IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
XABIAN ROBERT RILEY,
aka Xabien Robert Riley,
Defendant-Appellant.

Multnomah County Circuit Court
120532227; A156390

Cheryl A. Albrecht, Judge.

Argued and submitted February 8, 2016.

Kenneth A. Kreuscher argued the cause and filed the briefs for appellant.

Peenesh H. Shah, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Conviction for murder reversed and remanded; otherwise affirmed.

ARMSTRONG, P. J.

Defendant appeals a judgment of conviction, entered after a combined trial with codefendants Allen and Lomax, for one count of murder, ORS 163.115.[1] *See State v. Allen*, 288 Or App 244, ___ P3d ___ (2017); *State v. Lomax*, 288 Or App 253, ___ P3d ___ (2017). In his first assignment of error, defendant challenges the trial court's denial of his motion to suppress evidence, arguing that the police unlawfully seized him, in violation of Article I, section 9, of the Oregon Constitution, and then exploited that illegality to obtain the evidence that defendant sought to suppress. In his fifth assignment of error, defendant argues that the trial court erred in denying his request for a jury concurrence instruction with regard to principal or accomplice liability. For the reasons explained below, we conclude that the trial court did not err in denying defendant's suppression motion because the discovery of the challenged evidence was sufficiently attenuated from any police illegality. However, we conclude that the trial court erred in not giving a jury concurrence instruction, in violation of Article I, section 11, of the Oregon Constitution. Accordingly, we reverse and remand defendant's conviction for murder.[2]

We begin with defendant's challenge to the trial court's denial of his motion to suppress, which we review for legal error. *State v. Maciel-Figueroa*, 361 Or 163, 165-66, 389 P3d 1121 (2017). In doing so, we are bound by the trial court's findings of fact that are supported by evidence in the record; if the trial court did not make a finding on a particular fact and there is evidence from which differing findings about the fact could be made, we presume that the court found the fact in a manner consistent with its ultimate conclusion. *Id.* at 166. The following facts are taken

[1] Defendant was also indicted for unlawful use of a vehicle; however, that charge was dismissed before trial on the state's motion. We affirm that aspect of the judgment.

[2] Defendant also challenges the trial court's denial of his motions for mistrial when one of the state's witnesses gave inadmissible testimony and when the prosecutor argued that defendant and his codefendants are killers or Crip-killers, as well as the trial court's failure to instruct the jury that, as a matter of law, one of the state's witnesses was an accomplice. Because we remand for a new trial, and the evidentiary record and legal arguments may develop differently on remand, we decline to address those assignments of error.

from the suppression hearing and the court's order denying defendant's motion to suppress.

At 11:38 p.m. on May 9, 2012, police responded to a 9-1-1 call reporting a shooting in Northeast Portland. The victim, Henry, was shot and killed on the front step of his home. Detectives Merrill and Kammerer reported to the scene and observed spent bullets, blood spatter, holes in the sides of the house, spent casings in the grass, and one "pristine" slug. Henry's domestic partner, Nettles, reported that, before Henry was shot, a darker-skinned male in his early twenties, wearing a white or gray cap and red clothing, had come to the door and said his name was Jordan.

Portland Police Officers Elias and Wullbrandt were training a police dog in a parking lot a few blocks from the shooting when they heard gunfire. Wullbrandt called dispatch to report the shots at 11:39 p.m. and, two minutes later, he saw a Buick Regal pull into the parking lot with its lights off. There were three or four black men inside the vehicle.

As the officers approached the car, they saw three black men standing next to the car. They shone their flashlights on the men to illuminate the area and to get the men's attention, but the men walked away, looking back at the officers before rounding a corner. The officers used their police dog to track the men to a nearby apartment. Wullbrandt called dispatch, and the officers returned to the Buick Regal, where they saw from outside the car a piece of mail addressed to Fair and a red article of clothing stuffed under the seat.

The officers developed a suspicion that the men were involved in the shooting that they had just heard. Other officers arrived and set up a perimeter around the apartment, which belonged to Fair and Watson. At 12:19 a.m., officers positioned at the rear of the apartment saw a black male leave the apartment and look to his left and right. Around 10 minutes later, reports were called in that someone had looked out a window of the apartment and that someone was changing clothes in the apartment. At 12:31 a.m., officers saw Watson open the door and take a few steps outside the apartment. The officers announced themselves as police and

commanded Watson to come out of the apartment. Watson immediately turned around and returned to the apartment.

At 2:02 a.m., a woman named Jarrell called the police to report that she was Fair's mother and that she was "extremely concerned for her daughter's safety and her well being and [for] her granddaughter." According to Jarrell, Fair had called her to complain about some men who were inside her apartment and had refused to leave. Fair stated that the men may have done something "really bad," and she told Jarrell that she wanted to leave the apartment and needed a ride so she could go to a relative's house. Jarrell told the police that "her daughter was inside the apartment with a baby, a female relative, and a man who was hiding in the bathroom." Jarrell agreed to come to the scene and assist the police in getting Fair, her child, and Watson to leave the apartment safely.

Fair and Watson left the apartment at 2:50 a.m., and police placed them in separate police vehicles so that they could interview them separately. At first, Fair told Detective Teats that there was only one person inside the apartment, that his name was "X" or Xavier, that she had spent the day hanging out with him, and that he had fallen asleep on her bed at 11:30 p.m. Teats then spoke with Watson, who stated that she had gone to bed at 10:30 p.m. and that, when she got up to use the bathroom, there were two men she had never before seen watching television with Fair. She told Teats that she went back to bed and, a while later, was awakened by Fair telling her that police had surrounded the apartment and that Fair's mother was coming to get them.

Teats interviewed Fair a second time, during which she changed her story about how many people were inside the apartment. She told Teats that X had let two other guys, YB[3] and Oso, into her apartment; she explained that she had been untruthful with the police because she was scared and because Oso had told her not to talk to the police.

The three men left the apartment at 3:36 a.m. and were taken into custody by the police, who identified them

[3] The trial court's order identified Lomax's nickname as YV. However, as the record demonstrates, Fair told detectives that Lomax went by the initials YB.

as defendant, Allen, and Lomax. Officers asked Fair and Watson for consent to search the apartment to determine whether anyone else was in it. The officers did not ask for consent to search for weapons, but they did ask Fair and Watson whether they had any weapons in the apartment. Both Fair and Watson gave consent to search the apartment to look for more people. In addition, Fair stated that she "didn't want anyone leaving [anything in] there that her kids could get ahold of and get hurt," and Watson stated that she did not have any weapons.

At 4:14 a.m., Sergeant Dulio conducted a "clear" to search for people in the apartment. He knew from his training and experience to look anywhere a person could be hiding, including under or in beds and box springs. Dulio lifted the bottom of the bed in Watson's room; as he did so, the mattress slid to reveal a .22-caliber handgun hidden under the mattress. He also saw a gun holster on the floor.

Police then obtained Fair's and Watson's consent to search the apartment for weapons and narcotics. During the second search, police found a .380-caliber handgun and a bag with live .380-caliber bullets; the bullets appeared to match those found at the murder scene. Police also found three live .22-caliber rounds in the toilet and clothing that had been soaked in Pine-Sol.

Meanwhile, Teats and Detective Gradwahl continued to question Fair and Watson. After showing them photographs of the codefendants, both Fair and Watson identified defendant as Xab, Lomax as YB, and Allen as Oso. Among other things, Fair told the detectives that, when the police commanded Watson to come out of the apartment, Allen was standing right behind her, just inside the front door. After they had first run inside and shut the door, the codefendants began to panic, and Lomax turned off the lights and the TV. Lomax and Allen made several phone calls in an effort to "find a ride out of there," and Lomax offered Fair $5,000 if she would "take a charge." At 6:15 a.m., Fair and Watson gave the police written consent to conduct further searches of Fair's car and the apartment.

Before trial, defendant filed a motion to suppress, arguing that he was unlawfully seized when the police

besieged the apartment and commanded Watson to come out, and that all of the evidence collected after that unlawful seizure—including witness statements, the identifications of the codefendants, and items seized from the codefendants and the search of the apartment—should be suppressed as evidence obtained though police exploitation of the unlawful seizure of defendant.

The trial court denied defendant's suppression motion. The court agreed with defendant that the police had unlawfully seized him at 12:31 a.m. when they surrounded the apartment and gave commands to Watson as she attempted to leave the apartment: "the occupants [of the apartment] knew they would be subject to police authority if they did leave, and in that sense, their movement was restricted in a manner that constituted a stop." The court concluded that the police lacked reasonable suspicion for the seizure because "no articulable facts" connected the codefendants to the murder at that point and that, "[w]hile an investigation and even a perimeter may have been warranted, there was an insufficient basis to seize the occupants of the apartment."

However, the court concluded that, when Jarrell called the police at 2:02 a.m. to report that there were men in her daughter's apartment who would not leave and who may have done something "really bad," the police had reasonable suspicion to believe that the codefendants were involved in the shooting. Then, after Fair and Watson left the apartment at 2:50 a.m. and provided the police with more information, the police had probable cause to believe that the codefendants had committed other crimes, including trespass and unlawful use of a vehicle.

Ultimately, the court determined that the unlawfulness of the initial seizure did not require suppression of the evidence because Jarrell, Fair, and Watson provided the police with "reports of criminal activity [that] were an independent, intervening circumstance justifying [the codefendants'] detention and arrest." The court explained,

> "It is true that for some period of time, the seizure was not proper, and the ongoing seizure had the effect of keeping the defendants in the apartment. That does not mean

> when the defendants did exit the apartment and subject themselves to police authority it was derivative of the original improper seizure or that the officers exploited the improper seizure to conduct the detention and arrests.
>
> "*** Their detention in patrol vehicles, subsequent arrests and the information gathered as a result were not discovered based on any evidence seized during the time they may have been unlawfully detained. The reports of criminal activity were an independent, intervening circumstance justifying their detention and arrest."

Accordingly, the trial court denied defendant's suppression motion.[4]

On appeal, the parties agree that all of the challenged evidence flowed from the statements that Fair and Watson gave to the police after Fair and Watson had left the apartment at 2:50 a.m., including Fair's and Watson's consent to search Fair's car and the apartment. Defendant renews his argument that that evidence must be suppressed because the police obtained it only by exploiting the earlier seizure, which he argues violated his rights under Article I, section 9. The state contends that defendant was not unlawfully seized, but argues that, even if he was, suppression is not required because Fair and Watson spoke with the police and gave their consent to search voluntarily and not as a product of police exploitation of the initial seizure of defendant. The state argues that a significant circumstance intervened after the initial seizure and before Fair and Watson gave their statements to the police—namely, Fair's phone call with her mother, Jarrell.

Here, we need not decide whether defendant was unlawfully seized when the police surrounded the apartment and ordered Watson to come out. That is because we agree with the trial court that, even if defendant was unlawfully seized in violation of Article I, section 9, the state satisfied its burden of demonstrating attenuation, and thus the trial court did not err in denying defendant's suppression motion.

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[4] Defendant made several other arguments in support of his motion to suppress, but, because he does not raise those arguments on appeal, we do not discuss them further.

Article I, section 9, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." When the state has obtained evidence following the violation of a defendant's rights under Article I, section 9, "it is presumed that the evidence was tainted by the violation and must be suppressed." *State v. Jackson*, 268 Or App 139, 151, 342 P3d 119 (2014) (citing *State v. Unger*, 356 Or 59, 84, 333 P3d 1009 (2014)). "The state may rebut that presumption by proving, as relevant here, that the police did not exploit the unlawful police conduct to obtain the challenged evidence—that is, that the unlawful police conduct was 'independent of, or only tenuously related to' the disputed evidence." *State v. Benning*, 273 Or App 183, 194, 359 P3d 357 (2015) (quoting *State v. Hall*, 339 Or 7, 35, 115 P3d 908 (2005), *overruled in part on other grounds by Unger*, 356 Or 59). The state must therefore prove that "the violation of defendant's rights had such a tenuous factual link to the disputed evidence that the unlawful police conduct cannot be properly viewed as the source of that evidence." *Id*.

> "To determine whether the state proved attenuation under the totality of the circumstances, we consider the temporal proximity between the unlawful police conduct and the discovery of the challenged evidence; the presence of mitigating circumstances; the presence of intervening circumstances; the purpose and flagrancy of the unlawful police conduct; and the nature, extent, and severity of the constitutional violation. The underlying question those factors aim to address is whether police exploited or took advantage of or traded on their unlawful conduct to obtain the challenged evidence, or—stated another way—whether the challenged evidence was tainted because it was derived from or was a product of the unlawful conduct."

State v. Jones (A154424), 275 Or App 771, 778, 365 P3d 679 (2015) (internal quotation marks and citations omitted).

Here, Fair and Watson spoke with detectives more than two hours after the police had ordered Watson to come out of the apartment. Thus, the "temporal proximity" between Fair's and Watson's statements and any police illegality in seizing defendant was not close. *Cf. State v. Bailey*, 356 Or 486, 505, 338 P3d 702 (2014) ("because the temporal

break between the unlawful detention and the discovery of the evidence was brief, that factor bears some weight in favor of suppression"). In addition, there were intervening circumstances that served to attenuate from the seizure Fair's and Watson's statements and consent to search. The evidence showed that Fair had called her mother, Jarrell, at about 2 a.m. to complain about the men who were inside her apartment, one of whom was "hiding" in the bathroom. According to Jarrell, Fair believed that the men had done something "really bad" and wanted to leave the apartment to go to a relative's house. Contrary to defendant's assertion, there is no "direct causal connection" between Fair's call to her mother and any unlawful police conduct. The evidence suggests that Fair called her mother for help because she was afraid of the men hiding in her apartment, and not, as defendant contends, because the police had ordered Watson to come outside.

Nor is there evidence to suggest a less direct exploitation of any police illegality to obtain Fair's and Watson's voluntary statements and consent to search their apartment. In determining whether their statements and consent can survive a prior police illegality,

> "our task is to determine whether police 'exploited' or 'took advantage of' or 'traded on' their unlawful conduct to obtain consent, or—examined from the perspective of the consent—whether the consent was 'tainted' because it was 'derived from' or was a 'product of' the unlawful conduct. In making that determination, it seems obvious that, in many cases, the nature of the illegal conduct will be a relevant consideration. *** If the conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may be the extent to which the defendant's consent is 'tainted.' And where the taint is limited, the degree of attenuation necessary to purge the taint is correspondingly reduced."

Unger, 356 Or at 80-81 (footnote omitted).

Here, the police conduct was minimally intrusive. The evidence shows that the police ordered Watson to come out of the apartment when she was already attempting to walk outside. After she turned around and went back into

the apartment, the police did not pursue her or make any other attempt to order her or the other occupants of the apartment to come outside. Instead, they continued to wait and exhibited no force or intimidation. When Jarrell assisted the police in getting Fair and Watson to leave the apartment, the detectives did not trade on any information that they had obtained in the course of the initial seizure of defendant to induce the women to speak with them or to obtain their consent to a search of the apartment. *See id.* at 89-90 (finding that officers' conduct in trespassing onto the defendant's property to knock on a side door after no one responded to their knock on the front door was limited in extent, nature, and severity, and thus the defendant's consent was not tainted by the police illegality); *State v. Lorenzo*, 356 Or 134, 143, 335 P3d 821 (2014) (finding attenuation where officer opened apartment door, unlawfully reached in to knock on the defendant's bedroom door, and then waited outside the apartment until the defendant came out and consented to a search of the apartment, because the officer's conduct was restrained and without threats or intimidation); *cf. State v. Musser*, 356 Or 148, 156-57, 335 P3d 814 (2014) (the state failed to prove attenuation where officer's unlawful order to the defendant to stop and come back to him "clearly indicated to defendant that she had no choice but to respond to the order").

Although the purpose of the police conduct was clearly investigatory and there were no mitigating circumstances, the balance of the factors weigh against suppression. Under the totality of the circumstances, we conclude that the state met its burden of showing that the evidence obtained as a result of Fair's and Watson's statements to the police was sufficiently attenuated from any minimally invasive violation of defendant's Article I, section 9, rights. Thus, the trial court did not err in denying defendant's motion to suppress.

We turn to defendant's fifth assignment of error, in which he challenges the trial court's refusal to give a jury concurrence instruction on principal or accomplice liability, and we write only to address the state's preservation argument. The state argues that defendant did not preserve his claim because he did not join in his codefendants' initial

request for a jury concurrence instruction but only joined them in excepting to the court's instructions after they were given, which the state argues was untimely. The state also argues that defendant failed to preserve his claim because he expressly approved of the trial court's proposed instructions after the jury submitted questions to the court. We disagree with the state's preservation arguments.

Preservation is required "to advance goals such as ensuring that the positions of the parties are presented clearly to the initial tribunal and that parties are not taken by surprise, misled, or denied opportunities to meet an argument," *State v. Whitmore*, 257 Or App 664, 666, 307 P3d 552 (2013) (quotation marks and citation omitted), and to give the trial court "the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal," *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008). Preservation also "fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it." *Id*. at 219-20. "Ultimately, the preservation rule is a practical one, and close calls *** inevitably will turn on whether, given the particular record of a case, the court concludes that the policies underlying the rule have been sufficiently served." *State v. Parkins*, 346 Or 333, 341, 211 P3d 262 (2009).

Here, given the record of this case, we conclude that the goals of preservation were met. At the close of the trial evidence, the court and the parties engaged in a colloquy about the proposed jury instructions. Lomax's attorney requested a special instruction on jury concurrence: "we are asking for the concurrence *** [i]nstructing the jury that they have to each find 12-0 as to the same theory. Either that they think someone's guilty by aiding and abetting or directly guilty for being the primary." The court noted that Allen's attorney had made an identical request in writing. Defendant did not orally join in Lomax's and Allen's request for the concurrence instruction.

In response, the state withdrew its request for an aid-or-abet instruction, to which the court replied, "Then that takes care of that." However, the parties and the court

continued to discuss whether the concurrence instruction was required by law. Evidently, both the parties and the court were under the mistaken belief that our decision in *State v. Phillips*, 242 Or App 253, 255 P3d 587 (2011), *rev'd*, 354 Or 598, 317 P3d 236 (2013), which supported the state's argument that a concurrence instruction was not necessary, was binding authority. In actuality, our decision in *Phillips* had already been reversed by the Supreme Court, which held that, when the state advances competing theories of liability based on a defendant's acts as a principal or as an aider-and-abettor, the jury must be instructed that they must agree on each legislatively defined element necessary to find the defendant liable under one theory or the other. *Phillips*, 354 Or at 606. The court ultimately denied the request for the concurrence instruction on two bases: (1) the state's withdrawal of its request for an aid-or-abet instruction; and (2) the court's mistaken belief that our decision in *Phillips* was controlling.

The court then instructed the jury on the law applicable to the case and provided the jury with a written copy of those instructions. Despite the state's withdrawal of its request for an aid-or-abet instruction, the court nevertheless instructed the jury as follows:

> "There is another instruction that didn't get included in here that I'll be giving to you and I'll read it to you right now. You'll have a copy of it also with you in the—in the jury room for deliberations. ***
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> "This instruction is entitled Aid or Abet. A person aids or abets another person in the commission of a crime if the person, with the intent to promote or make easier the commission of the crime, encourages, procures, advises or assists by act or advice the planning or commission of the crime."

After the court concluded its predeliberation instructions to the jury, Allen's attorney excepted to them on the basis that the court had failed to instruct the jury on concurrence with regard to principal or accomplice liability; defendant joined in that exception.

During deliberations, the jury sent two questions to the court: (1) "Do you have to pull [the] trigger to be guilty of

murder?"; and (2) "If you are guilty of aiding and abetting a murder, is that grounds for a guilty verdict?" The court proposed to answer the questions by providing the jury with a written copy of the aid-or-abet instruction. The court asked the parties if they had any objection to giving the jury the written instructions, to which defendant replied, "No." The court then provided the jury with a written copy of the aid-or-abet instruction, without giving the previously requested concurrence instruction.

The state argues that defendant failed to preserve his claim because he did not initially join in his codefendants' request for a concurrence instruction. However, despite also arguing that a concurrence instruction was not required by law, the state announced that it was withdrawing its request for an aid-or-abet instruction, thus rendering a concurrence instruction unnecessary. At that time, there was no reason for defendant to believe that the court would instruct the jury on the definition of aid-or-abet, and thus there was no need for defendant to join in Allen's and Lomax's request for a concurrence instruction.

Then, when the court unexpectedly instructed the jury on the definition of aid-or-abet, defendant joined in his codefendants' exceptions to the jury instructions on the basis that the court had erred by failing to also give a concurrence instruction. At that point, the state had already been given a fair chance to meet defendant's argument, and the record had been fully developed on the issue. By excepting to the court's instructions, defendant apprised the trial court of his contention that a concurrence instruction was necessary, thus giving the court an opportunity to correct its error.

In support of its preservation argument, the state also notes that, after the jury submitted questions to the court, defendant did not object to the court's proposal to provide the jury with a written copy of the aid-or-abet instruction. However, by that time, the court had already explicitly rejected, as a matter of law, the request for a concurrence instruction. Defendant was not required to continue excepting to the court's instructions on a basis that had already been rejected. *See* *State v. Walker*, 350 Or 540, 550, 258 P3d

1228 (2011) ("Once a court has ruled, a party is generally not obligated to renew his or her contentions in order to preserve them for the purposes of appeal."); *State v. Barajas*, 247 Or App 247, 251, 268 P3d 732 (2011) ("Preservation does not require a party to continue making an argument that the trial court has already rejected."). Thus, we conclude that petitioner's claim is preserved for appeal.

And, for the reasons discussed in *Lomax*, 288 Or App at 259-63, we conclude that the trial court erred in failing to give the requested jury concurrence instruction, in violation of Article I, section 11.

Conviction for murder reversed and remanded; otherwise affirmed.