IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, v. STEVEN P. WAGNER NICHOLS, Defendant-Respondent.	Hood River County Circuit Court No. 140066CR SC S063985 **EXPEDITED APPEAL UNDER ORS 138.060(2)**

REPLY BRIEF OF APPELLANT, STATE OF OREGON

Appeal from the Judgment of the Circuit Court
for Hood River County
Honorable JOHN A. OLSON, Judge

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REPLY BRIEF OF APPELLANT, STATE OF OREGON

INTRODUCTION

The trial court suppressed evidence of defendant's interview based on an alleged *Miranda* violation. The court concluded that defendant equivocally invoked his right to cut off questioning, and that the detective violated Article I, section 12—as interpreted in *State v. Harding*, 221 Or App 294, 189 P3d 1259, *rev den*, 345 Or 503 (2008)—by continuing without clarifying defendant's intent. The state disputes that defendant made an unequivocal or equivocal invocation of the right to cut off questioning. The state also argues that Article I, section 12, does not impose a duty to clarify equivocal invocations of the right to cut off questioning. If defendant made an equivocal invocation, the detective did not have to halt the interview and seek clarification.

Defendant asserts that he unequivocally invoked his right to cut off questioning, and that the trial court erred by concluding otherwise. Alternatively, he contends that he equivocally invoked that right, and that the detective violated Article I, section 12, by failing to clarify his intent. Defendant also argues that he selectively invoked a purported right to not be asked particular questions, that his answers were involuntary, and that he never waived his *Miranda* rights. Defendant failed to raise his selective-invocation

and lack-of-waiver arguments below. And none of defendant's arguments has merit or provides a basis to affirm.

ARGUMENT

A. Defendant did not invoke his Article I, section 12, right to cut off all questioning.

1. Defendant did not unequivocally invoke his right to terminate the interview.

Defendant asserts that he unequivocally invoked his right to cut off all questioning, when he was asked about "the circumstances behind [the victim's] death," and he replied that "[i]t's not something I want to talk about." Defendant contends that the trial court wrongly concluded that a plausible inference was that the victim's death was still an emotional issue for him but that he was willing to discuss it. (Resp Br 29). He also contends that his statement was not a refusal to answer a particular question but instead a clear request that the detective terminate the interrogation. (Resp Br 23-27, 29). Neither contention is correct.

First, defendant's statement was not an unequivocal invocation, because it was not clear that he was unwilling to discuss the circumstances behind the victim's death. The trial court found the statement to be ambiguous, because it "could be a way of signaling that the topic is still emotionally charged for [defendant], but that [defendant] is nonetheless willing to discuss it." (ER-33, Memorandum Opinion). Defendant argues that that view is not plausible,

because six years had elapsed since the victim died. (Resp Br 29). Yet despite the passage of time, a person might find it emotionally difficult to speak about the way that a loved one died especially when, as here, the loved one was their partner in a serious relationship, they had a child together, the person witnessed the death, and the loved one died by falling from a cliff. On this record, the trial court properly found that defendant may have been conveying an understandable reluctance to remembering and discussing a painful or emotional topic that he was willing to discuss. For that reason, alone, defendant did not make an unequivocal invocation.

Second, no unequivocal invocation occurred, because defendant's statement was not directed at ending the interrogation. The right at issue is the right to cut off all questioning. As the state explains in its opening brief (App Br 19-33), that right is not invoked by a mere refusal to answer a particular question. Defendant counters that his statement was not a mere refusal to answer a particular question but rather an unequivocal refusal to answer any more questions. (Resp Br 23-27, 29).

The record demonstrates otherwise. The detective asked defendant a narrow question about how the victim died—that is, the immediate circumstances surrounding her fall from the cliff—and defendant responded by indicating that he preferred not to discuss his memories of that event, stating that "[i]t's not something I want to talk about." That was not a statement that

he was refusing to answer *any* questions pertaining to the victim's death, their relationship, or the murder case.

Quite the opposite, defendant already had begun answering those questions. After being told that he had been arrested for the murder of the victim,[1] defendant answered several questions, explaining that he knew the victim, that she was the mother of their child, that they had a long-term relationship, and that he knew the circumstances of her death. Defendant thus already had made several statements and then expressed reluctance to answering a single question. The trial court correctly concluded that defendant's statement was not an unequivocal invocation of the right to cut off all questioning.

2. Defendant did not equivocally invoke his right to terminate the interview.

Alternatively, defendant asserts that his equivocally invoked the right to cut off all questioning. (Resp Br 29). But defendant's statement did not rise even to that level, because (1) defendant simply appeared to be conveying his reluctance to discussing an understandably emotional topic rather than stating that he was unwilling to do so; and because (2) a single refusal or reluctance to

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[1] Defendant argues that the detective violated an Oregon statute by failing to advise him of the charge. (Resp Br 24). But defendant failed to raise that claim below, the statute did not apply, and the claimed violation would have been immaterial. The state discusses the claimed violation at the end of this brief in responding to defendant's claim that he did not waive his *Miranda* rights.

answering a particular inquiry is not even arguably an invocation of the right to cut off all questioning. (App Br 29-33). "[A]n unwillingness * * * to respond to a particular inquiry * * * is not a general claim of the privilege." 2 Wayne R. LaFave *et al*, *Criminal Procedure* § 6.9(g) (4th ed 2015) (footnotes omitted). A reasonable officer would not have understood defendant's response to the question as—even arguably—asserting the right to end the interview.

B. If defendant equivocally invoked his right to cut off all questioning, the detective did not have to halt the interview and seek clarification.

If defendant made an equivocal invocation of the right to cut off questioning, this court should hold that Article I, section 12, did not require the detective to halt the interview and seek clarification. In arguing to the contrary, defendant urges this court not to "abandon" the duty to clarify adopted in *State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014). (Resp Br 31). But that case does not establish the existence of such a duty. Although the court referred to a need to clarify equivocal invocations, that statement was at best dictum, because the defendant there unequivocally invoked his right to cut off questioning. This court has not yet decided a case in which it needed to resolve whether Article I, section 12, imposes a duty to clarify when a suspect equivocally invokes the right to cut off questioning or, for that matter, the right to have counsel present for questioning.

In all events, to the extent that this court's prior cases have assumed, without analysis or explanation, the existence of such a duty, the state has made a more-than-sufficient showing that "reconsideration" of this assumption would be appropriate. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53-54, 11 P3d 228 (2000) (discussing *stare decisis* considerations), Reconsideration is appropriate for "cases in which a prior pronouncement amounted to dictum or was adopted without analysis or explanation" and for "cases in which the analysis that does exist was clearly incorrect—that is, it finds no support in the text or the history of the relevant constitutional provisions." *Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015).

Reconsideration is justified for all of those reasons. The prior pronouncements (both for invocations of the right to have counsel present and especially for the right to cut off questioning) were dicta, were adopted without analysis or explanation, and there is no state constitutional basis for a duty to clarify. This issue is far too important to be deemed decided based on dictum and unexplained and unexplored assumptions. This court should address the issue directly and decline to impose an Article I, section 12, duty to clarify for ambiguous invocations of the right to cut off questioning.

The state has fully briefed that issue in its opening brief, (*see* App Br 33-52), and those arguments refute defendant's assertions that there is a state constitutional basis for a duty to clarify, that there is no "rational" justification

for not imposing a duty to clarify, and that a duty to clarify would be workable and easy to administer. Defendant admits that it is a "difficult" and "slippery" task to determine whether a suspect has made an "unequivocal" invocation of the right to cut off questioning. (Resp Br 35). Yet it would be next to impossible to determine whether each and every silence, evasiveness, refusal, resistance, or gesture amounted to an "equivocal" invocation of that right. The sanctions for an Article I, section 12, *Miranda* violation—suppression of the statements and derivative physical evidence—are far too severe to be tethered to such a vague, unmanageable mandate imposed on police officers.

Defendant argues that police officers should be required to clarify ambiguous invocations, because the *Miranda* warnings fail to inform the person of the "right" to cut off questioning. (Resp Br 33-34). But the United States Supreme Court has chosen not to include that specific advice and instead concluded that it is sufficient to require the police: (1) to read the suspect *Miranda* warnings (which include the specific advice that the person has the right to remain silent and that anything the person says can and will be used against them); (2) to obtain a *Miranda* waiver; and (3) to end the interrogation if the person makes a reasonably clear request for either a lawyer or for the interview to end. That procedure has been sufficient and is sufficient to protect suspects' constitutional rights against self-incrimination.

And if defendant's real argument is with the adequacy of the *Miranda* warnings themselves, the argument is misplaced here. This case is not about whether the police must give a suspect specific advice on the right to end the interview before the suspect can waive that right at the outset of an interview. It is about the narrower subset of cases in which suspects make ambiguous invocations after waiving their *Miranda* rights. This court should not saddle police officers with a murky duty to clarify to "fill the gaps" in an indirect, inartful, and partial attempt to remedy a claimed deficiency in the court-created *Miranda* procedure.

In sum—and regardless of the rule for ambiguous invocations of the right to have counsel present for questioning—this court should decline to impose a duty to clarify ambiguous invocations for the right to cut off questioning.

C. Defendant's selective-invocation argument is without merit.

Defendant argues that, even if he did not invoke his right to cut off all questioning, he also had a right to preclude questioning about a particular topic, a right which he claims he selectively invoked when he asserted that he did not want to talk about the circumstances of the victim's death. According to defendant, the detective violated Article I, section 12, by asking questions about the victim's death after defendant made that selective invocation. (Resp Br 17-22, 26-28). Defendant failed to raise that argument below and it was not the basis for the trial court's ruling. Consequently, to the extent that defendant's

selective-invocation argument turns on a factual determination, it would not provide a proper basis for affirmance. Assuming that that argument is properly before this court, it fails for two reasons.

First, defendant had no right to selectively limit the scope of questioning. As the state discusses in its opening brief (App Br 20-28 & n 5, 53 n 13), a person has the right to cut off questioning as a whole (which is a tool that the person may use to assert control over the topics discussed), and a person has a right not to be compelled to answer a particular question or questions. But a person does not have a right to not be asked a particular question or questions.

Defendant does not offer any authority that establishes otherwise. In *Connecticut v. Barrett*, 479 US 523, 107 S Ct 828, 93 L Ed 2d 920 (1987), *State v. Kell*, 303 Or 89, 734 P2d 334 (1987), *State v. Smith*, 310 Or 1, 791 P2d 836 (1990), and *State v. Longo*, 341 Or 580, 148 P3d 892 (2006), the courts *rejected* the defendants' challenges to the admission of the evidence. None of those decisions held that a person who has waived his *Miranda* rights has a right to not be asked particular questions, and that a violation of that right would entitle the person to the suppression of any resulting statements. Moreover, *Barrett* and *Kell* involved partial waivers of the right to the presence of counsel as to the mode of communication (*Barrett*) and as to certain questions (*Kell*). Those cases are inapposite, because defendant here made a complete *Miranda* waiver, not a partial waiver, and because the right at issue is the right to cut off

questioning, not the right to the presence of counsel for the interrogation. And *Smith* and *Longo* bolster the state's argument that a suspect's refusal to answer a particular question is not an invocation of the right to cut off all questioning. (App Br 23-24, 32-33).

Defendant remonstrates that a suspect must have a right to not be asked a particular question, because if a suspect states that he does not want to talk about a subject, and the police officer proceeds to ask about it, any answers necessarily will be involuntary. (Resp Br 22 n 3). That argument is flawed on each end. Even if the answers were necessarily involuntary, that would not mean that the suspect had a "right" not to be asked the questions. But more to the point, the suspects' answers will not necessarily be involuntary. The analysis for voluntariness is distinct from the *Miranda* analysis. *See, e.g.*, *State v. McAnulty*, 356 Or 432, 458-58, 338 P3d 653 (2014) (illustrating point). If the suspect makes it clear that he does not want to answer a particular question, and the police nonetheless pressure him to answer, then the statements that the suspect makes in response may or may not be voluntary depending on the circumstances. The key point is that that is a separate issue with a separate analysis.

Second, even if a suspect has a right to not be asked particular questions, the suspect would have to clearly indicate both that he was unequivocally refusing to discuss a topic and what that topic was. The police officer would

not have a duty to clarify ambiguous invocations of the purported right to not be asked particular questions. In this case, defendant did not unequivocally invoke any right to not be asked a particular question or questions. It was not clear that defendant was unwilling to discuss any particular topic, much less the scope of what he was unwilling to discuss. Defendant's selective-invocation argument provides no basis for affirmance.

D. Defendant's statements were voluntary.

Defendant also apparently contends that his statements were involuntary, because the detective asked about the circumstances of the victim's death after defendant stated that it was not something that he wanted to talk about. (Resp Br 22 n 3, 27-28). Although defendant raised an involuntariness claim as part of his suppression motion, the trial court did not rule on that issue and the claim is one that inherently is factual in nature. As a result, that issue does not appear to be properly before this court. If this court concludes otherwise, defendant's claim fails, because his statements were voluntary.

Because defendant did not invoke his right to cut off all questioning, the detective was "entitled to continue to ask defendant possibly incriminating questions, as long as [he] did not do so in a way that rendered [defendant's] responses involuntary." *State v. Turnidge*, 359 Or 364, 401, 374 P3d 853 (2016). The test is whether defendant's will was overborne and his capacity for

self-determination was critically impaired. *State v. Acremant*, 338 Or 302, 324, 108 P3d 1139 (2005).

Defendant's statements were voluntary. Defendant was advised of and waived his *Miranda* rights. After defendant stated that he did not want to talk about the circumstances behind the victim's death, the detective stated that he wanted to make sure that he did not have a "serial murderer walking into [his] jail," and defendant stated that he was not a killer. (TCF, 7/15/15 Declaration, Ex B, Transcript, 4). The detective replied that he did not know that, that he could not make that decision, and that he just wanted some information; he then stated "So if you can tell me * * * about the circumstances of how she died, that[would] be great." (*Id*. at 4-5). That "psychological" pressure was minimal and constitutionally insignificant. It did not critically impair defendant's capacity to make voluntary statements. The detective complied with the *Miranda* requirements and his brief, low-key followup inquiry did not render defendant's ensuing statements involuntary. *See Berkemer v. McCarty*, 463 US 420, 433 n 20, 104 S Ct 3138, 82 L E2d 317 (1984) ("cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare").

E. Defendant's claim that he never waived his *Miranda* rights provides no basis for affirmance.

Finally, defendant argues that he "never waived" his *Miranda* rights. (Resp Br 39-40). He argues that, after being advised of his *Miranda* rights, the only statements that he made "were in an effort to determine why he was in custody, which the detective failed to tell him despite the legal requirement to do so." (Resp Br 40). He contends that the detective violated ORS 133.235(3), which provides that "[t]he officer shall inform the person to be arrested of the officer's authority and reason for the arrest, and, if the arrest is under a warrant, shall show the warrant."

This court should not address defendant's claim that he never waived his *Miranda* rights, because defendant failed to raise that claim below, and because that was not the basis for the trial court's ruling. Had defendant raised his claim, the record may have developed differently. *See Outdoor Media Dimensions Inc., v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (application of the "right for the wrong reason" doctrine is not appropriate when the record may have developed differently had the issue been raised below).

At any rate, defendant's waiver was valid. Defendant's waiver was knowingly made, because the detective advised him of his *Miranda* rights and asked him whether he understood, and defendant replied "yes"; defendant's waiver was voluntarily made, because he answered questions only after

receiving and understanding *Miranda* warnings. (App Br 16-17). When a suspect speaks with the police after affirming that he understood his *Miranda* warnings, it is inferable that he intentionally chose to waive those rights.

Defendant's argument that the detective violated ORS 133.235(3) misses the mark for three reasons. First, the statute did not apply, because defendant was arrested in California, and because the Oregon statutory provision presumably did not apply to the California detective's conduct in California. It is a "well-established principle that the legislative acts of a state ordinarily are not operative outside the territorial boundaries of the enacting state." *State v. Meyer*, 183 Or App 536, 544, 53 P3d 940 (2002).

Second, it is immaterial whether defendant knew the basis for his arrest. A suspect need not have an awareness of the subject matter of the interrogation to make a knowing *Miranda* waiver. *Colorado v. Spring*, 479 US 564, 577, 107 S Ct 851, 93 L Ed 2d 954 (1987). This court has recognized that principle as well, stating that "the police need not first identify the subject matter of their questioning for a *Miranda* waiver to be valid; the *Miranda* rights inform a person that *any* statement may be used against them." *State v. Davis*, 313 Or 246, 261 n 9, 834 P2d 1008 (1992) (emphasis original).[2] Defendant was

[2] Such a rule would make even less sense under Article I, section 12, than it would under the Fifth Amendment. Unlike the federal constitution, the state constitution requires *Miranda* warnings if the suspect is in "compelling

Footnote continued…

informed that any statement that he made could be used against him, and he waived that right the moment he began to make statements. Defendant's waiver was valid regardless of whether he knew the basis for the arrest or the subject matter of the questioning.

Third, defendant overlooks the fact that, after he learned the reason for his arrest, he proceeded to answer questions before he made the alleged invocation. Accordingly, even if *Miranda* required proof that the suspect knew the basis for the arrest, the requirement was satisfied. Defendant waived his *Miranda* rights, and he did so before he made the alleged invocation.

(…continued)
circumstances." *State v. Shaff*, 343 Or 639, 645, 175 P3d 454 (2007). A suspect does not have to know why he was put in compelling circumstances before he can make a valid *Miranda* waiver.

CONCLUSION

For all the above reasons and all the reasons identified in the state's opening brief on the merits, this court should reverse the trial court's order suppressing defendant's statements and remand for further proceedings.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 6, 2016, I directed the original Reply Brief of Appellant, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Anne Fujita Munsey, attorneys for respondent, 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 3,620 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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