's limited definition of "statement" by acknowledging that not all verbal expressions are "statements." Such a rule distinguishes between statements and other verbal expressions by applying the very standard discussed in OEC 801(1)(b): the intended purpose of the expression. Although that standard applies, by its terms, only to nonverbal conduct, it provides a textual basis—

especially when viewed in light of the commentary quoted above—for concluding that even verbal expressions must be judged by the speaker's intent.

Some federal authorities have adopted a circumstance-specific rule by relying on the federal hearsay rule's commentary, which is similar to the OEC commentary discussed above. *See, e.g.*, *Long*, 905 F2d at 1579 (explaining that "'nothing is an assertion unless intended to be one'" (quoting Fed R Evid 801(a) advisory committee's note)).[7] Under that line of cases, the "crucial distinction under [Federal Rule of Evidence] 801 is between intentional and unintentional messages, regardless of whether they are express or implied." *Id.* at 1580. That distinction matters because a declarant can be untruthful only as to intended statements. That is, only an intended assertion can contain a lie. By contrast, when a speaker intends to communicate nothing, nothing can be fabricated. *See id*. (explaining that "an unintentional message is presumptively more reliable" because, "[w]hen a declarant does not intend to communicate anything * * * his sincerity is not in question"). Logically, then, only intentional assertions should be viewed skeptically and be subject to exclusion as hearsay.

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[7] *See also United State v. Summers*, 414 F3d 1287, 1299 (10th Cir 2005) (same); *United States v. Jackson*, 88 F3d 845, 848 (10th Cir 1996) (same).

Even under a circumstance-specific approach, the presence of implicit assertions is insufficient to turn a statement or non-verbal act into a "statement." Otherwise, hearsay problems would arise from all manner of conduct and expressions that imply or convey some fact even without any intent to do so. *See Long*, 905 F2d at 1580 ("It is difficult to imagine any question, or for that matter any act, that does not in some way convey an implicit message."); *see also United States v. Jackson*, 88 F3d 845, 848 (10th Cir 1996) ("The mere fact, however, that the declarant conveyed a message with her question does not make the question hearsay."); *United States v. Lewis*, 902 F2d 1176, 1179 (5th Cir 1990) (rejecting argument that a question is a statement because it contains an implicit assertion). For example, the act of stopping at a traffic light implicitly conveys an assertion that the light is red. But that implicit assertion cannot be enough to make that act a statement for hearsay purposes unless the act was intended as an assertion.

Thus, under a circumstance-specific approach, the inquiry turns on the intent of the speaker, asking whether the questions reflect an intent to elicit information rather than an intent to make an assertion. Here, the record shows that the victim intended the text messages to elicit information. That was precisely why the police encouraged the victim to send the messages—they were seeking to elicit incriminating information. Nothing in the record suggests that either the victim or the police intended the messages to convey information

or to make an assertion.[8] Therefore, the text messages are not assertions—and not hearsay—even under a circumstance-specific approach.

That result would be consistent with federal cases holding that questions are not assertions. For example, in *Love*, the defendant's associate had asked a potential drug purchaser whether the purchaser was "with" the defendant. 706 F3d 836, 839. That question was not an assertion or statement because it was designed to elicit information: whether the buyer was in on the deal. *Id*. at 840. In *Long*, the telephone rang in the apartment where the defendant was arrested, and the caller asked if the defendant "still had any stuff." 905 F2d at 1579. Because that question reflected no intent to assert anything, it was not hearsay. *Id*. at 1580. Similarly, in a Fifth Circuit case, the question, "Did you get the stuff?" was not an assertion. *United States v. Lewis*, 902 F2d 1176, 1179 (5th Cir 1990).

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[8] A hypothetical illustrates why the messages were only eliciting information and not conveying it. Suppose that the victim suspected a sexual assault but could not remember the details of what exactly transpired during that assault. Further suppose that, rather than asking the victim to send the messages, the police had obtained the victim's cellphone, along with her permission to use it to fish for details about what had happened. If the police had sent defendant equally vague questions in those circumstances, those questions could not be conveying any information because the police would have had no information to convey. Rather, as here, those questions would only be seeking to elicit information, and would not be hearsay.

Finally, even if the intent of the text messages is unclear, defendant failed to sufficiently establish a basis for exclusion. Defendant admits that the text messages "could be interpreted in more than one way." (Pet Br 17). But OEC 801 "is worded so that the opponent of the evidence has the burden of proving that the conduct was intended as an assertion," and "[a]mbiguous and doubtful cases should be resolved in favor of admissibility." Legislative Commentary to OEC 801, quoted in Kirkpatrick, *Oregon Evidence* § 801.01[2]; *see also Jackson*, 88 F3d at 848 (relying on similar statements in advisory committee's note to federal hearsay rule and holding that questions were not statements). Here, defendant has offered nothing to demonstrate that the victim intended the text messages to be assertions. Accordingly, those messages were not excludable as hearsay.

3. To the extent that the text messages contained any assertive content, they were offered for their effect on the listener, not for the truth of the matter asserted.

Admittedly, the text messages contained two express assertions: "we've been friends for along time," and "I was passed out." But the challenged evidence was not offered to establish the truth of those assertions or of any implicit assertions of the sort identified by defendant. (*See* Pet Br 17). As noted above, the state never suggested (in offering the texts or in closing argument) that the victim's texts, by themselves, somehow established any of

the elements that the state needed to prove. (*See* Tr 661–89, 715–21 (closing argument making no mention of these text messages)).

To the contrary, the state offered the text messages—as defendant concedes—"for the effect on the listener (defendant)." (Pet Br 19–20 (citing Laird C. Kirkpatrick, *Oregon Evidence* § 801.01[3][d][iii](4), 705 (6th ed 2013), to explain that non-hearsay purpose for admitting out-of-court statements)). The probative value of the text messages derived not from their content—assertive or otherwise—but rather, from the manner in which defendant reacted.

The effect of the text messages on defendant was relevant to the ultimate question of his guilt. Even if defendant's non-response was insufficient to allow the state to argue that he had intended to adopt any assertive content in the text messages as his own, that evidence allowed the state to argue that an innocent person would not have simply ignored those messages. (*See* Tr 144 (state's argument to that effect)). Indeed, this court's view of adoptive admissions reveals that evidence susceptible to analysis under that rule is relevant even in the absence of sufficient evidence that the listener intended to adopt the statements at issue. In *Carlson*, this court explained that the intent-to-adopt inquiry is a preliminary question of evidentiary competence or admissibility under OEC 104(1), *not* a question of conditional relevance under OEC 104(2). 311 Or at 211–12. That is, this court held that, in the absence of a

listener's intent to adopt a particular out-of-court statement, that statement is only *inadmissible* as an adoptive admission, not irrelevant.[9]

In short, because the text messages were offered for and relevant to a non-hearsay purpose, they were not hearsay even if they contained some assertive content.

4. Defendant's non-response was neither a statement nor non-verbal conduct intended as an assertion, and if it was a statement, it was a statement by party opponent.

As with the text messages themselves, defendant's non-response was not a statement, and therefore not hearsay. Under OEC 801(3), hearsay is "a statement * * * offered in evidence to prove the truth of the matter asserted." And a statement, in turn is:

(a) An oral or written assertion; or

(b) Nonverbal conduct of a person, if intended as an assertion.

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[9] Defendant implicitly concedes the relevance issue, contesting the effect-on-the-listener purpose only by arguing that the "state had not proved that defendant had received the messages." (Pet Br 20). That is, defendant admits that, had the state proved that defendant had received the messages, they would be relevant to an effect-on-the-listener purpose. But defendant's underlying premise—that the state was required to "prove," presumably with direct evidence, that defendant received the message—is mistaken. Defendant mis-analyzes that question of conditional relevance: the state was required only to present enough evidence to permit the jury to infer that defendant received the text messages. *See State v. Hickman*, 355 Or 715, 729, 330 P3d 551 (2014), *mod on reconsideration*, 356 Or 687, 343 P3d 634 (2015) (discussing and applying OEC 104(2)'s rule governing conditional relevance). And proof that they were sent was enough, because a rational factfinder could infer that the intended recipient of a text message in fact received them.

OEC 801(1). Defendant's non-response was not an oral or written assertion, as it involves nothing said or written by defendant.

Nor did defendant's non-response qualify as "[n]onverbal conduct * * * intended as an assertion."[10] OEC 801(1). On that issue, intent is again the key inquiry. But the record contains evidence pointing only to a *non*-assertive intent behind defendant's non-response. At trial, defendant testified that he did not respond to the text messages because they were "weird" and "didn't make sense." (Tr 638). For that reason, he "just ignored them." (Tr 638). In the absence of any contrary evidence, defendant did not carry his burden of showing that his silence was intended as an assertion, and the trial court correctly refused to exclude that evidence.

Finally—and perhaps most importantly—even if defendant's non-response were a statement, it would be excluded from the definition of hearsay

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[10] Although defendant's non-response did not constitute a statement, it was independently relevant for two reasons. First, his non-response was the effect on the listener discussed above as the purpose for admitting the text messages. And relatedly, the non-response provided necessary context to the text messages—had the prosecution omitted any discussion of defendant's response to unambiguous questions, the jury may have thought the prosecution was hiding something. That is, the prosecution discussed the non-response not to invite an inference of an assertive admission, but rather to establish that nothing in the contemporaneous communications reflected a denial.

And regardless, defendant never objected on relevance grounds to evidence of his non-response.

under OEC 801(4)(b)(A) as a party's own statement offered against him. Under that rule:

> A statement is not hearsay if * * * [t]he statement is offered against a party and is * * * [t]hat party's own statement, in either an individual or a representative capacity.

OEC 801(4)(b)(A). Here, if defendant's non-response qualifies as a statement, then it was defendant's own statement and therefore not hearsay under the foregoing rule.

5. Defendant is mistaken that admissibility of the text messages and his non-response must be analyzed together under the adoptive admission framework.

At bottom, defendant appears to argue that all of the challenged evidence could be admissible only under the adoptive admission rule, and that, if it does not satisfy that rule, it is therefore so prejudicial that it should be inadmissible as a matter of law. (*See* Pet Br 18–23). But the adoptive admission rule is not a rule of exclusion; in other words, that a question and response fail to qualify as an "adoptive admission" does not necessarily mean that the question and response are inadmissible. Instead—as this court has made it clear in a case addressing the adoptive-admission rule—inadmissibility under one rule of evidence does not bar admission under another rule of evidence. *See Carlson*, 311 Or at 215–19 (after concluding that an out-of-court statement did not qualify for admission under the adoptive admission rule, going on to assess whether that statement was independently admissible as an excited utterance).

Relatedly, defendant also appears to argue that this court cannot separately analyze the two categories of evidence here: the victim's text messages and defendant's non-response. Under defendant's view, the analysis must begin and end with application of the adoptive-admission rule, which necessarily requires the court to assess the victim's texts and defendant's non-response together.

But this court's analysis in the *Carlson* case demonstrates the flaw in defendant's assumption that the evidence here is incapable of separate assessment. In that case, a police officer asked the defendant about needle marks on his arm, and the defendant responded that the marks were injuries that he had received from working on a car. *Carlson*, 311 Or at 203. His wife then broke into the conversation by yelling: "You liar, you got them from shooting up in the bedroom with all your stupid friends." *Id*. Defendant responded non-verbally by shaking his head, *id*., but that response was not sufficient to establish an intent to adopt the wife's statements, *id*. at 214. Thus, neither the wife's statement nor defendant's reaction were admissible under the adoptive admission rule. *Id*. But this court went on to determine whether the wife's statement was independently admissible as an excited utterance, concluding that it was. *Id*. at 215–19. Further still, this court affirmed the defendant's conviction because defendant had not segregated his objection as between his wife's admissible statements and his inadmissible reaction. *Id*. at 219. That is,

this court's analysis reveals that the adoptive admission rule is not the end of the analysis when the evidence at issue could be subject to admission when assessed independently.

Because the wife's statements could be analyzed independently of the husband's reaction in *Carlson*, defendant is incorrect that the victim's text messages cannot be analyzed independently of defendant's non-response in this case. To the extent that defendant argues that the state offered the evidence solely under an adoptive admission theory, (*see* Pet Br 18), his brief is at odds with itself: he concedes that the state also argued that it "was offering the text messages for the effect on the listener (defendant)." (Pet Br 19–20). And if defendant intends to argue that the trial court's refusal to give a limiting instruction had the effect of allowing the state to use the evidence as an adoptive admission, (Pet Br 18–19), he has appealed the wrong ruling: the admission of evidence rather than the denial of a limiting instruction.

B. Defendant's OEC 403 arguments are not well-taken.

For the first time before this court, defendant argues that the challenged evidence was inadmissible under OEC 403 because it was substantially more prejudicial than probative. (Pet Br 21–25). But this court should not consider that argument because defendant never presented it to the trial court and because the court never made an OEC 403 ruling.

OEC 403 determinations are uniquely within the province of the trial court. *See State v. Titus*, 328 Or 475, 481, 982 P2d 1133 (1999) ("A decision to exclude evidence under OEC 403 is reserved to the *trial court's* discretion." (emphasis added)); *see also State v. Knight*, 343 Or 469, 492, 173 P3d 1210 (2007) (Linder, J., dissenting) ("[O]ne of the reasons for giving trial courts broad discretion in applying the OEC 403 balancing test is that they are in the better position to make the exact kind of assessment that the trial court made in this case."); *State v. Ventris*, 164 Or App 220, 230 n 6, 991 P2d 54 (1999) ("OEC 403 * * *, by its nature, requires the reasoned exercise of discretion by the trial court in the first instance.").

For that reason, this court should not apply that rule in the first instance. Rather, this court's role in applying OEC 403 is to review a trial court's exercise of discretion under that rule. Thus, this court should not consider defendant's OEC 403 argument in this case, where the trial court made no ruling to review.

Finally, even if this court were to consider defendant's OEC 403 argument in the first instance, it should conclude that the challenged evidence was not substantially more prejudicial than probative. The only unfair prejudice that defendant identifies is that resulting from commentary on "defendant's exercise of his constitutional right to remain silent." (Pet Br 24). That is, defendant's OEC 403 argument reduces to the same inquiry as his

constitutional argument, turning on whether his silence was protected under Article I, section 12. But, as explained above, that provision's protections did not attach when defendant received the victim's text messages, and the prejudice that defendant identifies was not "unfair." Defendant's OEC 403 argument is therefore meritless.

III. Any error was harmless.

Even if the text messages or defendant's non-response were erroneously admitted at trial, defendant must still demonstrate prejudice to prevail on appeal. *See State v. Davis*, 336 Or 19, 33–35, 77 P3d 1111 (2003)) (holding that this court "must affirm the trial court's verdict despite error if there is little likelihood that the error affected the verdict"). Here, any error in admitting the challenged evidence was harmless because the challenged evidence had very little probative value, especially when viewed in the context of the record as a whole.

The text messages themselves were vague in substance, asking defendant why he did "that" to the victim and why he did "what [he] did" while she was passed out. Neither of those facts established any element of defendant's crimes of conviction. Indeed, little in the messages contradicted defendant's own testimony and out-of-court admissions, in which he admitted to some sexual contact with the victim. (Tr 280–83 (testimony about defendant's out-of-court admission to consensual sexual activity); Tr 633–34 (defendant's

testimony describing consensual kissing, rubbing, touching, and failed penetration)). And although one text message, containing a portion about the victim being "passed out," may have contained information beyond that in defendant's admissions, the victim offered trial testimony to the same effect, in greater detail. Specifically, she testified that she had fallen asleep highly intoxicated, (Tr 86–88), had woken up to find defendant penetrating her, (Tr 90), and then pretended to still be asleep, (Tr 105). Regardless, that portion called for no response, so defendant's silence invited no inference. Moreover, the tenor of the text messages could have reflected nothing more than the illicit nature of the sexual contact, as the victim is married and has three children. (Tr 54). That is, the text messages established nothing necessary criminal.

For essentially the same reasons, defendant's non-response was—in the context of the state's case as a whole—not particularly significant and far from essential. Moreover, defendant expressly mitigated any prejudice by offering testimony explaining his silence. (Tr 638).

Ultimately, the state gained little from the challenged evidence. The prosecutor ignored that evidence in closing argument, making no mention of the victim's text messages, and making no mention of defendant's non-response to the texts. (*See* Tr 661–89, 715–21 (focusing on defendant's shifting story, where he initially denied any sexual contact and then later admitted allegedly

consensual sexual contact when confronted with DNA evidence)).[11] That circumstance further supports the conclusion that any error was unlikely to have affected the verdict. *Contrast with State v. Moller*, 217 Or App 49, 55, 174 P3d 1063 (2007) (concluding that error in admitting evidence was not harmless when the state itself characterized the challenged evidence as central to the case and that evidence played a "prominent part" in the state's closing).

In sum, any error was harmless.

[11] Although the prosecutor discussed certain text messages on rebuttal closing, those messages were between the victim and defendant's fiancée. (Tr 718; *see also* Tr 697–98).

CONCLUSION

For the foregoing reasons, this court should unequivocally state what it necessarily implied in *Davis*—that Article I, section 12, of the Oregon Constitution protects a defendant's silence only in circumstances that amount to a level of compulsion commensurate at least with custodial interrogation. This court should also reject defendant's argument that his non-response was somehow involuntary. Finally, this court should reject defendant's evidentiary argument and affirm the judgment of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 5, 2016, 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, and electronically served upon Ernest Lannet and Anne Kimiko Fujita Munsey, attorneys for appellant, 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 10,075 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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