IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JASON PAUL SCHREPFER,
Defendant-Appellant.

Lane County Circuit Court
201425077; A158830

Mustafa T. Kasubhai, Judge.

Argued and submitted November 15, 2016.

Stephanie J. Hortsch, Deputy Public Defender, argued the cause for appellant. With her on the opening brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services. Jason Paul Schrepfer filed the supplemental brief *pro se*.

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

Before DeVore, Presiding Judge, and Garrett, Judge, and James, Judge.*

JAMES, J.

Reversed and remanded.

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* James, J., *vice* Duncan, J. pro tempore.

JAMES, J.

Defendant appeals from a judgment of conviction for one count of robbery in the second degree, ORS 164.405. On appeal he raises three assignments of error, and defendant supplements with a single *pro se* assignment of error. We reject all of those assignments without discussion save the first, where defendant assigns error to the trial court's denial of his motion to suppress statements made following his invocation of the right against compelled self-incrimination under Article I, section 12, of the Oregon Constitution.[1] At issue on appeal is whether defendant unequivocally invoked his right to remain silent and, if so, whether the arresting officer unconstitutionally continued to question him in violation of Article I, section 12. We conclude that defendant's invocation was unequivocal and that the officer improperly continued to interrogate defendant following that invocation. Further, we conclude that the encounter was ongoing such that defendant's later statements cannot be considered unprompted, and thus defendant did not voluntarily waive his previously invoked right against self-incrimination. Accordingly, we reverse and remand.

We review for legal error and determine, as a matter of law, whether defendant's statement was an unequivocal invocation of his derivative right to remain silent. *State v. Nichols*, 361 Or 101, 106, 390 P3d 1001 (2017); *State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014); *State v. Sanelle*, 287 Or App 611, 613, ___ P3d ___ (2017). We are bound by the trial court's findings of fact that are supported by evidence in the record. *Avila-Nava*, 356 Or at 609 (referencing *State v. James*, 339 Or 476, 481, 123 P3d 251 (2005)). We state the facts in accordance with that standard.

Police officers were dispatched to a department store parking lot after two women were observed leaving the department store with merchandise they had not paid for. Two loss-prevention officers and a mall security guard attempted to stop the women and retrieve the merchandise

[1] Defendant also argues that the trial court's ruling was erroneous in light of his right against compelled self-incrimination under the federal constitution. Because we agree with defendant's argument under the state constitution, we do not reach his federal constitutional argument.

when defendant interfered in the altercation. The dispatched police officers located defendant driving in the mall parking lot area and pulled him over.

The officers removed defendant from his vehicle, placed him in handcuffs, read him *Miranda* warnings, and placed him in the back of Officer Magnus's patrol car. Magnus asked defendant a series of basic questions to which defendant replied. Magnus then left defendant in the patrol car while he and other officers spoke outside of the patrol cars regarding the incident and who had which person in custody, who would write up which reports, and who would book which pieces of evidence. When Magnus returned to his patrol car, defendant asked Magnus to retrieve his prescription glasses from his vehicle before it was impounded. Magnus eventually found defendant's glasses and the two drove off toward the jail. While driving, Magnus had the following exchange with defendant:

"[MAGNUS]: So you drove the car down from Albany?

"[MAGNUS]: How long have you had the car?

"[DEFENDANT]: Uh. I don't know. It's not even mine. I just borrowed it.

"[MAGNUS]: I know. How long ago did you borrow it?

"[DEFENDANT]: I don't know.

"[MAGNUS]: An hour ago? A week ago? A year ago? I mean—

"[DEFENDANT]: I'm done talking.

"[MAGNUS]: Do we need to call somebody and let them know that your car's down here?

"[DEFENDANT]: No.

"[MAGNUS]: No? Okay.

"[MAGNUS]: Hey. Just so you're aware: you're a felon. There are certain weapons you're not allowed to have. So, that brass knuckles, spring-assisted knife that was in the, uh, driver's door panel that I found when I was looking for your glasses—

"[DEFENDANT]: I told you it was the, the glasses was up on the dash. I don't know what—

"[MAGNUS]: The glasses weren't up on the dash. The glasses were in the center console where I finally found them.

"[DEFENDANT]: Oh, sorry. I don't know anything about a knife.

"[MAGNUS]: Well, sorry man, I don't know what to tell you.

"[DEFENDANT]: Well, I really don't give a fuck. You guys have already charged me with fucking robbery. So shut your fucking mouth and quit talking to me.

"[MAGNUS]: Wow, you're not a very nice person, are you Jason? You understand how we got to where we're at here, right?"

Magnus drove defendant from the mall parking lot to the jail, about a four-minute drive. During the drive, Magnus also told defendant that the poor choice he made earlier that night had turned into "a great big cluster." Defendant did not respond to Magnus's comment. Then Magnus asked defendant how long he had been in prison. Again, defendant did not respond to Magnus. For about a minute, Magnus and defendant drove without talking and arrived at the jail.

Upon arriving at the jail, Magnus asked defendant a series of booking-related questions. Defendant answered those questions. Magnus then handed defendant the charge list and defendant responded, "How the hell? Fucking robbery, really?" Magnus explained the charges to defendant and the two had the following exchange:

"[MAGNUS]: Exactly. I mean you want to sit there and try to play the innocence card, come on man.

"[DEFENDANT]: Yeah, whatever.

"[MAGNUS]: If you're innocent, you're innocent. If you're guilty, you're guilty. I mean I understand, I understand that people make shitty decisions. I get it. I get it. But here's the problem. She made a bad choice tonight and you made it worse by getting involved in the middle of it. If

she would have just gotten caught for the theft, she would have gotten a ticket and booted out the door. You got to think about that stuff, man. This isn't going to do you any good.

[a period of silence]

"[MAGNUS]: I mean Jason, I'm going to wager that you have been in and out of custody for a good portion of your life. But I mean you gotta stop and think for a second before something like this happens again. *Cause tonight you're getting three felonies.*

"[DEFENDANT]: *Three?*

"[MAGNUS]: *Yeah.*

"[DEFENDANT]: *What is it?*

"[MAGNUS]: *Robbery in the second degree, possession of methamphetamine, and felon in possession of a restricted weapon.*

"[DEFENDANT]: *What the fuck? Just rack them up, man, I don't give a fuck. Fuck it. You guys are fucked up, man. That's fucking bullshit.*

"[MAGNUS]: *No. It's factual.*

"[DEFENDANT]: *Yeah it is. And those loss prevention faggots, they didn't* [sigh]; *I see somebody fucking grabbing a girl like that and what the fuck am I supposed to do?*

"[MAGNUS]: *She was there with you. You knew who she was.*

"[DEFENDANT]: *I didn't leave the store. I wasn't with them in the parking lot. A guy and a girl runs past me saying some weird fucking shit, about trespassing, and runs out the fucking door. I go outside and they got the fucking, they're trying to throw some fucking girl on the ground. They didn't say who the fuck they were. They didn't tell me shit.*

"[MAGNUS]: *Do you know who that chick was?*

"[DEFENDANT]: *Don't matter. I'm done talking.*"

(Emphasis added.)

During the suppression hearing, defendant argued that his invocation—the first time he stated, "I'm done talking"—was clear and that the correct response by the

officer should have been to stop talking to him. The state conceded that defendant had, initially, invoked his right against compelled self-incrimination when he said, "I'm done talking." However, the state argued, defendant proceeded to reinitiate contact with the officer about the facts of the case when he responded, "How the hell? Fucking robbery, really?" The trial court, agreeing with the state, denied the motion to suppress and ruled that defendant reinitiated engagement with the officer after defendant said, "I'm done talking."

At trial, the above italicized portion of audio and video from the patrol car was played in open court and entered into the record. The state also offered video from inside the department store. There was no video of the parking lot confrontation between the two loss-prevention officers, the mall security officer, the two women, and defendant. In addition to the in-car conversation between Magnus and defendant, the state relied on witness testimony about the confrontation with defendant from the two loss-prevention officers and the mall security officer.

On appeal, the parties do not dispute that defendant was subject to custodial interrogation, that defendant was given his *Miranda* warnings, and that defendant indicated that he understood those warnings. Nor do the parties dispute that defendant at least equivocally invoked his right to remain silent. However, the state argues that whether defendant equivocally or unequivocally invoked his right, he later waived that right through reinitiating conversation with the officer. Moreover, the state contends that, even if there is error, admitting the statements was harmless.

Article I, section 12, which states, in part, "[n]o person shall be *** compelled in any criminal prosecution to testify against himself," protects a person's right against compelled self-incrimination. *Avila-Nava*, 356 Or at 608; *Sanelle*, 287 Or App at 617 n 2. Both the right to counsel during interrogation and the right to silence are derivative of that broader right. *State v. Scott*, 343 Or 195, 200, 166 P3d 528 (2007); *Sanelle*, 287 Or App at 617. Article I, section 12, applies to interrogation when a person is in custody, or "in circumstances that [would] create a setting which judges

would and officers should recognize [as] compelling." *State v. Roble-Baker*, 340 Or 631, 638, 136 P3d 22 (2006) (quoting *State v. Smith*, 310 Or 1, 7, 791 P2d 836 (1990) (internal quotation marks omitted)).

A suspect's invocation of his Article I, section 12, rights in those circumstances triggers a binary decision tree for law enforcement. The question is whether the invocation was equivocal or unequivocal, which we determine by considering "the defendant's words, in light of the totality of the circumstances at and preceding the time they were uttered, to ascertain whether a reasonable officer would have understood that the defendant was invoking that right." *Avila-Nava*, 356 Or at 612. We consider a suspect's words in context, including the preceding words of the suspect as well as the interrogating officer, the suspect's demeanor, gestures, and speech pattern as well as the demeanor and tone of the interrogating officer up and until the suspect invoked the right against self-incrimination. *Id.* at 614; *see also Nichols*, 361 Or at 109.

If the invocation is unequivocal, there is only one permissible response: interrogation must immediately cease. *State v. Boyd*, 360 Or 302, 318, 380 P3d 941 (2016). When the invocation is equivocal, assuming the police do not choose to cease interrogation entirely, again, there is only one permissible response: the officers "are required to ask follow-up questions to clarify" the equivocal nature of the suspect's statement. *Avila-Nava*, 356 Or at 609 (citing *State v. Charboneau*, 323 Or 38, 54, 913 P2d 308 (1996)). Any questioning not reasonably designed to clarify the equivocal nature of the statement is impermissible. *State v. Brown*, 276 Or App 308, 315, 367 P3d 544 (2016) ("[W]hen a suspect makes an equivocal request for counsel, the police may ask only 'further questions seeking clarification of the suspect's intent.'" (citing *Charboneau*, 323 Or at 54)).

In this case, the state concedes that, at the very least, defendant equivocally invoked his right to remain silent. That concession is well taken. Indeed, in our view, defendant *unequivocally* invoked his right against self-incrimination. His words, "I'm done talking," are clear and are "classic and easily understood words of invocation." *Nichols*, 361 Or at

110. A reasonable officer should have understood defendant was invoking his right to remain silent. At that point, the officer should have stopped interrogating defendant. That did not happen, however, and the interrogation continued in violation of Article I, section 12.

Nonetheless, even after an Article I, section 12, violation, a suspect retains the power to validly waive the right against self-incrimination "as long as that waiver is knowing, intelligent, and voluntary under the totality of the circumstances." *State v. McAnulty*, 356 Or 432, 455, 338 P3d 653 (2014); *see also State v. Meade*, 327 Or 335, 339-41, 963 P2d 656 (1998) (waiver under Article I, section 12). We exercise all presumptions against the waiver of constitutional rights. *State v. Page*, 197 Or App 72, 79, 104 P3d 616 (2005), *rev den*, 340 Or 673 (2006) (citing *Brookhart v. Janis*, 384 US 1, 4, 86 S Ct 1245, 16 L Ed 2d 314 (1966)). The state bears the burden of showing that a defendant validly waived the right after invocation. *Nichols*, 361 Or at 107; *Sanelle*, 287 Or App at 625.

The state can establish the voluntariness of such a waiver through one of two ways. First, the state can show that the officers reinitiated after waiting a reasonable length of time, re-*Mirandized* the suspect, and the suspect indicated a willingness to talk about the investigation. *Avila-Nava*, 356 Or at 617-18; *McAnulty*, 356 Or at 456-57. Alternatively, the state can show that the suspect reopened dialogue with officers by making unprompted statements that indicated a willingness to have a generalized discussion regarding the substance of the charges or investigation. *Avila-Nava*, 356 Or at 617-18; *McAnulty*, 356 Or at 456-57; *State v. Acremant*, 338 Or 302, 322-23, 108 P3d 1139, *cert den*, 546 US 864 (2005). More generalized questions about why the suspect has been taken into custody will not suffice. *Boyd*, 360 Or at 318.

Finally, in evaluating whether reinitiation of conversation shows a true *voluntary* waiver of the right against self-incrimination, as opposed to simply being the product of a police-dominated atmosphere, this court considers such "relevant factors *** includ[ing] the nature of the initial [invocation and] violation, the amount of time between the

violation and the [suspect's] later statements, whether the [suspect] remained in custody between the violation and the later statements, and whether there was a change in time and circumstances." *McAnulty*, 356 Or at 457-58 (citing *State v. Jarnagin*, 351 Or 703, 716-17, 277 P3d 535 (2012)).

Applying that framework to this case, we conclude that defendant's statements were not unprompted and do not represent a voluntary waiver of his previously invoked right against self-incrimination. There was no material change in circumstances and defendant remained in custody throughout the encounter. There was no clear break in time between the Article I, section 12, violation and defendant's statements. The entire episode spanned only a few minutes. When the officer said, "I mean you want to sit there and try to play the innocence card, come on man" only 10 minutes had passed since defendant said, in no uncertain terms, "shut your fucking mouth and quit talking to me."

The Supreme Court has explained that "approximately one hour between the unlawful interrogation and the defendant's later unprompted reinitiation of contact with the police" was "a clear break" and, thus, reinitiation was permitted in that circumstance. *Boyd*, 360 Or at 321 (describing the facts of *Acremant*). But, like here, where there is "no break at all" after a suspect has invoked and there is a "causal connection" between the interrogation questions and the possible reinitiation of the conversation, the court has held that the suspect's response can hardly be considered unprompted. *Id*. In a situation such as that, "the officers were required to take [the suspect] at his word and cease questioning him." *Avila-Nava*, 356 Or at 618 (referencing *State v. Sparklin*, 296 Or 85, 89, 672 P2d 1182 (1983)).

The officer's questions in this case were of the sort that were likely to elicit an incriminating response from defendant. A mere 10 minutes after defendant's reiterated invocation, and still in the patrol car, Magnus stated:

> "If you're innocent, you're innocent. If you're guilty, you're guilty. I mean I understand, I understand that people make shitty decisions. I get it. I get it. But here's the problem. She made a bad choice tonight and you made it worse by getting involved in the middle of it. If she would have just gotten

> caught for the theft, she would have gotten a ticket and booted out the door. You got to think about that stuff, man. This isn't going to do you any good."

That statement, and many more by Magnus, were not of a neutral, clarifying nature nor were any of them intended to acknowledge defendant's two preceding unequivocal invocations. To the contrary, Magnus's interaction with defendant appeared designed to confront defendant and prompt a substantive response. Under those circumstances, defendant's statements in response to Magnus's continued questioning were far from the kind of "unprompted" reinitiation that is necessary for a waiver of the right to remain silent after a preceding invocation and violation of that right.

Finally, we must determine whether admitting defendant's statements was harmless. *See Sanelle*, 287 Or App at 630; *see also State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) ("[U]nder Article VII (Amended), section 3, of the Oregon Constitution, a reviewing court affirms trial court error if there is 'little likelihood that the particular error affected the verdict.'"). "Our analysis turns on the possible influence that those statements had on the verdict and not whether proof of defendant's guilt was compelling even without the statements." *Sanelle*, 287 Or App at 630; *State v. Cazarez-Hernandez*, 280 Or App 312, 318, 381 P3d 969 (2016) (citing *State v. Maiden*, 222 Or App 9, 13, 191 P3d 803 (2008), *rev den*, 345 Or 618 (2009)). Accordingly, "when we review the record, we do so in light of the error at issue [and we] ask whether there was little likelihood that the error affected the jury's verdict." *State v. Holcomb*, 213 Or App 168, 183, 159 P3d 1271 (2007) (quoting *Davis*, 336 Or at 32).

On one level, defendant's statements supported his theory that he was unconnected to the store theft. *See Holcomb*, 213 Or App at 185 (noting that the self-serving nature of an erroneously admitted statement can factor into the harmless error analysis). But, defendant's statements also supported the state's case. Here, the state charged defendant with robbery in the second degree, which requires that the state prove, among other things, that a defendant used physical force with the intent to overcome the taking of property. *See* ORS 164.405; ORS 164.395. Defendant's

statement, "I see somebody fucking grabbing a girl like that and what the fuck am I supposed to do?" bore significant relevance to defendant's intent to use physical force. Further, his statement that "[a] guy and a girl runs past me saying some weird fucking shit, about trespassing, and runs out the fucking door" could be taken by a jury to mean that defendant likely knew his use of force was aiding in the taking of the store's property. *See* *State v. Shaff*, 209 Or App 68, 76, 146 P3d 389 (2006), *rev'd on other grounds*, 343 Or 639, 175 P3d 454 (2007) ("A defendant's direct admission bears an important relationship to a jury's determination of its verdict[.]").

Accordingly, we cannot conclude that there was "little likelihood" that the erroneously admitted statements did not affect the verdict.

Reversed and remanded.