

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

DARIUS LESHAWN THOMPSON,
aka Darius Lawshawn Thompson,

Defendant-Appellant,
Petitioner on Review.

Multnomah County Circuit
Court No. 14CR29087

CA A160396

SC S068639

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 Multnomah County
Honorable DAVID F. REES, Judge

Opinion Filed: January 27, 2021
Author of Opinion: Aoyagi, Judge
Before: DeHoog, Presiding Judge, and Egan, Chief Judge, and Aoyagi, Judge
Concurring in Part and Dissenting in Part: Egan, Chief Judge

Continued...

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**BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, STATE OF OREGON**

INTRODUCTION

The exigency exception to the warrant requirement reflects that the public has a compelling interest in avoiding the loss of evidence for which police have probable cause to seize. It allows police to immediately seize that evidence if the facts known to the officer make it reasonably likely that delaying action while obtaining a warrant will defeat that societal interest. Here, police seized defendant's cell phone to prevent the loss or destruction of evidence and obtained a search warrant five days later. The trial court denied defendant's motion to suppress evidence of call records found on his phone, and the Court of Appeals affirmed on harmless-error grounds without addressing the merits. *State v. Thompson*, 308 Or App 729, 736-38, 481 P3d 921 (2021).

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

This case presents the following questions of law, to which the state offers the following proposed rules of law:

First Question Presented: When exigent circumstances support a seizure to preserve evidence for which there is probable cause but do not justify an immediate search, does the exigent-circumstances exception limit the duration of any continued seizure?

First Proposed Rule of Law: Police can seize property for evidentiary use without a warrant if probable cause and exigent circumstances justify the seizure. Even if police intend a later search of the evidence based on a warrant, the exigency exception does not render the police retention of the evidence unlawful merely because it extends beyond the minimum time it would take to get a warrant.

Second Question Presented: When police are investigating the shooting of a person who claims to be a crime victim but who appears to be withholding information about its timing and location and the identity of the perpetrator, is it reasonable for police to believe that the shooting was a crime and that a cell phone carried by the person probably will contain evidence relevant to the shooting?

Second Proposed Rule of Law: When a claimed victim of an intentional shooting appears to be withholding information about its timing, location, and the identity of the perpetrator, it is reasonable to believe that the person knows more than the person is disclosing. Under that circumstance, police reasonably could conclude that a cell phone that the person carried at the time of the shooting probably contains information relevant to the timeline and circumstances of the shooting.

Third Question Presented: When police conduct a seizure to prevent the loss of evidence for which they have probable cause, does the applicability

of the exigent-circumstances exception depend on the degree of state's "need" for the evidence at trial in light of the nature and persuasiveness of any other evidence that might prove the same fact?

Third Proposed Rule of Law: The exigency doctrine applies in situations in which there is a "practical necessity" for dispensing with the warrant requirement and allowing an immediate warrantless seizure or search to prevent the likely risk of loss or destruction of evidence in the time it would take to obtain a warrant. Its availability does not depend on the degree to which the evidence ultimately will be "necessary" to meet the state's burden to prove any charges at trial.

BACKGROUND

A. Police seized defendant's cell phone, believing that it contained evidence of his crime of identity theft and of the shooting.

The following undisputed facts were before the trial court when it denied defendant's motion to suppress the cell phone evidence.

Officer Brad Robertson was off duty at about 11 p.m. on November 18, 2014, when he and another member of the East Metro Gang Enforcement Team were called by other Portland Police Bureau officers to meet with defendant, who had been shot, at the hospital. (Tr 103-04). On arrival, Officer Robertson learned that defendant had falsely identified himself to hospital staff by presenting identification in the name of Marcus Tyler. (Tr 105, 109).

Defendant continued to misidentify himself to police who were investigating the shooting. (ER 4). When asked about his use of Tyler's name and identification, defendant admitted that he knew it was a crime and stated that he used the false name because he "hates hospitals." (ER 5). With respect to the shooting, he claimed that he had been playing video poker at a Shari's restaurant and was walking to his sister's apartment, where he was staying, when two cars slowly drove by and two gunshots were fired, from one or both of the cars. (ER 6). He said he ran about a half mile to the apartment, and only then realized he had been shot. (*Id.*). When Robertson tried to clarify details about those claims, defendant was "vague and uncooperative." (*Id.*). He stated that he would not be able to identify the shooter or shooters, and that he did not "want to know" who had shot him. (*Id.*). He told Officer Robertson that he had been carrying his cell phone when he was shot, and, when asked if he had called police, stated that he had not. (ER 6).

Defendant's statements were inconsistent with those made by his sister and his girlfriend, who had brought him to the hospital. (ER 6-7). Defendant's sister stated that defendant had come home with the gunshot wound and that he had told her that "some white guy" was with him when he was shot. (ER 6). Defendant's girlfriend stated that defendant was shot after he had gone to walk to a store, and that he had only been gone from the apartment for 20 minutes before returning. (ER 7).

Because cell phones contain identifying information about the owner of the phone, Officer Robertson believed that the phone probably contained evidence relevant to defendant's use of another person's identification at the hospital, which constituted the crime of identity theft. (Tr 106).

Officer Robertson also believed that the phone probably contained evidence relevant to the shooting. He knew from both his training and experience that "it is very common" for cell phones to reveal the contents and timing of communications by both victims and suspects, and that those communications will help identify possible witnesses and associates of a suspect. (ER 7, 15). He also knew that phone data will show the "geographic location of the phone user." (ER 15). Based on his experience, Officer Robertson knew that shooting victims often know the shooter and others associated with the shooter and have knowledge about other incidents that might explain the crime. (Tr 106). He also knew from previous investigations that data in cell phones is "very useful" to establish timelines of events. (Tr 133).

Based on defendant's lack of cooperation, Officer Robertson believed that defendant was unlikely to consent to seizure of the phone. (Tr 112). Because it would take hours to seek and obtain a search warrant, the officer seized the phone to prevent the loss or destruction of evidence, "with the intent to apply for a search warrant later." (Tr 106-07; Tr 116).

Over the next several days, the officers continued to investigate the shooting. At 1 a.m. on November 20, within about 24 hours of the phone's seizure (sometime around midnight of November 18), they learned the identity of the likely shooter, Norton. (ER 7). They first interviewed Norton's son, then interviewed Norton later that day after he was arrested on warrants. (ER 7). Norton told police that a man he knew as "Pree" had arranged for a third party, a Black male, to buy stereo equipment from Norton, and that Pree and the other man robbed him instead. (ER 8-9). He described the robbery as having occurred at the apartment complex where defendant was staying, and reported that the Black male had held a knife to Norton's throat, taken his wallet, and then tried to remove the gun that he was carrying under his jacket. (ER 9). Norton stated that he fired two shots, and that the man with the knife ran away while Pree tried to get back into the car with Norton. (ER 9). Police seized Norton's gun, ammunition, and his cell phone, and ultimately seized his car. (ER 9-10). They also learned that defendant was the only person reported to have been admitted to an emergency room with a gunshot wound around the time of the shooting. (ER 10).

In the meantime, police also learned that defendant was a suspect in other robberies in the area and found defendant's public Facebook page, on which he bragged in early October about committing robberies; police believed that evidence of those crimes would be in the apartment where defendant was

staying with his sister. (ER 6, 11-13). They included that information in their application for the search warrant for the apartment. (ER 11-13). Officer Robertson later explained that “a lot happened” in the days between the phone’s seizure and the issuance of the warrant, in that police were gathering information from various sources, talking to potential witnesses, canvassing the area for surveillance video, and calling the manager of the apartment complex. (Tr 131-32). He explained that they had received “a lot of information” and that the investigation “became relatively complex, there were a lot of moving parts and a lot of information that we needed to try to verify”; in the days that followed the shooting, they made more than one trip to Salem in that time and had to arrange with a private dealership to have Norton’s car towed for forensic examination. (Tr 132).

Five days after the initial seizure, on November 24, 2014, they submitted a warrant application supporting a warrant authorizing: (1) a search of Thompson’s apartment for the knife used against Norton and items believed to have been taken in the robberies; (2) searches of Norton’s vehicle, gun, and cell phone; and (3) the seizure and examination of oral DNA swabs from both defendant and Norton. (ER 17-19).

On November 26, 2014, defendant came to the police department and told police that he had more information about the shooting; police arrested him on a probation detainer and gave him Miranda rights before the interview.

(SER 3).¹ Defendant claimed that a friend, Maya, had heard Norton “bragging” about having shot Pree and had given defendant some items she had taken from Norton, including an identification card. (SER 3-7). He initially stuck to his original story that he shot in a drive-by shooting, on which he elaborated by describing the makes and colors of the cars he claimed were involved. (SER 9-10). When Officer Robertson asked about who Pree was, defendant said that he hardly knew Pree, but that Pree knew Norton. (SER 10, 40). Officer Robertson told defendant that police had “talked to a lot of people,” that he knew that defendant’s drive-by shooting account “is not what happened,” and asked him how he had met Norton. (SER 42). Defendant said that he had never really met Norton, but that defendant had been present when Pree robbed Norton at the apartment complex. (SER 13, 42-43). He claimed that he was standing next to Norton’s car and that Norton and Pree were inside it when Pree pulled out a knife and robbed Norton. (SER 13, 43). He stated that Pree had arranged the robbery and must have “wanted me there for protection.” (SER 14, 44).

Officer Robertson challenged defendant’s assertion that he was not involved in the robbery by confronting him with the facts of other robberies in

¹ Defendant includes in his excerpt of record only the second half of the interview portions that the jury heard at trial, which he claims should have been suppressed. (ER 48-58). The state includes the entire recording that was played at trial because the entire recording is essential to this court’s harmless-error analysis. (SER 1-27).

which he was a suspect. (SER 44-47). When he asked if defendant's DNA or fingerprints would be in Norton's car, or whether defendant had the knife at the apartment, defendant denied that they would. (SER 16-18, 47-48). Officer Robertson took fingerprints and DNA swabs, and then informed defendant that police were about to execute a search warrant at the apartment for evidence of the robberies. (SER 20, 49-50). He told defendant that the warrant authorized a search of defendant's phone, and that his phone logs showed five calls from Pree around the time of the shooting. (SER 20, 50). Defendant continued to deny having a knife or having planned the robbery with Pree, and continued to claim that he did not know whether Pree had a knife. (SER 21, 51). Even after further pressing by Officer Robertson, defendant insisted that Pree was the robber and that Pree had told him only after the robbery that he wanted defendant there as "protection" because of his reputation with respect to other robberies. (SER 22-28, 51-58).

B. The trial court ruled that the exigency exception justified seizing the phone that police lawfully retained while seeking a warrant.

Defendant moved to suppress, challenging the initial seizure of the cell phone on the ground that it was not supported by probable cause and exigent circumstances. (ER 21-25). He argued that the phone and any "derivative evidence" should be suppressed as a result, specifically identifying the subsequent warranted search of the phone as fruit of the poisonous tree. (ER

25). At the hearing, he additionally argued that, even if the initial seizure was justified by the police need to preserve evidence while obtaining a search warrant, police lawfully could retain the phone only for the 6 to 10 hours that Officer Robertson believed it would take to get a warrant. (Tr 127, 130, 134).

The prosecutor responded that probable cause and exigent circumstances justified the initial seizure. (Tr 121-22).² He asserted that the exigency exception did not limit the duration of officers' authority to retain the evidence, and that they did not unreasonably delay seeking a warrant in light of the "active, complex" investigation that Officer Robertson described in his testimony. (Tr 135).

The trial court ruled that the risk of loss of evidence was an exigent circumstance, and that police had probable cause that the phone contained "direct evidence of defendant's identity" that would be relevant to the crime of identity theft. (Tr 129-30). It ruled that the officer also had probable cause to believe that the phone contained evidence relevant to the shooting investigation. (Tr 137). It further ruled that police lawfully retained the phone for five days

² The prosecutor also argued that the motion was effectively "moot" because the only evidence that the state intended to use from the phone—defendant's calls from Pree—was independently obtained from Pree's phone, which was searched at some point after the search of defendant's phone. (Tr 129-30).

before seeking a warrant, noting that it was an “active, ongoing investigation.” (Tr 136-37).

At a later hearing on defendant’s motion *in limine* seeking redactions throughout defendant’s recorded interview with police, defendant asserted “for purposes of appeal” that “section three on page 20” of the interview transcript—which was a statement by Robertson informing defendant that his call logs showed calls from Pree before and after the robbery—“would not have come in” if the court had granted his motion to suppress. (Tr 171-72).³ He further stated that, “arguably the interview would have flowed differently” if defendant had not been with the call logs from the phone. (*Id.*).

At trial, the state offered testimony from an officer that the call logs from both defendant’s phone and Pree’s phone showed that Pree had called defendant several times in the minutes surrounding the robbery and sent a text message saying, “Hey bro, you all right?” (Tr 340).

C. The Court of Appeals did not address the merits, concluding that any error in denying the motion to suppress was harmless.

In his opening brief on appeal, defendant reiterated his challenges to the lawfulness of both the initial seizure of the phone and its retention by police

³ “Page 20” was a reference to the transcription of the recorded interview, which defendant had attached to his motion *in limine* after marking by number the 50 redactions that he was asking the court to make. (SER 28-65). For this court’s convenience, the state includes the motion and the marked copy in its supplemental excerpt of record.

before obtaining the warrant to search it. (App Br 24). He argued that the warranted search of the phone was tainted by the seizure, in that police had used information from the phone in interviewing defendant and that the state had not proved that the seizure did not affect the “flow of the interview, the questions police asked, and the manner that they asked them.” (*Id.*). Thus, he argued, the denial of his motion resulted in the admission at trial of statements by defendant—that he was present during the robbery and that Pree had wanted him there for protection—that likely affected the jury’s verdict at trial. (App Br 25).

The state defended the trial court’s ruling, and further argued that, in any event, defendant had failed to show that he was prejudiced by the admission of any evidence from the phone, when viewed along with the evidence as a whole. (Resp Br 11-12). On the merits, the state argued that the initial seizure was justified by probable cause and exigent circumstances, and that the retention of the evidence before obtaining a warrant was subject to a “straightforward reasonableness analysis,” which was satisfied in this case. (Resp Br 18-22).

In a reply brief, defendant asserted that the entire interview after police confronted defendant with his call log should have been suppressed. (Reply at 5). With respect to prejudice, he identified specific statements by defendant that he had not previously identified in his opening brief but which he asserted in his reply were harmful. (Reply Br 6).

The Court of Appeals affirmed on harmless-error grounds, assuming without deciding that defendant's motion encompassed the argument on appeal that his interview statements were the product of the seizure. *Thompson*, 308 Or App at 735. It rejected, as "too undeveloped" to raise any additional issue on appeal, defendant's assertion that the call logs "affect[ed] the flow of the interview [and] the questions that police asked." *Id.* Then it addressed only specific statements that defendant had challenged in the opening brief. *Id.* at 738. First, it held that defendant was not harmed by his admissions to knowing Pree and being present at the robbery, because he had already admitted the same facts in the interview before police mentioned his call log. *Id.* at 736-37. Moreover, his admission to being present for the robbery had little importance to the state's case, given defendant's consistent acknowledgement that he had been present for the robbery but did not have the knife. *Id.* Finally, the court rejected defendant's challenges in the reply brief based on the admission of other statements made by defendant, ruling that they were not described in the opening brief as required by ORAP 5.45(4)(a)(iii), which requires a description of the evidence that the appellant "believes was erroneously admitted or excluded." *Id.* at 737. But, in any event, the court concluded that, even if those statements "were encompassed in defendant's motion to suppress and even if they had been raised in the opening brief, the admission of those statements was harmless as well." *Id.*

SUMMARY OF ARGUMENT

The exigent circumstances exception to the warrant requirement permits warrantless searches and seizures to protect against the risk of loss or dissipation of evidence during the time it would take to get a warrant, based on an officer's reasonable belief that the seized item probably is—or contains—evidence of a crime. Once police have lawfully seized the item, they can retain it for potential use at trial.

Here, police knew that defendant had come to the hospital for treatment of a gunshot wound and had falsely identified himself to both hospital staff and responding officers. Although he claimed that he was the victim of a random drive-by shooting, he appeared to be withholding information about the timing and circumstances of the shooting and the identity of the shooter. Knowing that defendant had carried his cell phone at the time of the shooting, police believed that data on the phone probably would help establish the “timeline” of events surrounding the shooting and identify other people with information about the shooting. Under those circumstances, the initial seizure of the phone was a lawful exigency seizure to prevent the loss or destruction of evidence of both the shooting and of identity theft. And neither the initial seizure of the phone nor its retention over the next several days before police obtained a warrant to search its contents violated defendant's constitutional rights against unreasonable search and seizure.

Although defendant concedes that police had probable cause to believe that defendant's phone contained evidence of identity theft, he contends that exigent circumstances did not support its seizure based his argument that the state did not need evidence from the phone to prosecute him for identity theft. He argues that, in making the exigency determination, officers must determine whether the state's "need" for that evidence, relative to other evidence of the same fact, justifies the interference with the defendant's interests in the particular item at issue. But the exigency exception does not require an officer to conduct an on-the-scene assessment of the qualitative "necessity" of the evidence to the case as a whole, nor does it require the state to prove, at a later hearing on a challenge to such a seizure, that it had a particular quantum of "need" for the seized evidence to prove the case. Thus, even if the state could have prosecuted the charge of identity theft without evidence from the phone, that fact did not undermine the justification for seizing the phone based on exigent circumstances.

Nor did the length of the seizure undermine the exigency on which the seizure was based. If police lawfully seize evidence based on probable cause and exigent circumstances, they can retain that evidence for use at trial—and, if the exigency continues, it may justify a warrantless *search* of such an item. But if, as in this case, the exigency is extinguished by the seizure itself and a warrant is necessary for any further intrusion, the exigency exception no longer

is in play and does not limit how long police can retain lawfully seized evidence. Although circumstances may render police retention of lawfully seized items constitutionally “unreasonable,” the retention of evidence does not become unreasonable merely because a search warrant is not obtained as quickly as possible after a lawful exigent-circumstances seizure. Where police are diligently investigating a case and the defendant has not sought the return of seized items, police retention of the evidence for five days before seeking a search warrant is not unreasonable.

In any event, as the Court of Appeals concluded, any error in denying the motion to suppress was harmless. The only evidence that was both properly challenged by defendant as derived from the phone and ultimately used at trial was cumulative of other evidence and of little importance to the state’s case.

ARGUMENT

In this case, defendant challenges both the initial seizure of the phone and its retention for the days before a warrant was obtained. His first challenge to the initial seizure is a fact-specific question of probable cause. His other challenges—to both the initial seizure and the retention of the seized evidence before obtaining a warrant—implicate the overall application of the exigent-circumstances exception.

The parties agree on the legal test for probable cause and disagree only as to its application to the facts here. But the parties also disagree as to the

components of the exigency exception as they apply to the initial seizure of defendant's cell phone, and to the police retention of that evidence, in this case. Ultimately, though, even if the trial court committed error, it was harmless.

A. The trial court correctly denied the motion to suppress, because police lawfully seized based on exigent circumstances and lawfully retained it before obtaining a warrant.

1. Police may lawfully seize or search evidence without a warrant based on probable cause and exigent circumstances.

Under Article I, section 9, of the Oregon Constitution,⁴ a warrantless search or seizure “is deemed unreasonable unless it ‘fall[s] within one of the few specifically established and carefully delineated exceptions to the warrant requirement.’” *State v. Mazzola*, 356 Or 804, 810, 345 P3d 424 (2015) (quoting *State v. Bridewell*, 306 Or 231, 235, 759 P2d 1054 (1988)). The recognition of a warrant exception's application to a particular type of police search or seizure is based on two factors: “on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed to for the promotion of legitimate governmental interests.” *Birchfield v. North Dakota*, 579 US 438, 136 S Ct 2160, 2176, 195 L Ed 2d 560 (2016) (quoting *Riley v. California*, 573 US 373, 385, 134 S Ct 2473, 189 L Ed 2d 430 (2014)).

⁴ Article I, section 9, provides that, “[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause[.]”

The exigent-circumstances exception allows police to conduct a warrantless seizure or search if they have probable cause to believe that they will locate crime evidence and exigent circumstances exist. *Mazzola*, 356 Or at 810-11; *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991). Probable cause exists if, based on specific and articulable facts, the officer reasonably believes that the item to be seized or searched probably is or contains evidence of a crime.

The rationale underlying the exigent-circumstances exception has been described as one of “practical necessity”: that a seizure or search without a warrant is reasonable because the warrant process itself would frustrate the purpose of the police action. *State v. Greene*, 285 Or 337, 342, 591 P2d 1362 (1979). That is, in certain circumstances, “the societal interest in a warrantless search or seizure is simply believed to outweigh the interest in requiring prior judicial approval of such governmental action.” *State v. Peller*, 287 Or 255, 262, 598 P2d 684 (1979).

For those reasons, the exigent-circumstances exception will authorize a warrantless seizure or search if the circumstances known to police at the time of the action taken reasonably appeared to require law enforcement to “act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect’s escape or the destruction of evidence.” *Stevens*, 311 Or at 126. Whether exigent circumstances justified particular police action depends on the

circumstances at the time of that action. *State v. Bonilla*, 358 Or 475, 487-88, 366 P3d 331 (2015).

Different types of exigencies can justify different degrees of intrusion with respect to crime evidence. That is because the scope of permissible police conduct is limited by the nature of the exigency that justified it. *Stevens*, 311 Or at 130; *State v. Miller*, 300 Or 203, 229, 709 P2d 225 (1985). For that reason, police cannot rely on exigency as a basis to conduct a *search* if a seizure alone will obviate the exigency. *See State v. McCarthy*, 369 Or 129, 178, 501 P3d 478 (2021) (exigency may justify the seizure of an item as evidence, but the seizure itself may eliminate any exigency that would justify proceeding further without a warrant); *see also Riley*, 573 US at 391 (noting that, even if exigent circumstances do not support a *search* of a cell phone, they may support a less-intrusive measure such as a seizure to prevent the loss of evidence).

2. Police had probable cause to believe that the phone contained crime evidence.

The trial court concluded that police had probable cause to believe that defendant's phone contained information that would be relevant to both identity theft and the shooting. Defendant does not challenge the court's ruling with respect to evidence of identity theft, but argues that the state lacked probable cause to believe that evidence of the shooting would be on the phone. (Merits

Br 31-33). The record demonstrates that the officer's belief that the phone probably contained evidence related to the shooting was reasonable.

The probable cause analysis for a warrantless search is the same as for a warranted one. *State v. Foster*, 350 Or 161, 169, 252 P3d 292, 297 (2011). Probable cause exists if the facts on which the officers relied would "lead a reasonable person to believe that seizable things will probably be found in the location to be searched." *Foster*, 350 Or at 169 (quoting *State v. Anspach*, 298 Or 375, 381, 692 P2d 602 (1984)). The standard is one of probability, not certainty. *Id.*

In assessing probable cause, a court must consider the "totality of the circumstances, including the officer's training and experience." *Foster*, 350 Or at 169 (quoting *State v. Vasquez-Villagomez*, 346 Or 12, 23, 203 P3d 193 (2009)). In addition, the facts articulated in support of probable cause must be assessed in a commonsense and realistic fashion. *State v. Coffey*, 309 Or 342, 346, 788 P2d 424 (1990); *State v. Villagran*, 294 Or 404, 408, 657 P2d 1223 (1983). Because the state must establish the validity of a warrantless search, ORS 133.693(4), it is the state's burden to show that the search was supported by probable cause.

In light of the facts known to police, it was reasonable to believe that information about the shooting would probably be found on the phone. Unlike a situation in which police merely *suspect* that a crime has occurred, police

knew for a fact that defendant had been shot. And even if, absent additional information, it may have been equally possible that the shooting was the result of either an accidental or a volitional act, defendant's story and behavior were inconsistent with any theory that the shooting was a non-criminal act.⁵

When Officer Robertson spoke to defendant, he already knew that defendant had given false identifying information to the hospital and to other officers, which made him suspect that defendant might not give truthful information about the shooting. Defendant's implausible explanation for using someone else's identification—that he “hates hospitals”—made it reasonable for Officer Robertson to believe that he gave the false name, which defendant admitted knowing was a crime, for other reasons. Defendant's evasive responses to questions, along with the inconsistencies between his version of events and those given by his sister and girlfriend, only increased Officer Robertson's belief that defendant was withholding information about the shooting. (Tr 105-07). Other statements about the timing of events and whether he was alone when he was shot were inconsistent with information from other sources. Defendant's conduct both before and during his statements to Officer Robertson were objective facts that raised doubt about his claim that

⁵ And even if it was equally likely that defendant was the victim of a criminal act or a justifiable use of force by the shooter in response to conduct by
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he had been shot in an unprovoked attack by a stranger. Based on the circumstances, Officer Robertson reasonably concluded that there likely was “more to the story” and that defendant was withholding information about the shooting.

Officer Robertson had reason to believe that information would be on the phone because of his experiences investigating other shootings. (Tr 106). He knew that phones carried by a person will reveal information about a shooting, “[e]specially establishing a timeline” for the crime. (*Id.*). He further explained that, in his experience, shooting victims often know their assailants, or are aware of other people connected to the shooter or the incident itself, and that information on their phones can help establish those associations. (Tr 106).

Officer Robertson did not, in his testimony, describe the specific types of phone data that could provide that information, but his affidavit detailed his knowledge that communications, whether sent by victims or suspects, will often contain information relevant to an investigation, including data showing the time and date of the communication. (ER 7, 15). The affidavit further explained his knowledge that phones contain information regarding the

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defendant or someone else, it was probable that the shooting occurred in the course of criminal activity by *someone*.

“geographic location of the phone user” and “the times messages were sent to and from associates and possible witnesses.” (ER 15).

With respect to Officer Robertson’s belief that defendant’s use of a false name was evidence that he was also being untruthful about the shooting, defendant points to other possible explanations, including the fact that he was on probation at the time. (Merits Br at 32-33). But an officer who observes facts consistent with criminal conduct does not have to eliminate any possibility of an innocent explanation to conclude that probable cause exists. *Foster*, 350 Or at 173; *see also State v. Westlund*, 302 Or 225, 231, 729 P2d 541 (1986) (probable cause to search where officer, from training and experience, believed it highly likely, but not certain, that white powder visible in transparent vial was controlled substance). And although defendant asserts that police had no specific information that his phone was even turned on at the time of the shooting (Merits Br 32), it was reasonable for police to infer that it was, given defendant’s negative answer, without explanation, to Robertson’s question about whether he had called police. (ER 7). But even absent that fact, at the very least, police reasonably could believe that a person carrying a cell phone probably has the power turned on.

Based on that information, Officer Robertson reasonably believed that the shooting was related to criminal conduct by someone, even if not defendant, and knew that a phone carried by a person involved in a shooting will reveal

information about the timing, location, and possible witnesses to that crime. As Robertson acknowledged, it was possible that the information located on the phone could either “corroborate or not corroborate” the information that defendant had provided to police. But either way, it was probable that some information on the phone would assist police in determining the circumstances of the shooting.

3. The availability of the exigent circumstances exception does not require a fact-specific assessment of the “need” for the evidence in relation to other available evidence.

Defendant concedes that police had probable cause to believe that the phone would contain evidence of identity theft but contends that, unless the state establishes that the evidence was “necessary” to a later prosecution, the risk of loss of evidence is not a true exigency. (Merits Br 34). He further argues that the existence of an exigency depends on the nature of the particular property that is to be seized or searched—here, a cell phone—and that a higher degree of need for the evidence is necessary to support an interference with property that contains a large amount of personal information. (Merits Br 35).

But the legality of an exigent-circumstances seizure does not turn on a prediction about how important the evidence will end up being at a future trial. The “practical necessity” that underlies the exigent-circumstances exception is not about the degree of “necessity” of the particular information sought as compared to other information that might be available to police. Rather, it

recognizes that an immediate warrantless search is, as a practical matter, necessary because of the risk that the warrant process itself would lead to the loss of evidence. And the exigency is the fact that a delayed seizure or search will result in the loss of evidence.⁶

This court previously has rejected the argument that the existence of an exigency depends on the degree to which the particular information sought is “necessary,” when viewed in light of other sources of information, for the law-enforcement purpose for which it is sought. In *State v. Snow*, 337 Or 219, 94 P3d 872 (2004), a case involving police action taken to apprehend a fleeing suspect, this court rejected the defendant’s argument that a police search for information identifying the suspect was not “necessary” because of the existence of other means that police could use to identify him.

In *Snow*, police sought to identify the driver of a car that he had abandoned in an apartment complex after eluding the officers. *Id.* at 221-22.

⁶ Defendant uses the word “emergency” as a synonym for exigency, arguing that prevention of the loss of evidence is an “emergency” only if the evidence will ultimately be necessary in a prosecution. (See App Br 34). But equating exigency with “emergency” is misleading. It is true that this court has held that an exigency can stem from a medical “emergency”—see, e.g., *State v. Bridewell*, 306 Or 231, 236, 759 P2d 1054 (1988) (quoting *State v. Miller*, 300 Or 203, 229, 709 P2d 225 (1985)); *State v. Fessenden/Dicke*, 355 Or 759, 774, 333 P3d 278 (2014). But the fact that an exigency can stem from an emergency involving persons or animals does not limit the circumstances that can create an exigency. Or, to put it differently, it is the loss of evidence—the actual nature

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Witnesses told police they had seen the defendant before, and police learned that another person had reported that a man had run through her house. *Id.* at 222. Police searched the car and found identifying information as well as a gun. *Id.* The trial court had suppressed the evidence, ruling that no exigency existed because the eyewitnesses' observations of the defendant obviated the "need" to search the car for identification. *Id.* at 223.

On review, this court reversed, holding that exigent circumstances excused the need for the police to obtain a warrant to search the car. *Id.* It held that police reasonably believed that the defendant's identity and address could aid in his apprehension and limited their search for information showing those facts. *Id.* This court rejected the argument that the existence of eyewitnesses—and the fact that officers could have attempted to speak with the car's registered owner—defeated the exigency. *Id.* at 224-25. Rather, it held that the "need for immediate action to prevent [the] defendant's escape justified the officers' decision to search" for identifying information. *Id.* It held that officers "need not exhaust every conceivable means, no matter how speculative, to avoid a claim that no exigency existed," noting that, "[i]n the exigencies of the moment, the officers could not reasonably be expected to put fine weights in the

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of which often is not yet known—is itself the exigency or "emergency" that the police action seeks to address.

scale in weighing the chances of securing the house or of losing their quarry.’” *Snow*, 337 Or at 225 (quoting *State v. Girard*, 276 Or 511, 515, 555 P2d 445 (1976)).

Snow holds that the existence of alternative means of obtaining information similar to that sought does not undermine an officer’s decision to take action based on the exigency at hand, whether it is the apprehension of a fugitive or the prevention of the loss of evidence. That is consistent with the fact that the existence of exigent circumstances depends on the objective reasonableness of the officer’s assessment based on the information available at the time of the seizure or search, and not based on facts available only in hindsight. *State v. Ritz*, 361 Or 781, 796, 399 P3d 421 (2017).

And although defendant argues that this court’s decision in *Mazzola* supports his claim that the existence of an exigency depends on the relative “need” for the evidence sought when compared to other evidence that might exist, that argument misconstrues *Mazzola*. In that case, this court held that an officer was justified in requiring the defendant to perform FSTs because a delay to obtain a warrant would risk the loss of observational evidence of her impairment close in time to her act of driving. *Id.* at 820. It concluded that because the effects of drugs will diminish over time, a delay in conducting the search would risk the loss of “probative evidence” of the defendant’s impairment *at the time of driving*. *Id.* at 820. It further held that the scope of

the search—subjecting the defendant to FSTs designed to reveal evidence of physical impairment—was reasonable in time, scope, and intensity. *Id.*

Mazzola's reference to the FST evidence as “probative” does not mean that officers must evaluate the degree of significance that the evidence sought will have in the context of the case as a whole before they decide whether to protect it from loss. (Merits Br 34). That language merely identified *what* evidence was being lost—evidence of defendant's physical impairment at the time—to distinguish it from the defendant's argument, which focused on whether delay would result in any loss of chemical-testing evidence. *See Mazzola*, 356 Or at 820.

Nor does *Mazzola*'s reference to the “time, scope, and intensity” of an exigency search support defendant's argument that the existence of an exigency depends on the private nature of the property involved. (Merits Br 34). It is true that the scope of action taken in response to an exigency must be “reasonable,” in that it is constrained by the exigency itself. But the answer to whether an exigency existed does not change depending on the nature of the property that police seek to preserve.

Here, the scope of the police action was reasonable in response to the nature of the exigency: the risk of loss of evidence. Police seized the phone without intruding on the privacy of its contents, an approach that is generally sufficient to address the risk of loss of evidence, absent facts giving rise to a

specific concern about remote interference with data within it. *See Riley*, 573 US at 389-91 (approving of *seizure* of phone incident to arrest to prevent the loss of evidence, in absence of specific exigent circumstances justifying a further intrusion). The later police intrusion into its contents—the scope of which was not challenged in this case—was supported by a search warrant. And special rules limit the extent of the intrusion into a cell phone and ensure that any data that falls outside the warrant’s scope cannot be used as evidence. *See State v. Mansor*, 363 Or 185, 222-23, 421 P3d 323 (2018) (warrant must specifically describe category of information to be searched, including relevant time periods; “use limitation” will protect information not covered by warrant).⁷ Thus, even if, at the time of the seizure, the police had probable cause to believe that the phone contained only evidence of identity theft, the exigency created by the risk of loss of that evidence would justify the seizure.

When the police have probable cause to believe that evidence is present and it reasonably appears that the evidence likely will be unavailable if it is not immediately seized, that by itself constitutes an exigency justifying an immediate warrantless seizure or search to preserve that evidence, as long as the scope of the police conduct is limited to terminating the exigency. Police often

⁷ For example, a warrant supported by probable cause to believe that the phone contained identity theft alone would have a more limited scope than would a warrant seeking information about the shooting.

will not know either the exact nature of the evidence that is sought or the existence or the relative value of other evidence of the same fact. For those reasons, they cannot fairly be expected to assess—and to arrive at a single correct conclusion about—not only the evidentiary value of the information sought but its degree of value when compared to other evidence that exists or could be obtained to prove the same point at trial. Even when police *know* that other evidence exists—and what it will consist of—it would be unreasonable to expect an officer acting in the exigencies of the moment to accurately assess the “need” that the prosecution will have for the particular evidence if charges are filed.

An assessment of “need” would require the officer, a non-lawyer, to correctly determine the nature of the exact charges that will be filed, to weigh the likelihood that a factfinder would be satisfied by other evidence alone. In addition, the officer would have to accurately predict whether the other evidence will be available at the time of trial and whether it will be admissible in light of evidentiary and criminal-procedure rules.

Moreover, the fact that defendant may have had no reason to think that his phone was a likely source of identity-theft evidence does not diminish Robertson’s concerns about the risk of the loss or destruction of evidence. The loss or destruction of the phone itself was a distinct possibility. Defendant knew not only about the crime of identity theft, but also that police were

investigating the shooting, and that they knew that he had his phone at the time he was shot. Given that police believed that defendant already was actively withholding information about a serious crime, it was reasonable to believe that he was likely to destroy—or at least make unavailable—the phone itself or any information relating to the shooting.

In sum, the rationale underlying the exigent-circumstances exception is that the warrant requirement in a particular case should be excused if insistence on a warrant would frustrate the public interest in preventing the loss or destruction of evidence. In determining whether an exigency exists, an officer need not predict the degree of the state’s need for the evidence in a later prosecution, or evaluate the degree to which the item contains “personal” information. And although those considerations might affect the reasonableness of the scope of a *search* conducted to address an exigency, the police action in this case was limited to the *seizure* of the phone, which they believed was sufficient to prevent the loss of evidence.

4. After police seized the phone pursuant to exigent circumstances, the exigency exception did not limit their authority to *retain* it.

Even though the scope of permissible conduct that police can take to address an exigency may be limited, the exigent-circumstances exception does not limit the authority of police to *retain* evidence that they lawfully seize pursuant to the exception. Probable cause and exigent circumstances are

sufficient justification for a seizure, and retention of seized items, for evidentiary use at trial. And although the retention of seized items—after a seizure under *any* warrant exception, or even after a seizure pursuant to a warrant—is governed by an overall standard of “reasonableness,” that determination does not depend solely on the amount of time in which a warrant for further *search* of the seized evidence reasonably could be expected to be obtained.

a. The exigent-circumstances exception authorizes the seizure of evidence for potential use at trial.

When evidence is lawfully seized based on exigent circumstances, it is often the case that no warrant will be sought at all. Police can hold lawfully seized evidence for use in evidence in a trial—and can even “observe, feel, smell, shake and weigh” the evidence—without violating a possessory interest of the defendant. *State v. Heckathorne*, 347 Or 474, 223 P3d 1034 (2009) (quoting *State v. Owens*, 302 Or 196, 729 P2d 524 (1986)); *see also State v. Herbert*, 302 Or 237, 242, 729 P2d 547 (1986) (police could seize container based on probable cause that it contained drugs, and, because the unique design of the container “announced its contents,” police were not required to get a warrant to submit the evidence for confirmatory testing). The exigent-circumstances exception itself does not require police to seek a warrant at all,

let alone limit the continued retention of evidence by police to the length of time it would take to obtain a warrant.

Defendant relies on this court's decision in *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981), for his proposition that the duration of an exigent-circumstances *seizure* is lawful only for the period of time it would take officers to obtain a warrant to *search* it. But the holding in *Quinn*—which addressed only whether the exigency exception authorized both a seizure *and* a search of property after an overnight delay—does not support that proposition.

In *Quinn*, police seized the defendant's car without a warrant under the exigent circumstances doctrine but waited until the next day to conduct a purported "exigent circumstances" search. 290 Or at 391. The question was whether a *search* after "an overnight delay" was justified by the same exigency that supported the seizure. *Id.* at 392. The court held that the delayed search was not justified by exigent circumstances because it "was not occasioned by the impracticability of searching the car immediately; [r]ather, it was for the convenience of the police and the owner of the stolen property." *Id.*

That analysis makes sense. Because an exigency is determined at the time of the particular police action that the state seeks to justify under that exception, the delay in conducting the search demonstrated that—even though the seizure itself was justified by the exigencies of the moment—a warrant could have been obtained to support the search. Thus, although the initial

seizure of the car in *Quinn* was justified by exigent circumstances, the search the next day was not supported by the same exigencies.

But even though the absence of any continuing exigency will mean that any further search or seizure will not be justified by the original exigency, it does not render unlawful any prior police action that was justified by the exigency. For example, in *Miller*, police entered to offer emergency assistance to a victim whom the defendant claimed he had killed but officers thought could still be alive. *Miller*, 300 Or at 229. This court held that the officers were not required to accept the suspect's claim that the victim was dead—and could enter to offer any needed assistance—but that the exigency ceased to exist when, upon entry, officers found that the victim was dead. *Id.* In *Miller*, this court held that, although no *further* search or other police intrusion was authorized after the exigency had terminated, police were authorized to seize evidence they saw in plain view from a lawful vantage point because the seizure would have independent constitutional justification. *Id.* at 229-30.

The fact that a police seizure or search *terminates* the original exigency does not limit police authority to *retain* the seized item as evidence. Once police lawfully seize crime evidence, they can retain it for purposes of prosecution. The exigency exception itself does not require police to retain seized items only for the minimum time in which a warrant can be obtained.

b. The Fourth Amendment imposes a reasonableness requirement on the duration of certain lawful seizures.

Both Article I, section 9 and the Fourth Amendment contain prohibitions on “unreasonable” seizures, which, at least under the Fourth Amendment, may impose limits on the continued retention by police of a lawfully seized item. But defendant’s argument in this case is that the exigent-circumstances exception itself strictly limits the period of a seizure of an item for which police intend to seek a later warrant to the minimum time in which a warrant can be obtained. As explained above, the exigent-circumstances exception is not the source of a durational limit on police retention of items lawfully seized as evidence. And there is no authority for a rule that police must obtain a warrant within the absolute minimum time in which one can be obtained.

At most, Article I, section 9, is a source of a general “reasonableness” requirement on police authority to retain seized property, whether it was seized pursuant to the exigency exception or any other justification, including a search warrant. But the parameters of that reasonableness analysis have not been addressed by this court in any reported case. And, although that question is not raised by the defendant in this case, the state provides the following summary of the Fourth Amendment analysis that other courts have applied in this context.

For purposes of the Fourth Amendment, the United States Supreme Court has recognized that, at least with respect to some types of seizures, a seizure

that is “reasonable at its inception because based on probable cause may become unreasonable as a result of its duration or other reasons.” *Segura v. United States*, 468 US 796, 812, 104 S Ct 3380, 82 L Ed 2d 599 (1984); *United States v. Jacobsen*, 466 US 109, 124, 104 S Ct 1652, 80 L Ed 2d 85 (1984).

The reasonableness of a continued seizure depends on a number of factors, including its legal justification and the nature of the owner’s interest in property. For example, if a seizure of item is justified because it is crime evidence, officers can retain it for purposes of the criminal prosecution. But if the justification authorizes only a temporary seizure of property for a particular purpose, such as securing a house based on probable cause while seeking a warrant, the seizure may become unreasonable, depending on the degree of interference with the owner’s interests, the duration of the seizure, and the diligence of the officers in seeking a warrant. *See Segura*, 468 US at 812-813 (temporary seizure of residence, based on probable cause that it contained contraband, for 19 hours was reasonable); *Illinois v. McArthur*, 531 US 326, 330, 121 S Ct 946, 148 L Ed 2d 838 (2001) (temporary seizure of trailer home for two hours based on probable cause was reasonable). And when a seizure is permitted based on a standard lower than probable cause, the detention of property may become unreasonable at a much earlier point. *United States v. Place*, 462 US 696, 708-09, 103 S Ct 2637, 77 L Ed 2d 110 (1983)

(90-minute detention of the defendant's luggage based on a reasonable suspicion was unreasonable).

Lower courts in other jurisdictions have applied those principles to determine the reasonableness of the continued retention of personal property that is seized not because the item itself will be offered in evidence, but because it *contains* potential evidence that the government intends to obtain pursuant to a warrant. Courts apply an objective test that weighs the competing interests of the property owner (or possessor) and the government to determine whether, under the totality of the circumstances, the period of time during which the government retains the property without obtaining a warrant is unreasonable. *United States v. Mays*, 993 F3d 607, 616 (8th Cir 2021). In *Mays*, the Third Circuit Court of Appeals canvassed cases evaluating the reasonableness of the duration of otherwise lawful seizures, noting that there is “no bright line past which a delay becomes unreasonable.” *Id.* (quoting *United States v. Burgard*, 675 F3d 1029, 1033 (7th Cir 2012)). Rather, “‘in some contexts, a delay as short as 90 minutes may be unreasonable,’ while in other contexts, ‘a delay of over three months may be reasonable.’” *Mays*, 993 F3d at 617 (quoting *United States v. Laist*, 702 F3d 608, 614 (11th Cir 2012)).

In weighing the defendant's interests, relevant factors include the “significance of the interference with the person's possessory interest, the duration of the delay, whether the person consented to the seizure, and the

nature of the seized property.” *Mays*, 993 F3d at 617. But even though a personal device such as a computer or a phone is of a type of property that can contain vast amounts of important and personal information, a claimed violation of a person’s possessory interest as a result of police retention of even that type of device is diminished if the individual did not pursue available methods for obtaining the return of the property or otherwise attempt to determine the status of the seizure or seek assurances about the property’s return. *Id.*; *Burgard*, 675 F3d at 1033; *Laist*, 702 F3d at 616; *United States v. Christie*, 717 F3d 1156, 1163 (10th Cir 2013); *United States v. Stabile*, 633 F3d 219, 235-36 (3d Cir 2011) (the defendant’s failure to seek return of his property for more than 18 months was a factor that reduced the weight of his claim of unreasonable interference with his possessory interests).

In evaluating the government interests, courts consider “the government’s legitimate interest in holding the property as evidence, the nature and complexity of the investigation, the quality of the warrant application and the amount of time we expect the application would take to prepare, and any other evidence proving or disproving law enforcement’s diligence in obtaining the warrant.” *Id.* In *Mays*, retention of the defendant’s laptop for 15 days before obtaining a warrant was not unreasonable because of the complexity of the ongoing investigation and the effort that it took to prepare a warrant based on a substantial amount of information. *Id.* at 618. Similarly, where the

government acted diligently in its investigation and the defendant made no effort to obtain earlier return of seized property, retention of a device for a period of 25 days before seeking a warrant was reasonable. *Laist*, 702 F3d at 616-17.

On the other hand, courts have found the retention of personal devices for periods of weeks to be unreasonable where the government gave no reasons that justified the delay. *See United State v. Pratt*, 915 F3d 266, 272 (4th Cir 2019) (month-long delay in obtaining a warrant was unreasonable when only justification was that crimes had been committed in two different states and agents had to decide where to seek the warrant); *see also United States v. Mitchell*, 565 F3d 1347, 1352 (11th Cir 2009) (delay of 21 days after a plain-view seizure of the defendant's computer based on the defendant's admission that it contained contraband was unreasonable where investigator explained only part of the delay on the ground that he was at a conference for two weeks during that time period).

Again, defendant's challenge is based on the exigent-circumstances exception itself, and not the Fourth Amendment "reasonableness" standard discussed above. Because defendant's argument was that police had to obtain a warrant within a firm period of hours, the record does not contain evidence on all of the factors addressed in the Fourth Amendment caselaw, nor did the trial court make findings on those factors. But even if that issue were raised in this

case, the record establishes that the five-day period between the seizure and the application for a warrant was not unreasonable under the circumstances.

The record shows that, over the five days following the seizure, the officers diligently pursued a warrant while also fulfilling their duties with respect to the rest of their investigation. They canvassed the area looking for surveillance footage, interviewed witnesses, and twice drove to Salem to obtain Norton's car and other evidence. The warrant application was substantial: in addition to the phone, the affidavit supported the search and seizure numerous pieces of other evidence at different locations, as well as a search of the apartment where defendant was staying for evidence of the robbery and prior crimes of which he was suspected. The five-day delay before obtaining a warrant was not due to neglect, but, rather, as the trial court found, resulted from investigators' other obligations during an "active, ongoing investigation." (Tr 138). And nothing suggests that they acted with anything less than due diligence pursuing those obligations.⁸

⁸ The state further notes that, although a person has a significant interest in the contents of his or her phone in general, nothing in this record suggests that defendant sought the return of the phone in the five days before the warrant was obtained—or, for that matter, at any point in the course of this case. Oregon statutes allow a property owner to seek the return of seized property and a trial court to determine, as a factual matter, whether continued retention of the property is justified. *See* ORS 133.633, *et seq.* (procedure for motion for return of seized property). That fact would weigh against a

Footnote continued...

In sum, the exigent-circumstances exception itself does not limit the length of time police can retain evidence after an exigent-circumstances seizure. The status of evidence seized pursuant to exigent circumstances is the same as that seized pursuant to any other warrant exception or to a warrant exception, and police can seek a warrant for any further search. The duration of police retention of evidence is governed only by its reasonableness under the totality of the circumstances. To the extent that defendant's challenge in this court raises that question, the record establishes that the five-day period here was reasonable.

B. Merits aside, defendant's arguments present no basis for reversal.

Defendant argues that, if this court concludes that either the initial seizure or the retention of the phone over the five days before the warrant issued, he was prejudiced by the trial court's denial of his motion to suppress and is entitled to reversal. He argues that, although he was not harmed by the use of the phone evidence itself at trial, the ruling resulted in the admission of other evidence that he contends was prejudicial. Specifically, he contends that, if his challenges to the seizure prevailed, he would have been entitled to suppression of the second half of his November 26 police interview, after Officer Robertson

(...continued)

conclusion that his lack of access to his phone in the five days after its seizure was unreasonable.

confronted him with what he had seen in the call logs after obtaining the search warrant.

But, as explained below, defendant's motion to suppress did not encompass any claim that his interview statements were derived from the phone's seizure. To the extent that he later made such an assertion *after* the trial court had ruled, it was too late. Moreover, even that late claim was narrower in scope than what he argues now, in that it was directed only at specific statements by Officer Roberts, not the rest of the interview after that point. As a result, the Court of Appeals correctly declined to consider arguments beyond the scope of those preserved in the trial court. Finally, even if defendant was entitled to suppression of all of his interview statements after he was confronted with the call records, he was not prejudiced by their admission because they were merely cumulative of other statements he had already made at that point.

1. Defendant failed to preserve his argument that his interview should have been suppressed as derivative of the phone's seizure.

As previously explained, the only evidence from the phone that the state offered at trial consisted of call records that were independently obtained through another source; thus, even if the trial court had suppressed the evidence from his phone, the same evidence would have been admitted. As a result, defendant can establish a basis for reversal only if he was entitled to

suppression of evidence beyond that obtained from the phone itself, and that he was harmed by its admission. To that end, he asserts that he was entitled to suppression of the entirety of the police interview after police confronted him with the call records found on his phone as a result of the search warrant.

(Merits Br 44). But that challenge goes beyond the narrow argument he made in the trial court and, as a result, it is not a basis for relief on appeal.

Before trial, defendant moved to suppress the initial seizure of the phone on the ground that it was not supported by probable cause and exigent circumstances. (ER 21-25). He argued that the “cell phone” and any “derivative evidence” should be suppressed as a result, and specifically identified the “subsequent search [of the phone pursuant to a warrant] as fruit of the poisonous tree. (ER 25).

At the hearing on the motion, the prosecutor expressed his understanding that defendant sought to suppress only the phone and its contents. Before arguing the merits of the seizure, he asserted that defendant’s motion was “moot” because evidence “obtained from the phone will also come in through various other means.” (Tr 128-29). He stated, “Really what we’re talking about is [Pree], the co-defendant, calling and having, you know, conversations leading up to the robbery and then phone calls afterwards,” noting that the state had obtained “the same information” from Pree’s phone. (*Id.*). Defendant did

not challenge that description of the scope of evidence derived from the seizure of the phone. (*Id.*).

Later, only after the trial court had denied the motion to suppress—and in the middle of a hearing on his requests for fifty discrete redactions of material in the interview transcript—did he refer to other evidence that might have been suppressed if the trial court had granted his motion. He stated that he wanted “to mention one thing for the purposes of appeal,” noting the prosecutor’s prior statement that the call logs were independently discovered on Pree’s phone. (Tr 171-72). He directed the court to “section three on page 20” of the interview transcript, which was a statement by Robertson informing defendant that his call logs showed calls from Pree before and after the robbery. (Tr 171; SER 50). Defendant stated only that “[t]hose statements would not have come in, and arguably the interview would have flowed differently,” if Robertson had not confronted defendant with what was on his phone. (Tr 172).

On appeal, defendant argued that the trial court should have suppressed evidence from the interview because police had used the call logs in the interview at the police station. (App Br 24). He asserted that the state failed to prove that the use of the call logs did not affect the “flow of the interview, the questions police asked, and the manner that they asked them.” (App Br 24). He argued that statements by defendant in the interview—that he was present during the robbery and that Pree had wanted him there for protection—likely

affected the jury's verdict at trial. (App Br 25). Because the Court of Appeals held that any error in admitting defendant's statements would have been harmless in any event, it declined to decide whether "defendant's motion to suppress encompassed statements made in his police interview," referring to that as a "preservation issue that we need not resolve given our disposition." *Thompson*, 308 Or App at 735.

In this court, defendant asserts that Robertson used the call-log information to "put pressure on defendant to change his story," and that, as a result, the trial court should have suppressed "all of defendant's subsequent statements from the interview." (Merits Br 45). But defendant did not preserve that argument below, and the trial court never ruled on that question. As a result, it is not properly before this court.

Before the trial court, defendant never asked the court to suppress the entire interview after police confronted defendant with his call records. At the hearing on the motion to suppress, defendant sat silent when the prosecutor informed the court that the only evidence at issue consisted of phone records that were obtained through independent sources, and only at a later hearing raised any issue about the interview.

On appeal, defendant appears to assume that his statements at the later hearing about Robertson's use of the call records preserved his current claim about the scope of evidence derived from the phone's seizure. But even at that

later hearing, defendant did in any clear way assert that the whole interview after the reference to the call records derived from the seizure, or that the court should rule on that issue. Rather, he noted “for purposes of appeal” that a specific portion of the transcript—“section three on page 20” of the interview transcript, which consisted only of statements by Robertson—would have been suppressed if the court had granted his motion. (Tr 172). The trial court noted that defendant was “preserving the argument with respect to my ruling on the phone with respect to those statements as well.” (*Id.*). Defendant agreed, saying, “Right. Those statements would not have come in, and arguably the interview would have flowed differently without the State’s –the officer’s ability to confront” defendant about what was on his phone. (*Id.*). The court responded, “Okay. I’m going to need to take a break.” (*Id.*).

If defendant had argued in his motion to suppress based on the seizure that any part of the interview, let alone the entire interview after the reference to the call logs, was derived from the seizure, the state could have addressed that issue. It could have asked Robertson how the call-log information affected his questioning of defendant, and whether, at the time he asked defendant about the call logs, he had other information that would have similarly impeached his denial that he had any association with Pree other than the happenstance of the robbery. It also could have asked the trial court to determine which, if any, admissions by defendant were derived from the police statements about his call

records, as opposed to the fact that they had taken DNA swabs and were about to search the apartment, where he knew they would find Norton's property and the knife with Norton's blood on it.⁹ But because defendant identified only the set of statements by Robertson on a single page of the transcript, the state had no reason to offer evidence about the relationship between the seizure and any later statements by defendant in response to questioning.

The preservation requirement is a pragmatic one, designed to ensure procedural fairness to both the parties and the trial court. *See Peebles v. Lambert*, 345 Or 209, 219, 191 P3d 637 (2008). An argument that asks the trial court to take one type of action does not preserve an argument that would require it to take a different action. *State v. Chandler*, 360 Or 323, 338, 380 P3d 932 (2016). And, although, under some circumstances, a "short-hand reference" may be sufficient, it must be made in a manner and context that both the court and opposing party would understand "from that single reference the essential contours of the full argument." *State v. K.J.B.*, 362 Or 777, 790, 416 P3d 291 (2018). In this case, defendant not only made his argument about the

⁹ In addition to confronting defendant with the call records, police told him that they had talked to Norton and to Pree, and that they had warrants for DNA samples and for his apartment, where they later found Norton's belongings and a bloody knife. (Tr 479-80, 519). Defendant's failure to identify his interview statements as a product of the phone's seizure deprived the state of the opportunity to ask the court to determine whether his statements

Footnote continued...

interview in the course of another hearing, but referred to only a single specific statement that he asserted would not have “come in.” (Tr 171). His further assertion that “arguably” that statement affected the “flow” of the rest of the interview did not make any affirmative argument at all. Neither of those points put the court on notice that he was saying that the state had a burden to prove that the interview was not affected by the reference to the call logs, nor would such an argument have been timely, given that the court already had ruled on the motion and the state had no opportunity to respond to the assertion with evidence on that question.

For those reasons, the Court of Appeals correctly identified the preservation problem with respect to defendant’s appellate challenge to the admission of the interview. And because the trial court did not commit plain error by not suppressing the interview on the ground that it derived from the seizure, he is not entitled to reversal on that ground on appeal.

2. Any error in denying defendant’s motion to suppress was harmless.

As stated above, defendant moved to suppress evidence obtained from his phone, and did not make any timely assertion that any part of the interview was tainted by the seizure. At trial, the state did not offer any evidence that

(...continued)

derived from the use of the call records, as opposed to his knowledge that police were soon to find damning evidence in the apartment.

depended on the seizure of his phone; the evidence of Pree's calls to defendant were found in Pree's phone independently of anything on defendant's phone. For that reason, defendant cannot have been harmed by the denial of the motion to suppress.

Nevertheless, even if this court disagrees and holds that defendant both preserved his challenge to the admission of all of the interview after Robertson confronted him with the call logs from his phone and raised that issue in his opening brief, it should still affirm on harmless-error grounds. Defendant's statements after being confronted by the call logs were not materially different from his statements before that point, and, in light of the evidence as a whole, he has not demonstrated that he was prejudiced by any error in admitting the entire interview.

- a. An appellant cannot raise arguments for the first time in his reply brief about the scope of the evidence that should have been suppressed.**

The state agrees with defendant's legal arguments about an appellant's obligation under ORAP 5.45 and the permissible scope of a reply brief. That is, the state agrees that current law allows an appellant to use a reply brief to clarify arguments already made, especially in response to specific arguments made by the respondent.

For that reason, the state agrees that if defendant had preserved his current claim that he was entitled to suppression of the entire interview after

Robertson confronted him with his call log—and if he properly raised that issue in his opening brief—nothing prevented him from filing a reply that identified specific statements that constituted prejudice requiring reversal under Article VII (amended), § 3, of the Oregon Constitution. *See State v. Lotches*, 331 Or 455, 487, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001) (“[a] defendant in a criminal case assigning error to the exclusion or admission of evidence must establish that the error was not harmless.”).

But because defendant failed to preserve a claim that he was entitled to suppression of all of the interview statements after the mention of the call logs, that argument was not properly before the court on appeal. Rather, he preserved only a challenge to the specific statements by Robertson in the single section of the interview transcript. In that circumstance, he was not entitled to use a reply brief to broaden the scope of the evidence that he claimed should have been suppressed.

b. In light of the evidence as a whole, defendant was not prejudiced by the denial of his motion to suppress.

In any event, defendant cannot establish that any of his admissions made after police confronted him with the call records were prejudicial in light of his earlier statements, and in the context of the evidence as a whole.

First, the content of any admissions that defendant made after police mentioned the call records were not qualitatively different from the

incriminating aspects of his statements before that point. Before police asked him about the records, defendant had already changed his story about the shooting, admitting that it was not a drive-by shooting but, rather, that it occurred during a robbery. He had admitted knowing Pree and being present during the robbery. (SER 13, 42-43). He made that admission only after police expressed skepticism about his drive-by shooting story, which he elaborated on early in the interview by providing specific details about the cars he had claimed were involved. (SER 9-10). The fact that he so quickly pivoted from one story to another was powerful evidence of his involvement in the robbery.

To the extent that defendant argues that any of his statements after he was told about call logs added to the inference of guilt, it was not because those statements acknowledged any active participation in the robbery. That is, his later statements did not go to a central factual issue in the case. Rather, the rest of his statements harmed him only in their vagueness and their internal inconsistencies, in the same way his previous conduct already had. But even the exclusion or admission of evidence that goes to a central factual issue may be harmless if it is “merely cumulative of,” rather than “qualitatively different than,” evidence presented to the factfinder. *State v. Bement*, 363 Or 760, 779, 429 P3d 715 (2018) (quoting *State v. Davis*, 336 Or 19, 34, 77 P3d 1111 (2003)); *see also State v. McAnulty*, 356 Or 432, 461, 338 P3d 653 (2014) (admission of defendant’s admissions and guilty plea not prejudicial where jury

would have regarded them as duplicative or unhelpful to determining the issues before it). And because his later statements were cumulative of his previous statements, their admission was highly unlikely to have affected the outcome of the trial.

In addition, significant direct testimony and physical evidence corroborated the state's theory that defendant had wielded the knife and taken Norton's property in a robbery perpetrated by both defendant and Pree. In light of that evidence, the differences between defendant's early and later interview statements were even less significant, in that defendant, at most, admitted being present at the robbery, which was consistent with all of the other evidence at trial.

Further, to the extent that ambiguities and inconsistencies in his later statements would be interpreted to suggest a deeper involvement in the robbery than defendant had claimed, earlier statements by defendant before he knew about the call records had the same effect. Early in the interview, he told police that he had Norton's identification, and that they would find it in the apartment. (SER 3-7). He claimed that he had obtained it from a woman, Maya, who told him Norton had been "bragging" about shooting him and that she took the ID while using drugs with him on November 21. (*Id.*). But the evidence showed that Norton had left the Portland area on November 19, and had been in custody

since he was arrested in Salem on November 20 on his way to California. (Tr 293-94, 440-41).

Finally, Norton testified about the details of the robbery and consistently identified defendant as the robber with knife. (Tr 412-58). Norton testified that he had known Pree, who was white, for several months because Pree had sold him bikes and shoes. (Tr 415). Norton testified that, in November, he was short on money and wanted to sell a car stereo, and that Pree was helping him find a buyer. (Tr 416-17). The day of the robbery, they spent the afternoon together, driving to different locations to find a potential buyer, and that, eventually Pree told Norton that his “partner” would buy the stereo. (Tr 417-20). While discussing the sale, defendant lurched at Norton with a knife, which Norton grabbed by the blade as defendant kept pushing it into his throat. (Tr 422, 432-34). Norton testified that defendant took his wallet and that Pree was trying to take Norton’s gun when he was able to fire two shots. (Tr 432, 434-37). Defendant ran away, but Pree stayed at the scene. (Tr 437-38).

When Norton was arrested on November 20, 2014, he had small lacerations on his neck that appeared to be a few days old, along with a “very large” laceration on his ring finger and smaller cuts on his hand. (Tr 263). A search of the apartment where defendant was staying revealed a Safeway bag containing Norton’s wallet and identification. (Tr 479). Police also found a knife with blood that was determined to be Norton’s. (Tr 479-80, 519; Ex 31-

33). Thus, evidence of defendant's guilt was overwhelming despite his interview statements. And even if, in the abstract, it was possible for a factfinder to believe that defendant had obtained the knife and stolen items from Pree after the robbery, that inference would have been significantly strained in light of the uncontroverted claims of both defendant and Norton that defendant had run away immediately after the robbery.

For those reasons, even if the trial court erred by denying defendant's motion to suppress—and even if the trial court should have suppressed the portion of his interview after the mention of the call logs—any error was harmless.

CONCLUSION

This court should affirm the decision of the Court of Appeals and the judgment of the trial court.

Respectfully submitted,

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**SUPPLEMENTAL
EXCERPT OF
RECORD**

SUPPLEMENTAL EXCERPT OF RECORD

Pursuant to ORAP 5.50, respondent submits the following, as indexed below.

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1 MR. SCOTT: No objection.

2 THE COURT: Okay.

3 MR. VASQUEZ: If I may play it for the jury at
4 this time?

5 THE COURT: Sure.

6 *(State's Exhibit 20 played for the jury as*
7 *follows:*

8 OFFICER ROBERTSON: Well, let's -- you said you
9 wanted to talk a little bit about the shooting first.
10 Let's talk about that and then I'll try calling him again.
11 Since you're in custody, I'm going to read you this first,
12 okay? Just like I read you at the hospital. You have the
13 right to remain silent. Do you understand that?

14 DARIUS THOMPSON: Yes, sir.

15 OFFICER ROBERTSON: Anything you say can and will
16 be used against you in a court of law. Do you understand
17 that?

18 DARIUS THOMPSON: Yes, sir.

19 OFFICER ROBERTSON: You have the right to talk to
20 a lawyer and have him present with you while you're being
21 questioned. Do you understand that?

22 DARIUS THOMPSON: Yes, sir.

23 OFFICER ROBERTSON: If you cannot afford to hire
24 a lawyer, one will be appointed free of charge to
25 represent you before any questioning if you wish one. Do

1 *you understand that?*

2 *DARIUS THOMPSON: (inaudible)*

3 *OFFICER ROBERTSON: (inaudible)*

4 *DARIUS THOMPSON: Yes, sir.*

5 *OFFICER ROBERTSON: Okay. Do you understand all*
6 *your rights?*

7 *DARIUS THOMPSON: Yes, sir.*

8 *OFFICER ROBERTSON: Okay. First, since we are*
9 *getting recorded here, let me get your -- it's Darius*
10 *Thompson, right?*

11 *DARIUS THOMPSON: Yes, sir.*

12 *OFFICER ROBERTSON: What's your middle name?*

13 *DARIUS THOMPSON: Lashawn.*

14 *OFFICER ROBERTSON: Lashawn? How do you spell*
15 *that?*

16 *DARIUS THOMPSON: L-a-s-h-a-w-n.*

17 *OFFICER ROBERTSON: Okay. And what's your date*
18 *of birth, Darius?*

19 *DARIUS THOMPSON: (inaudible)*

20 *OFFICER ROBERTSON: (inaudible) birthday in less*
21 *than two weeks.*

22 *DARIUS THOMPSON: (inaudible)*

23 *OFFICER ROBERTSON: Yeah. How's your leg?*

24 *DARIUS THOMPSON: (inaudible) I'm able to walk on*
25 *it now.*

1 OFFICER ROBERTSON: Did they leave the bullet in
2 or are you going to --

3 DARIUS THOMPSON: It's still in there.

4 OFFICER ROBERTSON: It's still in there? Have
5 they talked about getting it out at all? Or did you go
6 back to the follow-up appointment yet?

7 DARIUS THOMPSON: I haven't went for my follow-up
8 appointment.

9 OFFICER ROBERTSON: Okay.

10 DARIUS THOMPSON: (inaudible)

11 OFFICER ROBERTSON: Gotcha. Well, I appreciate
12 you coming down here for all this too, hopefully we can
13 get it sorted out.

14 So you said that you wanted to talk to me more
15 about the shooting, you might have more info about it.

16 DARIUS THOMPSON: (inaudible)

17 OFFICER ROBERTSON: So he was what now?

18 DARIUS THOMPSON: (inaudible)

19 OFFICER ROBERTSON: Mmm-hmm. He was (inaudible)
20 about staying there?

21 DARIUS THOMPSON: (inaudible)

22 OFFICER ROBERTSON: Who did that? Who brought
23 that to you?

24 DARIUS THOMPSON: A friend.

25 OFFICER ROBERTSON: A friend?

1 DARIUS THOMPSON: Yeah.

2 OFFICER ROBERTSON: What's the friend's name?

3 DARIUS THOMPSON: Maya.

4 OFFICER ROBERTSON: Maya? Have you ever -- this

5 guy, Michael Norton, what does he look like?

6 DARIUS THOMPSON: (inaudible)

7 OFFICER ROBERTSON: Okay. Have you ever met him

8 before?

9 DARIUS THOMPSON: No, sir.

10 OFFICER ROBERTSON: And you know that -- because

11 originally you told me that you were walking and you just

12 got shot when you were walking along. And they told you

13 that that was the guy that shot you?

14 DARIUS THOMPSON: Yeah.

15 OFFICER ROBERTSON: How did they know that?

16 DARIUS THOMPSON: (inaudible) was a .25

17 (inaudible).

18 OFFICER ROBERTSON: Uh-huh.

19 DARIUS THOMPSON: (inaudible) and there was this

20 dude named (inaudible).

21 OFFICER ROBERTSON: Pree you said?

22 DARIUS THOMPSON: (inaudible)

23 OFFICER ROBERTSON: Okay.

24 DARIUS THOMPSON: (inaudible)

25 OFFICER ROBERTSON: Why would he want to shoot

1 *you if you're just walking along?*

2 *DARIUS THOMPSON: Just (inaudible) he's not*
3 *black, he's white, you know?*

4 *OFFICER ROBERTSON: Uh-huh.*

5 *DARIUS THOMPSON: (inaudible)*

6 *OFFICER ROBERTSON: But do you think he could*
7 *have seen if you were black or white then? Because you*
8 *said you were wearing a black coat with your hood up and*
9 *it was dark outside.*

10 *DARIUS THOMPSON: (inaudible)*

11 *OFFICER ROBERTSON: Okay. And who told you --*
12 *they said it was a .25 auto, too?*

13 *DARIUS THOMPSON: (No audible response)*

14 *OFFICER ROBERTSON: And this is the same girl,*
15 *Maya, that's telling you this?*

16 *DARIUS THOMPSON: (No audible response)*

17 *OFFICER ROBERTSON: How do you know her?*

18 *DARIUS THOMPSON: She's --*

19 *OFFICER ROBERTSON: Now, how does -- how does she*
20 *-- she said -- now, who told her this stuff?*

21 *DARIUS THOMPSON: His son.*

22 *OFFICER ROBERTSON: His son? Do you know his*
23 *son's name?*

24 *DARIUS THOMPSON: Hmm-mmm.*

25 *OFFICER ROBERTSON: Okay. And you said this guy*

1 *has got tattoos?*

2 *DARIUS THOMPSON: (No audible response)*

3 *OFFICER ROBERTSON: How do you know that?*

4 *DARIUS THOMPSON: (inaudible) I.D. (inaudible).*

5 *OFFICER ROBERTSON: His I.D.?*

6 *DARIUS THOMPSON: Mmm-hmm.*

7 *OFFICER ROBERTSON: You still have it?*

8 *DARIUS THOMPSON: Yes, sir.*

9 *OFFICER ROBERTSON: Okay. Is it at the apartment?*

10 *DARIUS THOMPSON: (No audible response)*

11 *OFFICER ROBERTSON: Okay. Does he -- anything*
12 *else of his there?*

13 *DARIUS THOMPSON: (No audible response)*

14 *OFFICER ROBERTSON: No? Okay. That's crazy,*
15 *man. So weird why his stuff would be there.*

16 *OFFICER BROODER: How did she get a hold of it?*

17 *DARIUS THOMPSON: (inaudible)*

18 *OFFICER ROBERTSON: Does she -- do you know her*
19 *phone number? Is there any way we can talk to her -- talk*
20 *to her about this guy?*

21 *DARIUS THOMPSON: I don't know her phone number*
22 *just because (inaudible).*

23 *OFFICER ROBERTSON: Her name is Maya?*

24 *DARIUS THOMPSON: Mmm-hmm.*

25 *OFFICER ROBERTSON: M-a-y-a maybe or do you know*

1 *how she spells it?*

2 *DARIUS THOMPSON: No, sir.*

3 *OFFICER ROBERTSON: Is she a white or black girl*
4 *or Hispanic?*

5 *DARIUS THOMPSON: Black.*

6 *OFFICER ROBERTSON: Black? About how old is she?*

7 *DARIUS THOMPSON: About 21.*

8 *OFFICER ROBERTSON: Twenty-one.*

9 *OFFICER BROODER: I'm sorry, (inaudible)?*

10 *DARIUS THOMPSON: (inaudible)*

11 *OFFICER ROBERTSON: So, does she live in the*
12 *apartments too?*

13 *DARIUS THOMPSON: I'm not sure.*

14 *OFFICER ROBERTSON: Okay. She hangs out --*
15 *you've seen her there?*

16 *DARIUS THOMPSON: (inaudible) kind of like*
17 *(inaudible).*

18 *OFFICER ROBERTSON: Who stays there?*

19 *DARIUS THOMPSON: (inaudible)*

20 *OFFICER ROBERTSON: How do you know he stays*
21 *there?*

22 *DARIUS THOMPSON: She said that's -- he stays in*
23 *the (inaudible).*

24 *OFFICER ROBERTSON: Okay. With anybody else?*

25 *DARIUS THOMPSON: I'm not sure.*

1 OFFICER ROBERTSON: Okay.

2 OFFICER BROODER: Do you know when she (inaudible)?

3 DARIUS THOMPSON: She said (inaudible) yeah, my
4 birthday.

5 OFFICER BROODER: Your birthday?

6 DARIUS THOMPSON: Mmm-hmm.

7 OFFICER ROBERTSON: I mean, I'm trying to refresh
8 my memory. Let's go back a little bit and maybe
9 (inaudible). Let's go back to when -- you said you left
10 Shari's that night, you were walking -- you were playing
11 video poker there?

12 DARIUS THOMPSON: And I walked home.

13 OFFICER ROBERTSON: And about what time was that?

14 DARIUS THOMPSON: Around (inaudible) eleven.

15 OFFICER ROBERTSON: Eleven? And you were
16 walking home from Shari's back to the apartments at 2700
17 West Powell. And did you stay on Powell the whole time,
18 did you go out of Powell at all? No other side streets,
19 you just stayed on Powell the whole time. And then what
20 happened as you were walking?

21 DARIUS THOMPSON: Cars drove by, other cars, and
22 (inaudible).

23 OFFICER ROBERTSON: Okay.

24 DARIUS THOMPSON: (inaudible)

25 OFFICER ROBERTSON: Okay. About how far do you

1 think you ended up running from there?

2 DARIUS THOMPSON: I would say probably about --
3 I'd say (inaudible).

4 OFFICER ROBERTSON: (inaudible) or farther?

5 DARIUS THOMPSON: My house is right there on
6 Powell.

7 OFFICER ROBERTSON: Okay. Because originally I
8 thought you had told me that you were closer to like -- I
9 think you said like maybe 109th and Powell or something
10 like that, it's farther way.

11 DARIUS THOMPSON: (inaudible) 109th and Powell,
12 but the 700 block is the same thing.

13 OFFICER ROBERTSON: Okay.

14 DARIUS THOMPSON: (inaudible) close to the
15 graveyard right there.

16 OFFICER ROBERTSON: Okay. So you were pretty
17 close to your house already. Okay. And did you think
18 you got shot then or did you just hear the shots and then
19 it wasn't until you got to the apartment that you
20 realized?

21 DARIUS THOMPSON: No. I heard the shots and then
22 I felt (inaudible) on my leg and I took off running.
23 I've never got shot before, so I didn't know what it was
24 at the time.

25 OFFICER ROBERTSON: Okay.

1 DARIUS THOMPSON: I thought it was a muscle spasm.

2 OFFICER ROBERTSON: Okay.

3 DARIUS THOMPSON: So (inaudible).

4 OFFICER ROBERTSON: Now what -- what did the cars
5 look like?

6 DARIUS THOMPSON: It was a -- like a gray Impala
7 and a black Buick.

8 OFFICER ROBERTSON: Okay. A black Buick and a
9 gray Impala. You're sure on the make and models?

10 DARIUS THOMPSON: I'm not sure on the make and
11 models.

12 OFFICER ROBERTSON: Okay. You said something
13 else about some guy named Pree. Tell me how he enters
14 into this.

15 DARIUS THOMPSON: I guess he knows the guy.

16 OFFICER ROBERTSON: He knows the guy? Have you
17 ever -- do you know what Pree looks like?

18 DARIUS THOMPSON: (inaudible)

19 OFFICER ROBERTSON: Do you think you'd recognize
20 him if you saw a picture of him?

21 DARIUS THOMPSON: Probably not.

22 OFFICER ROBERTSON: Okay. Were there any
23 reasons, like have you ever talked to him on the phone or
24 anything like that before?

25 DARIUS THOMPSON: (No audible response)

1 OFFICER ROBERTSON: That you can remember? I
2 mean --

3 DARIUS THOMPSON: (No audible response)

4 OFFICER BROODER: It's just that everybody else in
5 the mix seems to be (inaudible).

6 OFFICER ROBERTSON: Yeah, kind of (inaudible).

7 OFFICER BROODER: (inaudible)

8 DARIUS THOMPSON: (No audible response)

9 OFFICER ROBERTSON: Okay. What's he look like?
10 Is he a white guy, black guy, Hispanic guy?

11 DARIUS THOMPSON: A white guy.

12 OFFICER ROBERTSON: White guy? Okay. What
13 color -- do you remember like hair or eye color at all?

14 DARIUS THOMPSON: No, sir. I just seen him
15 riding on a bike like (inaudible) associate with him.

16 OFFICER ROBERTSON: He rides a bike though?

17 DARIUS THOMPSON: (No audible response)

18 OFFICER ROBERTSON: Does he have any tattoos,
19 scars, goatees, shaved head, anything like that?

20 DARIUS THOMPSON: I'm not sure.

21 OFFICER ROBERTSON: You're not sure. All right.
22 The other thing I wanted to cover too is, when we first
23 contacted you at the hospital, you handed us an I.D. for
24 Marcus Tyler and you showed that I.D. to the nurse and
25 then to Officer Harrison-Meyer. Now Marcus Tyler, that's

1 *your cousin, is that right?*

2 *DARIUS THOMPSON: Hmm-mmm.*

3 *OFFICER ROBERTSON: No? Is he any relation to*
4 *you?*

5 *DARIUS THOMPSON: No, I just found his I.D.*

6 *OFFICER ROBERTSON: You found his I.D.? Okay.*
7 *And we talked about this at the hospital and it's not that*
8 *big of a deal, but you understand by like using that I.D.*
9 *to get medical services that clear defrauding the*
10 *hospital, that's a crime, you understand that?*

11 *DARIUS THOMPSON: (No audible response)*

12 *OFFICER ROBERTSON: Okay.*

13 *DARIUS THOMPSON: I apologize.*

14 *OFFICER ROBERTSON: Okay. All right. So, this*
15 *is kind of the issue that I'm curious about, Darius, is*
16 *that -- well first, let's talk about this guy, Pree for*
17 *just a second, okay? So, I'm pretty sure that you know*
18 *who he is. I'm sure you've seen him before. But is this*
19 *him? This is Pree?*

20 *DARIUS THOMPSON: (No audible response)*

21 *OFFICER ROBERTSON: Okay. So that's Pree. And*
22 *does this look like the guy?*

23 *DARIUS THOMPSON: That's the guy, yeah.*

24 *OFFICER ROBERTSON: This is him?*

25 *DARIUS THOMPSON: It's that guy.*

1 OFFICER BROODER: Just out of curiosity, because
2 we don't know, does the picture on the I.D. --

3 OFFICER ROBERTSON: This picture you're saying is
4 this guy?

5 DARIUS THOMPSON: (inaudible)

6 OFFICER ROBERTSON: Okay. Okay. And this is --
7 you said his name is Michael Norton?

8 DARIUS THOMPSON: Mmm-hmm.

9 OFFICER ROBERTSON: Okay. And the other guy's
10 name you know him as Pree? Do you know his real name?

11 DARIUS THOMPSON: (No audible response)

12 OFFICER ROBERTSON: Okay. But he rides a bike?

13 DARIUS THOMPSON: (No audible response)

14 OFFICER ROBERTSON: Okay. All right. Oh, and
15 this is -- that's the I.D. (inaudible), right? That's
16 Marcus. Yeah. Okay. All right.

17 Let's back up a little bit about this, Darius.
18 Let's kind of clarify some things. Because we're getting
19 told a lot of different things about what happened that
20 night. And since that shooting has occurred we've talked
21 to a lot of people ourselves as we were trying to figure
22 out who did it, all right? And I'm going to tell you
23 right now, I know that what you're telling me isn't what
24 happened at all. Okay? I know that something else
25 happened that night and I'd rather get better facts about

1 *what actually happened that night and I'm hoping you can*
2 *fill me in, okay? So why don't you tell me more about*
3 *this guy, Mike. How did you initially meet him?*

4 *DARIUS THOMPSON: (inaudible), Pree knows him.*

5 *OFFICER ROBERTSON: Okay. Did Pree introduce*
6 *you to Mike?*

7 *DARIUS THOMPSON: Hmm-mmm.*

8 *OFFICER ROBERTSON: Okay. How did you come to*
9 *know Mike?*

10 *DARIUS THOMPSON: This is what happened. I*
11 *really don't want to be involved in all that.*

12 *OFFICER ROBERTSON: Mmm-hmm.*

13 *DARIUS THOMPSON: But Pree tried to rob him.*

14 *OFFICER ROBERTSON: Okay.*

15 *DARIUS THOMPSON: (inaudible)*

16 *OFFICER ROBERTSON: Okay.*

17 *DARIUS THOMPSON: (inaudible)*

18 *OFFICER ROBERTSON: So -- so Mike had a gun?*

19 *DARIUS THOMPSON: (inaudible) I didn't know*
20 *(inaudible).*

21 *OFFICER ROBERTSON: What did Pree do when he was*
22 *trying to rob him? Like how was Pree trying to rob him?*

23 *DARIUS THOMPSON: He put a knife to him.*

24 *OFFICER ROBERTSON: Pree did?*

25 *DARIUS THOMPSON: (No audible response)*

1 OFFICER ROBERTSON: Okay. What kind of -- what
2 did it look --

3 DARIUS THOMPSON: He basically came in
4 (inaudible) and he said (inaudible).

5 OFFICER ROBERTSON: Mmm-hmm.

6 DARIUS THOMPSON: (inaudible)

7 OFFICER ROBERTSON: Mmm-hmm.

8 DARIUS THOMPSON: So, walked up to him
9 (inaudible) cell phone (inaudible).

10 OFFICER ROBERTSON: Who was in the passenger side?

11 DARIUS THOMPSON: Pree.

12 OFFICER ROBERTSON: Pree was?

13 DARIUS THOMPSON: (inaudible) and the dude got
14 out and tried to shoot him. I guess (inaudible) or
15 whatever (inaudible). This was something Pree did
16 (inaudible) he just wanted me there for like protection or
17 something. I wasn't -- I wasn't (inaudible).

18 OFFICER ROBERTSON: Mmm-hmm. Okay.

19 DARIUS THOMPSON: I was a bystander shot
20 (inaudible).

21 OFFICER ROBERTSON: Okay. Well let's talk about
22 that word "bystander." That's an interesting word.
23 Because another version that I heard was that Pree knew
24 that Michael had a gun and he knew that Michael wanted to
25 sell some stereo equipment and that you potentially wanted

1 to either buy it or hit a lick and that it was actually
2 you that held the knife to his throat.

3 DARIUS THOMPSON: No.

4 OFFICER ROBERTSON: Okay. Would there be any
5 reason why any -- your blood would be inside that car?

6 DARIUS THOMPSON: Hmm-mmm.

7 OFFICER ROBERTSON: Okay. So where were you when
8 you got shot?

9 DARIUS THOMPSON: I was basically (inaudible).

10 OFFICER ROBERTSON: Mmm-hmm.

11 DARIUS THOMPSON: (inaudible) I was walking
12 towards my steps.

13 OFFICER ROBERTSON: Mmm-hmm.

14 DARIUS THOMPSON: (inaudible).

15 OFFICER ROBERTSON: What kind of knife was it
16 that Michael Norton got cut with?

17 DARIUS THOMPSON: I'm not sure. Pree had it.

18 OFFICER ROBERTSON: Does Pree still have it?

19 DARIUS THOMPSON: I don't know.

20 OFFICER ROBERTSON: Okay. Would there be any
21 reason that knife's in your apartment? Would it be in
22 Stephanie's apartment? Because you're staying with her
23 still off and on, right?

24 DARIUS THOMPSON: (No audible response)

25 OFFICER ROBERTSON: You said you've never seen

1 Mike Norton at the apartment complex before that day, is
2 that so?

3 DARIUS THOMPSON: (No audible response)

4 OFFICER ROBERTSON: You said you heard two shots,
5 right?

6 DARIUS THOMPSON: (No audible response)

7 OFFICER ROBERTSON: Was it like boom and then 10
8 or 15 seconds and then boom, or was it like boom, boom?

9 DARIUS THOMPSON: Boom, boom.

10 OFFICER ROBERTSON: Okay. I'm just wondering
11 why he would shoot you at all if it was Pree that had the
12 knife. Why would he even shoot you?

13 DARIUS THOMPSON: I guess he thought that I was
14 there trying to fucking help Pree, which I wasn't. As
15 soon as I seen what was going on (inaudible). I've been
16 in -- I've been in too much bullshit (inaudible).

17 OFFICER ROBERTSON: And then the search warrant
18 also included a search of your cell phone, the AT&T HTC
19 cell phone 971-221-0765. That's your cell phone, right?

20 DARIUS THOMPSON: (No audible response)

21 OFFICER ROBERTSON: The one that you had with you
22 that day at the hospital?

23 DARIUS THOMPSON: (No audible response)

24 OFFICER ROBERTSON: Okay. And then we've got DNA
25 standards from you. This is just a copy of the search

1 warrant and the paperwork there. It's just not. This is
2 your phone log from your phone, okay? So we would
3 download a phone and analyze those. There are five calls,
4 one, two, three, four, five. This is Pree's number, okay?
5 This call happens at 11:05 p.m. the night of the shooting,
6 okay? You told me that you've never talked to him on the
7 phone or anything like that before, so I wonder why he has
8 your phone number in the first place. But then also the
9 time frame, this happens right after the shooting, so he
10 was even calling you when you were at the hospital.
11 Because you got to the hospital about, what, like 11:30, I
12 think?

13 DARIUS THOMPSON: 11:03.

14 OFFICER ROBERTSON: 11:03. Yeah, so all of these
15 were when you're at the hospital. So he's calling to
16 check on you because he knows you got shot, but he wasn't
17 the one with the knife that night. Okay? Will you
18 agree on that that Pree didn't have the knife?

19 DARIUS THOMPSON: I didn't have any weapons on me.

20 OFFICER ROBERTSON: But Pree didn't have any
21 weapons on him either, did he? He didn't have a knife.

22 DARIUS THOMPSON: I don't know what Pree had on
23 him. All I know --

24 OFFICER ROBERTSON: But Pree never held the knife
25 to Michael Norton's neck. Pree never had a knife -- Pree

1 *never had a knife and cut Michael Norton, that never*
2 *happened.*

3 *DARIUS THOMPSON: I don't know what -- what he*
4 *did, but I'm just (inaudible) to what I did and I was --*

5 *OFFICER ROBERTSON: So, I'm -- I'm just wondering*
6 *like were you guys trying to actually just straight up*
7 *kill Mike Norton because you didn't like him or was it*
8 *just a robbery gone bad?*

9 *DARIUS THOMPSON: I didn't -- I didn't know*
10 *(inaudible).*

11 *OFFICER ROBERTSON: Okay. So you're saying you*
12 *didn't want to kill him?*

13 *DARIUS THOMPSON: I don't know.*

14 *OFFICER ROBERTSON: Okay.*

15 *DARIUS THOMPSON: I don't know, (inaudible).*

16 *OFFICER ROBERTSON: Okay.*

17 *DARIUS THOMPSON: The only person who knew was*
18 *Pree.*

19 *OFFICER ROBERTSON: Uh-huh.*

20 *DARIUS THOMPSON: Mmm-hmm.*

21 *OFFICER ROBERTSON: Right.*

22 *DARIUS THOMPSON: So...*

23 *OFFICER ROBERTSON: And I talked to Mike Norton,*
24 *he said he's never met you either, he didn't know you*
25 *either, okay? He said he only knew Pree, and I knew that*

1 *Pree is kind of the middle man with all of this. Was*
2 *there anybody else there?*

3 *DARIUS THOMPSON: No.*

4 *OFFICER ROBERTSON: There wasn't a girl there?*

5 *DARIUS THOMPSON: (No audible response)*

6 *OFFICER ROBERTSON: You sure? Positive about*
7 *that?*

8 *DARIUS THOMPSON: Positive. Just me and Pree.*

9 *OFFICER ROBERTSON: Okay. Nobody else there had*
10 *a knife?*

11 *DARIUS THOMPSON: I didn't. I don't know what*
12 *Pree had. I can't vouch for him.*

13 *OFFICER ROBERTSON: But before you told me that*
14 *he had a knife and he held it to Michael Norton's neck,*
15 *and now you're saying that you don't know what he had.*

16 *DARIUS THOMPSON: No, I said that (inaudible) I*
17 *didn't know if he had it on him or not.*

18 *OFFICER ROBERTSON: Well, wouldn't he have it on*
19 *him if he pulled the knife out? Wouldn't the guy have a*
20 *knife on him if he pulled it out?*

21 *DARIUS THOMPSON: I'm just telling you what I*
22 *saw.*

23 *OFFICER ROBERTSON: Well, just let me -- let me -*
24 *- let me put this in your head, Darius, okay? When was*
25 *the last time you talked to Pree?*

1 DARIUS THOMPSON: The last time I talked to Pree?

2 OFFICER ROBERTSON: Before you got shot, the
3 night you got shot?

4 DARIUS THOMPSON: Mmm-hmm.

5 OFFICER ROBERTSON: Okay. That was the last time
6 you saw him and talked to him?

7 DARIUS THOMPSON: Because I never met the dude a
8 day in my life, why would I (inaudible).

9 OFFICER ROBERTSON: You never had met Pree?

10 DARIUS THOMPSON: No, I met Pree, but I never
11 (inaudible).

12 OFFICER ROBERTSON: No, but what I'm saying is if
13 Pree told us that, if Pree -- if Pree told us that you
14 were the one with the knife during the robbery, would that
15 surprise you?

16 DARIUS THOMPSON: It wouldn't surprise me.

17 OFFICER ROBERTSON: It wouldn't surprise you.
18 Okay. Do you think he's lying?

19 DARIUS THOMPSON: If I had a -- yeah. Yeah.

20 OFFICER ROBERTSON: And you got shot and you were
21 the one with the knife.

22 DARIUS THOMPSON: (inaudible) Pree had me for
23 backup (inaudible).

24 OFFICER ROBERTSON: Pree is tiny. Pree is tiny.
25 Do you think Pree could have pulled a knife -- and

1 actually, Mike Norton is bigger than Pree?

2 DARIUS THOMPSON: (inaudible) Pree. (inaudible).

3 OFFICER ROBERTSON: Then why did you lie from the
4 get-go when we first contacted you at the hospital? You
5 lied at the hospital, you lied to me again when you said
6 that there were cars that drove by and a car shot at you,
7 and then it's just today that you're telling me that it
8 was Michael Norton that shot you and you have his I.D. and
9 his social security card.

10 DARIUS THOMPSON: I don't want to -- I don't want
11 this dude to get in trouble for shooting me (inaudible).

12 OFFICER ROBERTSON: Why would you not want him to
13 get in trouble for shooting you?

14 DARIUS THOMPSON: Because he didn't know any
15 better, bro. He was just shooting at somebody --

16 OFFICER ROBERTSON: Did he not know any better or
17 was he defending himself because he was getting robbed?

18 OFFICER BROODER: Let's say that what you're
19 saying is true and that you genuinely felt for this guy's
20 situation and you understood why he shot --

21 DARIUS THOMPSON: Yeah, I do.

22 OFFICER BROODER: I understand that. A
23 reasonable person understands that they can tell the
24 police that and then choose not to be a crime victim,
25 which is the case?

1 DARIUS THOMPSON: I don't want the dude to get in
2 trouble for shooting at us because I understand Pree
3 brought him to my -- to my attention, you know what I'm
4 saying? Pree brought him around, you know what I'm
5 saying? I never once (inaudible).

6 OFFICER BROODER: Okay.

7 DARIUS THOMPSON: And I -- he didn't have nothing
8 that I wanted (inaudible) and I wasn't with him.

9 OFFICER ROBERTSON: Okay. So Pree knew this was
10 going to go down though? Pree knew that it was going to
11 -- you guys were going to hit a lick and take this guy's
12 stereo and shit and you were going to try to take his gun
13 too. Because Pree knew he had a gun, right?

14 DARIUS THOMPSON: Pree -- Pree told me
15 (inaudible). I said (inaudible), you know what I'm
16 saying?

17 OFFICER ROBERTSON: Mmm-hmm.

18 DARIUS THOMPSON: I said, well, (inaudible)
19 something good going.

20 OFFICER ROBERTSON: Yeah, you guys brought a
21 knife to a gun fight.

22 DARIUS THOMPSON: Not me. Because I didn't know
23 Pree was going to do this.

24 OFFICER ROBERTSON: But you just told me -- you
25 just told us that you knew it was going to be a robbery.

1 DARIUS THOMPSON: But I didn't know Pree was
2 going to -- going to pull out a knife, you know what I'm
3 saying? The whole time the dude was blowing his horn,
4 Pree, "Oh, I feel for you, Bro. I'd do anything for you."
5 You know what I'm saying? (inaudible)

6 OFFICER ROBERTSON: It sounds like Pree and Mike
7 actually -- I don't know if they go back a ways, but
8 they've known each other a while, right? And then all of
9 a sudden Pree's setting him up to get fucked and get
10 robbed.

11 DARIUS THOMPSON: I never (inaudible) I wasn't
12 even in his vehicle, you know what I'm saying? I never
13 once said (inaudible).

14 OFFICER BROODER: You just told us that Mike
15 Norton --

16 OFFICER ROBERTSON: You just told us Mike
17 Norton's I.D. is there.

18 DARIUS THOMPSON: Yeah, because it was brought to
19 me.

20 OFFICER BROODER: And I understand, that's what
21 you told us.

22 OFFICER ROBERTSON: Right. But Mike Norton told
23 us that you guys stole his wallet that had his I.D. and
24 his social security card and cash in it. And you just
25 told us that you set him up for a robbery.

1 DARIUS THOMPSON: I don't have any of his cash.

2 OFFICER ROBERTSON: None of his cash?

3 DARIUS THOMPSON: No.

4 OFFICER ROBERTSON: Did Pree get the cash?

5 DARIUS THOMPSON: There was only (inaudible).

6 OFFICER ROBERTSON: But the plan was, is that you
7 and Pree were going to rob the guy?

8 DARIUS THOMPSON: Pree told me (inaudible).

9 OFFICER BROODER: (inaudible). You know more
10 about these things than we do. I've never robbed anybody.
11 (inaudible) get the guy's gun. And if what you're telling
12 us is true that you wanted no part of it, why did you even
13 go out to that parking lot?

14 DARIUS THOMPSON: Because I wanted to see what
15 Pree was doing. (inaudible) I stood beside.

16 OFFICER ROBERTSON: Do you realize how lucky you
17 are, man?

18 DARIUS THOMPSON: I really, really realize that
19 and I don't want this dude to get in trouble, you know
20 what I'm saying?

21 OFFICER ROBERTSON: You could be dead.

22 DARIUS THOMPSON: I understand that. (inaudible)
23 Pree.

24 OFFICER BROODER: Your sister could be dead. It
25 wasn't more than a few weeks ago Officer Robertson and I

1 had to investigate a call where a little girl got shot
2 through an apartment wall from a parking lot.

3 DARIUS THOMPSON: (inaudible) a dumb ass and
4 thought I did, and I didn't.

5 OFFICER ROBERTSON: And the detectives that are
6 helping us out on this whole case and they're at the
7 apartment now searching it. Is there going to be any
8 stolen stuff in there? Like is there going to be any
9 stolen stereos, cell phones, anything like that? Any
10 stolen items in there? Any guns in there? Any drugs in
11 there?

12 DARIUS THOMPSON: (No audible response)

13 OFFICER ROBERTSON: Okay. Anything that police
14 would be interested in while they're searching that
15 apartment?

16 DARIUS THOMPSON: (No audible response)

17 OFFICER ROBERTSON: Anything that you think you
18 can get in trouble for?

19 DARIUS THOMPSON: (No audible response)

20 OFFICER ROBERTSON: Or that Stephanie can get in
21 trouble for?

22 DARIUS THOMPSON: I (inaudible) Safeway bag and
23 it was full of stuff.

24 OFFICER ROBERTSON: Like what kind of stuff, like
25 drugs or stolen stuff?

1 DARIUS THOMPSON: I don't know what's all in
2 that.

3 OFFICER ROBERTSON: Okay.

4 DARIUS THOMPSON: We left that in the apartment.

5 OFFICER ROBERTSON: What stuff is in the bag
6 though? Like is it --

7 OFFICER BROODER: Stuff from Safeway? Is it just
8 random stuff that happens to be in a Safeway bag?

9 DARIUS THOMPSON: (inaudible)

10 OFFICER BROODER: Okay.

11 (End of audio)

12 _____

13 MR. VASQUEZ:

14 **Q.** Okay. Officer Robertson, I want to ask you a quick
15 point. In the video Darius Thompson says that an unknown
16 individual named Maya brings him an I.D. and social
17 security card of Michael Norton. Were you ever able to
18 identify this Maya person?

19 **A.** No, we were not.

20 **Q.** And in the interview, do you ask him when this alleged
21 Maya individual spoke with Michael Norton?

22 **A.** Yes, we did.

23 **Q.** And what was Mr. Thompson's response?

24 **A.** Mr. Thompson told us that he spoke with Maya on the
25 day of his birthday, which is November 21st.

1
2 IN THE CIRCUIT COURT OF THE STATE OF OREGON
3 FOR THE COUNTY OF MULTNOMAH

4 STATE OF OREGON,) No. 14-CR-29087
5)
6 Plaintiff,) MOTIONS *IN LIMINE* TO EXCLUDE ITEMS
7) #1-50 OF DEFENDANT’S VIDEOTAPED
8 vs.) INTERVIEW
9)
10 DARIUS LESHAWN THOMPSON,) (Oral Argument Requested)
11)
12 Defendant.)

13 COMES NOW the defendant, by and through his attorney, Ryan Scott, and moves to exclude
14 items marked #1-50 of the attached transcript of defendant’s videotaped interview. The defendant
15 moves individually for each of the 50 pieces of transcript he is objecting to.

16 The handwritten portions in black represent items the prosecutor has indicated he will
17 voluntarily edit out of the video. The blue numbers #1-50 represent individual objections to
18 individual lines, largely based on prejudice, relevance or hearsay. For those portions of the
19 videotape where the interrogator expresses an opinion about what actually happened, defendant
20 relies primarily on *State v. McQuisten*, 97 Or App 517 (1989)(“From the context of the officer's
21 comment to defendant, the jury could reasonably have drawn the inference that the officer believed
22 the story of the complaining witness, bolstering her credibility in its estimation. Although it may be
23 correct that the officer's assertion was not offered to prove the truth of the matter asserted, the
24 prejudicial effect of the officer's opinion as to the credibility of the complaining witness outweighs
25 any probative value of defendant's response. See OEC 403.”)

26 DATED this 14th day of June, 2015.

/s/ Ryan Scott
Ryan Scott, OSB# 95526

SER - 29

Attorney for Defendant

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PAGE 2 – DEMURRER

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Certificate of Service

On June 14, 2015, a certified true copy of the attached MOTION IN LIMINE was e-mailed to Nathan Vasquez at Nathan.Vasquez@mcdca.us

/s/ Ryan Scott

Ryan Scott, OSB #95526
Attorney for Defendant

SER - 31

GRESHAM POLICE DEPARTMENT
1333 NW EASTMAN PARKWAY
GRESHAM, OR 97030

RECORDED INTERVIEW

GPD CASE NO. 14-712749

Page 1 of 35

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DATE AND TIME OF INTERVIEW: 11/26/2014 at 11:43 AM

INTERVIEW OF: Darius Thompson DT:

OTHER PERSONS SPEAKING: Detective Brad Robertson DPSST #50042 BR:
Officer Michael Brooder DPSST #49900 MB:

9 DT: [Unintelligible] first thing is just that I been, I been in pain man, I just, I finally got
10 on my feet, you know I'm sayin'?

11 BR: Yeah, just a second here. Oh what the hell? We'll talk about it okay? And then I'll
12 call him. What is wrong with this key? My key is not working on that for some
13 reason so I don't know if Brooder has a different one or what. Hold on for a sec,
14 let me go get Brooder's key. [Background Noises] Hey, can I borrow your uh,
15 your cuff key? Mine's not working in your cuffs, I don't know why.

16 DT: I just wanna get home.

17 BR: Go ahead and stand up here.

18 DT: I just wanna get home to my family for Thanksgiving man, this is my first
19 Thanksgiving.

20 BR: Yeah. Alright, hold tight for a second. So I'm gonna un-cuff this hand and then I
21 gotta re-cuff you to the wall there okay?

22 DT: Okay.

23 BR: Okay, have a seat.

24 [Background Noises]

25 DT: You think, you think [Unintelligible].

26 [Background Noises]

27 BR: I mean, I don't know, I mean, you might be cause of the holidays and stuff but I
28 mean, I really have no idea [Background Noises] until I talk to 'em but
29 [Background Noises] um, sit tight for a second here okay? And just so you know
30 this is being audio, video recorded now too since you're in an interview room,
31 okay? Um.

32 DT: I just wanna know that it's.

- 1 BR: Let, let me go see if I can get a hold of him right now and if I can, I'll talk to him
2 and let him know that you're here um, it's getting close to lunch time though, he
3 said he was just gonna go out to lunch. Um, and like I said you're being audio
4 and video recorded right now okay? This is a recording too, it's just a backup I
5 make and we'll talk in a second okay? So let me go call, it's Dane is his name
6 right?
- 7 DT: So [Unintelligible] now I'm really sorry man, I just been going through a lot, I got
8 shot man and fucking.
- 9 BR: Yeah.
- 10 DT: Dealing with everything.
- 11 BR: Did they get you pain killers for that di- and give me one second here just so it's
12 uh, November, is today the twenty-sixth?
- 13 DT: Twenty-six.
- 14 BR: Yeah November, twenty-sixth-two-thousand-fourteen, eleven-forty-three AM.
15 Officer Robertson DPSST five-zero-zero-four-two. So sit tight for a second, man
16 and I'll be right back okay? [Background Noises for 10 Seconds] I'm una give
17 Dan a call and be right back, okay? Officer Brooder is gonna sit with you for a
18 second.
- 19 MB: Do you want some water or anything man?
- 20 DT: It's just that man. I, I woulda went to see my PO man but I b- I was on pain killers
21 man, I, I couldn't get up bro, it was, I'm. [Background Voices] I'm sayin' like.
- 22 MB: Man, they're usually pretty understanding but you gotta, sometimes you gotta
23 reach out.
- 24 DT: I know I, e- I haven't even, I haven't been seen so I just, I been.
- 25 MB: Did he talk to you about that?
- 26 DT: Hmm?
- 27 MB: Did he talk to you about that? Did you guys deal with that?
- 28 DT: Hmm. It's just [Unintelligible] I'm going through, man. Hope my PO will
29 understand man, this is the only time I been out to see my family you know I'm
30 sayin' like, really out for the holidays and [Unintelligible].
- 31 MB: You said [Unintelligible] right?
- 32 DT: And it's, it's been hard times on my sister at the same time, three kids.
- 33 MB: Cause it, I'm, yeah. There's been a lot going on in our little small town.

1 DT: I just wanna be out on the holidays for my family, it's my first time, you feel me? I
2 never give my PO's any, any problems or anything I'm sayin'. It's just been fuck
3 man, I been dealing with this man, it's just, it's, it's hard moving on by yourself
4 man.

5 MB: Dane's probably never been shot so, he might not know what it's like. Try
6 explaining to him. [Pause for 21 Seconds]

7 BR: He's not answering his phone so I'm guessing he's uh, on lunch.

8 [Background Noises]

Cut out

9 DT: [Unintelligible] that I can, I, I will go see him today [Background Noises] you I'm
10 sayin' like.

11 BR: Uh, well let's, you said you wanted to talk a little bit about the shooting first,
12 [Background Noises] let's talk about that then I'll try calling him again but since
13 you're here and you're in custody I wanna read you this first okay? [Background
14 Noises] Just like I read you at the hospital. Uh, you have the right to remain
15 silent, do you understand that?

16 DT: Yes, sir.

17 BR: Anything you say can and will be used against you in a court of law. Do you
18 understand that?

19 DT: Yes, sir.

20 BR: You have the right to talk to a lawyer and have him present with you while you
21 are being questioned, do you understand that?

22 DT: Yes, sir.

23 BR: If you cannot afford to hire a lawyer one will be appointed free of charge to
24 represent you before any questioning if you wish one, do you understand that?

25 DT: Yes, sir.

26 BR: You saw the card that I read you your rights from?

27 DT: Yes, sir.

28 BR: Okay, you understand all your rights?

29 DT: Yes, sir.

30 [Background Noises]

31 BR: Okay, first and since we are getting recorded here let me get your, it's Darius
32 Thompson right?

- 1 DT: Yes sir.
- 2 BR: What's your middle name?
- 3 DT: Lashawn.
- 4 BR: Lashawn? How do you spell it?
- 5 DT: L, L-A-S-H-A-W-N.
- 6 BR: Okay and what's your date of birth again Darius?
- 7 DT: November twenty-first-eighty-nine.
- 8 BR: And you just had your birthday last week too, huh?
- 9 DT: Yes, sir I just have my.
- 10 BR: Okay.
- 11 DT: I w- I been in bed rest you I'm sayin'. [Unintelligible]
- 12 BR: Yeah, how's your leg?
- 13 DT: It's kinda feeling better you I'm sayin'.
- 14 BR: Yeah.
- 15 DT: I'm, I'm able to walk on it you I'm sayin'.
- 16 BR: Did they leave the bullet in or are you gonna?
- 17 DT: It's still in there [Unintelligible].
- 18 BR: It's still in there, uh, they talk about getting it out at all?
- 19 DT: [Unintelligible]
- 20 BR: Or did, did you go back for the follow-up appointment yet or?
- 21 DT: I haven't went back for my follow-up appointment or anything.
- 22 BR: Okay.
- 23 DT: [Unintelligible] I been, I been off my leg like for the last two days I barely, I'm
24 starting to walk man, I'm sayin'.
- 25 BR: Gotcha. Well, I appreciate you coming down here for all this too. Uh, hopefully
26 you can it sorted out. So you said that you wanted to talk more about the
27 shooting, that you might have more info about that?

- 1 DT: Uh, basically um, somebody was bragging [Unintelligible] in my apartment
2 complex.
- 3 BR: Somebody was what now?
- 4 DT: They were bragging about it and someone came to me, his name is Michael
5 Norton.
- 6 BR: Uh hu. He's bragging about staying there?
- 7 DT: No, bragging about he like shot me and I guess he shot somebody I'm sayin' and
8 basically he can get [Unintelligible].
- 9 BR: Who did that? Who brought that to you?
- 10 DT: A friend.
- 11 BR: A friend?
- 12 DT: Yeah.
- 13 BR: What's the friend's name?
- 14 DT: Mia.
- 15 BR: Mia. Have you ever, this guy Michael Norton, what does he look like?
- 16 DT: Uh, he got a tattoo on his face.
- 17 BR: Kay and have you ever met him before?
- 18 DT: No, sir.
- 19 BR: And you know that, cause originally you told me that you were walking and you
20 just got shot when you were walking along.
- 21 DT: Right and, and.
- 22 BR: And they told you that that was the guy that shot you?
- 23 DT: Uh hmm [Affirmative Response].
- 24 BR: How did they know that?
- 25 DT: Basically [Unintelligible] um, it was a twenty five.
- 26 BR: Uh hu.
- 27 DT: [Unintelligible] sayin'.
- 28 BR: Uh hu.

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- 1 DT: And that his son was going around telling everybody and it was this dude named
2 Pre [Unintelligible].
- 3 BR: P- ha- Pre, you said?
- 4 DT: Yeah, Pre [Unintelligible]
- 5 BR: Okay.
- 6 DT: I wa- it was crazy bro because my.
- 7 BR: Why would he wanna shoot you if you're just walking along?
- 8 DT: It's just a thing to do, I guess so, he's not black, he's white. You I'm sayin'.
- 9 BR: Uh hu.
- 10 DT: I don't think he has, has, has [Unintelligible] from him.
- 11 BR: But do you think he coulda seen if you were black or white that, cause you said
12 you wearing a, a black coat with your hoodie up.
- 13 DT: [Vocal Sounds]
- 14 BR: And it was dark outside.
- 15 DT: They could be on some [Unintelligible] or just trying to you know I'm sayin'.
- 16 BR: Yeah. Okay and who told you they said it was a twenty-five auto too? A- and this
17 is the same girl Mia that's telling you this? How do you know her?
- 18 DT: From the streets.
- 19 BR: And how does, how does she, she said and now who told her this stuff?
- 20 DT: Basically her s- his son and [Unintelligible].
- 21 BR: His son?
- 22 DT: I'm just like.
- 23 BR: Do you know his son's name?
- 24 DT: Hu umm [Negative Response].
- 25 BR: Okay and you said this guy has got tattoos? Like his, who to-, how do you know
26 that?
- 27 DT: Um, she brought the ID to me.
- 28 BR: His ID?

- 1 DT: Uh hmm [Affirmative Response].
- 2 BR: You still have it?
- 3 DT: Yes, sir.
- 4 BR: Okay. Is it at the apartment? Okay, does he, anything else of his there? No,
5 okay. Um, that's crazy man. Um, so weird why his stuff would be there.
- 6 MB: Do you know how she got a hold of that stuff?
- 7 DT: She was [Unintelligible] but she's, she's on drugs [Unintelligible]
- 8 MB: Chillin' with Mike?
- 9 BR: Yeah. Is she uh, like do you know her phone number? Is there any way we could
10 talk to her to talk to her about this guy?
- 11 DT: I don't know her phone number or anything.
- 12 BR: Okay.
- 13 DT: She just came to my house and [Unintelligible]
- 14 BR: A- and her name is Mia?
- 15 DT: Uh hmm [Affirmative Response].
- 16 BR: I ha- [Unintelligible] M-A-Y-A maybe or do you know how she spells it?
- 17 DT: No, sir.
- 18 BR: Is she a white or black girl or Hispanic?
- 19 DT: She's black.
- 20 BR: Black? About how old is she?
- 21 DT: About twenty-one.
- 22 BR: Twenty-one?
- 23 MB: I'm sorry, do you know her, you said you know her from the streets here, from the
24 streets or from the complex?
- 25 DT: From the complex.
- 26 MB: Oh okay. [Unintelligible Simultaneous Speaking]
- 27 BR: So does she live in the apartments too?

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- 1 DT: I'm not sure.
- 2 BR: Okay but she hangs out, you've seen her there?
- 3 DT: But the thing about it is though, I been kinda like, kinda paranoid to come outside
4 too knowing that he stays in the apartment complex too I'm sayin'.
- 5 BR: Who stays there?
- 6 DT: Um, Michael, Michael Norton I'm sayin'.
- 7 BR: How do you know he stays there?
- 8 DT: She said that's who, uh, he stays in R. Lived in R.
- 9 BR: Okay. [Background Noises] With anybody else?
- 10 DT: I'm not sure.
- 11 BR: Kay.
- 12 [Pen Clicking]
- 13 MB: Do you know when she talked to him?
- 14 DT: Mmm she said probably about my um, the day my birthday.
- 15 MB: The day of your birthday.
- 16 [Pen Clicking]
- 17 DT: Uh hmm.
- 18 MB: That's the twenty-first.
- 19 BR: Let me, try to refresh my memory, let's go back a little bit cause maybe I can
20 think of som'm that'll, that'll make more sense to me. Let's go back to when, you
21 know, you said you left Shari's that night and you were walk and you were
22 playing video poker there?
- 23 DT: And I walked home.
- 24 BR: And about what time was that?
- 25 DT: Um, say the shooting happened around uh, what eleven.
- 26 BR: Eleven? And you were walking home from Shari's back to the apartments.
- 27 DT: [Unintelligible]

- 1 BR: At twenty-seven-hundred West Powell and did you stay on Powell the whole
2 time? Did you go off of Powell at all? No other side streets, I mean, you stayed
3 on Powell the whole time and then what happened as you were walking?
- 4 DT: Um, [Unintelligible] cars drove by.
- 5 BR: Uh hmm.
- 6 DT: [Unintelligible] cars and I heard two gunshots.
- 7 BR: Okay.
- 8 DT: And the second one I felt [Unintelligible] and I ran home.
- 9 BR: Okay, about how far do you think you end up running from there?
- 10 DT: Uh, say probably around I was like at least thirty, forty feet away from my, my
11 home. Because.
- 12 BR: Only that far or farther?
- 13 DT: Yeah because my house is right there on Powell.
- 14 BR: Okay, cause originally I thought you had told me that you were closer to like e- I
15 think you said like maybe a hundred and ninetieth and Powell or something like
16 that.
- 17 DT: Yeah, that's where.
- 18 BR: Farther away.
- 19 DT: That's where a hundred and ninetieth and Powell but.
- 20 BR: Uh hu.
- 21 DT: Twenty-seven-hundred block is the same thing on [Unintelligible]
- 22 BR: Okay.
- 23 DT: And I'm right like close to the graveyard right there.
- 24 BR: Okay.
- 25 DT: And.
- 26 BR: So you were pretty close to your house already. Okay um, and did you think you
27 got shot then or did you just hear the shots and then it wasn't until you got to the
28 apartment that you realized?
- 29 DT: No, I heard the shots and then I felt a thud in my leg and I took off running.

- 1 BR: Kay.
- 2 DT: I never been shot before so I don't, I didn't know what it was I'm sayin'.
- 3 BR: Okay.
- 4 DT: Muscle spasm.
- 5 BR: Okay.
- 6 DT: So automatically I just took off.
- 7 BR: And what, what did the cars look like?
- 8 DT: Uh, it was uh, like a grayish Impala and um, a black Buick.
- 9 BR: Okay a black Buick and a grayish Impala. You're sure on the make and models?
- 10 DT: I'm not sure on the make and on the models.
- 11 BR: Okay. You said something else about some guy named Pre, tell me how he
12 enters into this?
- 13 DT: I guess he, he was the one who knows the guy or whatever.
- 14 BR: Pre knows the guy? Have you ever, do you know what Pre looks like?
- 15 DT: Not really.
- 16 BR: Do you think you'd recognize him if I, if you saw a picture of him?
- 17 DT: Probably not.
- 18 BR: Okay, would there any be reason, like have you ever talked to him on the phone
19 or anything like that before? Either you can remember, I mean, okay.
- 20 MB: It's just that everybody else in the mix seems to be around that [Unintelligible
21 Simultaneous Speaking]
- 22 BR: Yeah, kind of around that.
- 23 MB: Maybe if you, if you can give us any info it might help us figure out who Pre is, I
24 mean.
- 25 BR: Nkay uh, what does he look like? Is he a white guy, black guy, Hispanic guy?
- 26 DT: White guy.
- 27 BR: White guy. Kay, what color uh, do you remember like hair or eye color at all?
- 28 DT: No, sir.

- 1 BR: Um.
- 2 DT: I just see him around but I don't know [Unintelligible] I really don't associate with
3 him.
- 4 BR: Okay, he rides a bike though? Does he have any tattoos, scars, goatee.
- 5 DT: I'm not sure.
- 6 BR: Shaved head, anything like that?
- 7 DT: I'm not sure.
- 8 BR: Not sure. [Background Noises] Alright, [Pen Clicking] the other thing I wanted to
9 cover too is uh, when we first contacted you at the hospital you handed us an ID
10 for Marcus Tyler and you showed that ID to the nurse and then to Officer Harris-
11 Myer. Now, Marcus Tyler, that's your cousin? Is that right?
- 12 DT: No, sir.
- 13 BR: No? Is he any relation to you?
- 14 DT: I don't know, I just found his ID.
- 15 BR: You found his ID? Okay and we talked about this at the hospital and it's not that
16 big of a deal but you understand by like using that ID to get medical services
17 technically you're defrauding the hospital and that's a crime, you understand
18 that?
- 19 DT: I apologize.
- 20 BR: Okay, alright. Uh, so look dude this is, this is kind of the issue that I'm, I'm
21 curious about here Darius, is that, well first let's, let's talk about this guy Pre for
22 just a second okay? So I'm pretty sure that you know who he is um, I'm sure
23 you've seen him before but is this him?
- 24 [Background Noises]
- 25 DT: Yeah.
- 26 BR: This is Pre?
- 27 DT: [Vocal Sounds]
- 28 BR: Okay, so that's Pre. [Background Noises] And does this look like the guy?
- 29 DT: That's him, that's the ID I have.
- 30 BR: This is him?
- 31 DT: [Vocal Sounds] That's the ID I have.

- 1 BR: Okay well.
- 2 MB: Just out of curiosity, cause we don't know, the, the picture on the ID looked
3 [Unintelligible Simultaneous Speaking]
- 4 BR: Was the picture the same as this guy?
- 5 DT: [Unintelligible]
- 6 MB: Tattoos and everything.
- 7 DT: [Unintelligible] dude so it's a little bit more.
- 8 BR: Okay.
- 9 DT: Tattoos.
- 10 MB: He has more tattoos? Oh okay.
- 11 BR: Okay and this is, you said his name is Michael Norton?
- 12 DT: Uh hmm [Affirmative Response].
- 13 BR: Okay and the other guy's name, you know him as Pre, do you know his real
14 name?
- 15 DT: Hu umm [Negative Response].
- 16 BR: Okay but he rides a bike. Okay. [Background Noises] Alright, oh and this is uh,
17 that's the ID you had right? That's Marcus? Yeah, okay. Alright um, let's see here
18 [Pen Clicking]. [Vocal Sounds] Let's, let's back up a little bit about this, Darius
19 and let's kinda clarify some things. Because we're getting told a lot of different
20 things about what happened that night and since that shooting has occurred
21 we've talked to a lot of people ourselves cause we were trying to figure out who,
22 who did it, alright? And uh, I'm una tell you right now I, I know that what you're
23 telling me is not what happened at all okay? Um, I know that something else
24 happened that night and I'd rather get better facts about what actually happened
25 that night and hoping you can fill me in okay? So why don't you tell me more
26 about this guy Mike, how did you initially meet him?
- 27 DT: I never really met him, Pre knows him.
- 28 BR: Okay. Did Pre introduce you to Mike?
- 29 DT: Hu umm [Negative Response].
- 30 BR: Okay, w- how did you come to know Mike?
- 31 DT: Mmm this is what happened, I really didn't wanna be involved [Unintelligible]

- 1 BR: Uh hmm.
- 2 DT: But Pre tried to rob him.
- 3 BR: Okay.
- 4 DT: And I ran off.
- 5 BR: Okay.
- 6 DT: And as he was trying to rob him dude [Unintelligible] and just started shooting.
- 7 BR: So, so Mike had a gun.
- 8 DT: Uh hmm and I ran home. I didn't.
- 9 BR: Okay.
- 10 DT: I didn't know the dude and.
- 11 BR: What did Pre do r- do when he was trying to rob him? Like how was Pre trying to
12 rob him?
- 13 DT: [Unintelligible] He put a knife to him.
- 14 BR: Pre did? Kay what kinda, what did it look, what kinda knife?
- 15 DT: He basically, he basically [Unintelligible] Pre [Unintelligible] and he said I um, got
16 homeboy out here and I guess the dude had some stereo equipment or som'm
17 like that.
- 18 BR: Uh hmm.
- 19 DT: I don't have a car.
- 20 BR: Uh hmm.
- 21 DT: So walked up to him, think [Unintelligible] dude was on a cell phone, dude was
22 saying Pre [Unintelligible] he was in the passenger side seat.
- 23 BR: Who was in the passenger side?
- 24 DT: Pre.
- 25 BR: Pre was?
- 26 DT: [Unintelligible] and Pre basically took out a knife was like, and he was like Pre I
27 do anything for you man, I kill for you, so Pre got [Unintelligible] car, I was still
28 outside the car and dude got out the driver's seat [Unintelligible] I guess Pre got
29 shit or whatever and then dude [Unintelligible] whatever and dude shot as I was

1 walking [Unintelligible] I'm sayin' and [Unintelligible] and the thing about it is this
2 was something Pre had [Unintelligible].

3 BR: Uh hmm.

4 DT: [Unintelligible] he just wanted me there for like protection som'm and I'm, I was
5 just, I wasn't in clarification of none of this I'm sayin'.

6 BR: Uh hmm. Okay.

7 DT: And I was a bystander shot I'm sayin' and.

8 BR: Okay let's, let's talk about that word bystander, that's an in- interesting word. L-
9 cause another version that I heard was that uh, [Background Noises] Pre knew
10 that Michael had a gun and he knew that Michael wanted to sell some stereo
11 equipment and get rid of it and that, that you potentially wanted to either buy it or
12 a hit a lick and that it was actually you that held a knife to his throat.

13 DT: No.

14 BR: Okay. Would there be any reason why any of your blood would be inside that
15 car?

16 DT: Hu umm [Negative Response].

17 BR: Okay so where were you when you got shot?

18 DT: I was basically like close to my steps.

19 BR: Uh hmm.

20 DT: By a grey um, uh, s- um, golden van.

21 BR: Uh hmm.

22 DT: [Unintelligible] right there and I was walking towards my steps.

23 BR: Uh hmm.

24 DT: It was on the outside of, I'm sayin' dude was on the opposite side [Unintelligible]

25 BR: Okay.

11:59:24

26 DT: Two shots and I felt it, I mean, I [Unintelligible] [Background Noises] I'm sayin'.

18:18

27 BR: Okay cause the, the reason that I, it's, it's hard for me to, to wrap my head
28 around all this is because there have been other people in the past that have
29 talked about you holding a knife and threatening them. So that's like, kinda like e-
30 like you've done that before, that's your thing.

31 MB: [Unintelligible] a pattern.

Leave

In



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out

1 BR: Yeah.
2 DT: Never once I'm sayin'. I didn't.
3 BR: Well let's, let's yeah, it has happened once and you actually ended up getting
4 detained for it by Officer Van Beek, it was another issue about a cell phone. Do
5 you remember that?
6 DT: Yeah but I n- I was never charged with any.
7 BR: No I know, I know you weren't charged with it that day but you remember the
8 incident right?
9 DT: And they tried to say I held a knife and I, I didn't.
10 BR: Okay.
11 DT: And.
12 BR: But they actually, didn't he recover a knife that day?
13 MB: From behind the TV.
14 BR: From behind the TV. He recovered a knife that day.
15 DT: No, I never, I never held a knife to him. [Unintelligible] I basically.
16 BR: So why, but why w- why would anybody talk about a knife that day if nobody ever
17 held a knife? People don't just make up stuff about knives.
18 DT: I never had a knife that day, I'm sayin'.
19 BR: Uh, what kind of knife was it that Officer Van Beek got that day? Was it like a
20 steak knife or?
21 DT: Hu umm [Negative Response] it was just like um.
22 BR: This was like a, was it a folding knife?
23 DT: Hu umm [Negative Response] it's like, like a hunting knife almost.
24 BR: A hunting knife? Okay.

12:00:41

19:36



25 [Vocal Sounds]

26 BR: Uh, what kinda knife was it that Michael Norton got uh, cut with?

27 DT: I'm not sure. Pre had it.

28 BR: Kay.

Leave
i-



1 DT: [Unintelligible]

2 BR: Does Pre still have it?

3 DT: I don't know.

4 BR: Okay, would there be any reason that that knife's in your apartment?

5 DT: Hu umm [Negative Response].

6 BR: Would it be in Stephanie's apartment? You, cause you're staying with her still off
7 and on, right?

8 DT: [Vocal Sounds]

9 BR: No? Okay cause I, I called Marlo when I called Stephanie this morning trying to
10 get in touch with you and Stephanie said that you just left this morning when I
11 talked to her. So were you staying there last night? Not that it matters one way or
12 the other, I'm just wondering if you were staying at her place. No? Kay. Um.

Leave
in

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2

12:01:26

26:18

13 DT: [Unintelligible Simultaneous Speaking]

14 BR: Well and then there's this thi- this other deal too dude. Like, you've had a run in
15 with a couple a things. There was like another guy that said that you got popped
16 in the face. That y- you punched him in the face and took his wallet.

17 DT: [Vocal Sounds]

Cut out

↓

18 BR: Do you remember anything about that?

19 DT: Mmm yes and, and the officer verified the case that I didn't.

20 BR: Okay do you remember, who was the guy that got punched in the face?

21 DT: [Unintelligible]

22 BR: Do you know him from the apartment complex?

23 DT: [Vocal Sounds] Well, not really like we don't associate like that.

24 BR: You don't, I know you don't hang out with him but you know.

25 DT: Right now we- right now we're cool friends.

26 BR: Yeah.

27 DT: Y- I'm sayin'. He apologized to me and everything and told me hey, man I'm
28 sorry. I'm sayin'.

29 BR: Is he a white guy, black guy, Hispanic guy?

- 1 DT: [Unintelligible]
- 2 BR: He's a white guy? He.
- 3 MB: We're not trying to trick you, we're trying to establish if you're aware of the guy
4 we're talking about.
- 5 BR: Yeah, do you know his name?
- 6 DT: I don't know his real name.
- 7 BR: Do you know about how old he is?
- 8 DT: Like twenty, twenty-one.
- 9 BR: I- is there an older guy?
- 10 DT: Hu umm [Negative Response].
- 11 BR: Cause this guy is like almost fifty years old that got punched.
- 12 DT: No.
- 13 BR: So who's the twenty-one year old guy that you punched?
- 14 MB: Or that said you punched him, I mean.
- 15 BR: You know, we're just trying to sort out, I mean, there just seems to be a lot of
16 cases that occur at that apartment complex where your name ends up popping
17 into 'em, Darius.
- 18 MB: Specifically with some kind of violent [Unintelligible].
- 19 BR: Yeah, guys getting punched, a woman that had a knife pulled on her, this guy
20 Mike Norton that got cut. Um, n- and how do you know like when you, when you
21 said that Pre robbed him at knife point, did Pre actually cut him? Or he just had
22 the knife out?
- 23 DT: I'm not sure you I'm sayin'. I, basically I walked away from the car when he in, in
24 pursuit of him doing what he was doing.
- 25 BR: Uh hmm.
- 26 DT: I'm sayin' and I walked away.
- 27 MB: And you never got in the car you said.
- 28 DT: Never.
- 29 MB: So your fingerprints.

- 1 DT: Nothing.
- 2 MB: Hair.
- 3 BR: Okay.
- 4 MB: [Unintelligible] be in the car.
- 5 BR: Well if, if nothing's like that in the car kay w- we, let's swab your cheeks and get
6 your DNA okay so we can have that as comparison. You got that stuff and get
7 that outta the way.
- 8 MB: No offense, I put gloves on [Unintelligible]
- 9 DT: I un- I understand.
- 10 MB: I'm not saying you're dirty and I'm actually not gonna do it, you can do it yourself
11 [Unintelligible Simultaneous Speaking]
- 12 DT: Man, [Unintelligible] honest.
- 13 UNK: Well.
- 14 DT: I, I didn't want anything to do with this I'm sayin' and.
- 15 BR: Well, and I just think there's a lot a stuff to get sorted out um, and that's, that,
16 that's part of the reason you talked about the shooting, you know, and get, I
17 want, what I wanna do right now is I wanna go try and call [Background Noises]
18 um, your PO again to see if he's done with lunch and I'm just gonna let him know
19 that we're still talking. I'm una let Officer Brooder finish this up and I'll be back in
20 a, in a couple a minutes okay, just give me four or five minutes here.
- 21 DT: Can you, can you please tell him like I'm going through a lot man and I'm.
- 22 BR: Yeah, I know and it's the holidays too man.
- 23 DT: [Unintelligible]
- 24 BR: It's Thanksgiving tomorrow.
- 25 DT: I'm.
- 26 BR: Yeah.
- 27 DT: Cooperative and, and.
- 28 BR: Yep.
- 29 DT: I will do anything, anything he ax me to do, just give me this chance to do this
30 opportunity because I'm, I been kinda, I been kinda scared lately I'm sayin'?

1 BR: Yeah.

2 MB: Yeah you got shot man [Unintelligible].

3 BR: Yeah, yeah. I'll talk to him okay? Hang tight for a second. Hopefully he answers
4 this time.

5 [Background Noises for next 2 Minutes and 45 Seconds]

6 MB: Alright so [Background Noises] the way they ask that you do this is [Vocal
7 Sounds] you do twice, two swabs, hold 'em together. One side cheek do like up
8 and down like ten times, up in the gum line and stuff. Do it with these two and
9 then you do these two on the opposite side. Doesn't matter which one is which,
10 just do opposite sides. Thank you. [Pause for 24 Seconds] Same thing just do
11 the other side of your cheek. [Pause for 34 Seconds] So that night we talked to
12 you we gave you a card and a case number everything, do you still have that by
13 chance? I'll give you another one but just so you know. Oh man, everything's
14 gonna stay under that case number for the Gresham Police so obviously we're
15 taking samples of your DNA, it's all the same case file and everything like that
16 alright. [Pause for 18 Seconds] Not that you would but I'm just gonna close this
17 up cause it's got other people's personal info in it. Not that you would or anything
18 like that. Alright, hang tight for a second.

Cut out

19 [Background Noises for 2 Minutes and 22 Seconds]

20 BR: Alright, [Background Noises] Robertson back in interview at twelve-oh-nine PM
21 November twenty-sixth. So you got a DNA done with Officer Brooder here?

22 DT: Yes, sir. 12:09:51 28:44

23 BR: Okay um, you said you've never seen Mike Norton at the apartment complex
24 before that day, is that right?

25 DT: [Unintelligible]

26 BR: No? Okay. [Unintelligible] Um, [Background Noises] you said you fa- you heard
27 two shots right? Was it like boom and then ten or fifteen seconds and then boom
28 or was it like boom boom?

29 DT: [Unintelligible] boom boom.

Leave in

30 BR: Okay. What t- I'm just wondering why he would shoot you at all if it was Pre that
31 had the knife? Why would he even shoot you?

32 DT: He uh, I guess, I guess he felt like I was there trying to fucking help Pre, which I
33 wasn't, you know. Soon as I seen what was going on.

34 BR: Uh hu.

12:10:43

29:36

1 DT: [Unintelligible] Pre in the front seat [Unintelligible] and I walked back towards my
2 apartments, you know I'm sayin'. I been in, I been in too much bullshit as it is
3 over there I'm sayin'. [Unintelligible]

4 BR: Well let me, let me tell you what else is going on right now, Darius. So, as part of
5 our investigation uh, and this is a copy, we'll give it to ya. Uh, we applied for and
6 received a search warrant okay, to search your apartment for items of i- of
7 identification for Marcus Tyler, Michael Norton, for Michael Norton's social
8 security card, for Michael Norton's California ID card, for Bradley g- Graham's
9 identification, for Bradley Graham's debit card, for Melissa Workinson's uh, black
10 and white Samsung Galaxy S4, now that phone, the day that Officer Van Beek
11 was there and that phone was taken he found the uh, sim card, he called and the
12 sim card ended up in somebody else's phone but he never found the phone.



13 DT: That um, they searched my apartment for that and they never.

14 BR: They never found it right?

Cut out

15 DT: [Unintelligible]

16 BR: But they found the sim card from the phone.

17 MB: [Unintelligible]

18 BR: Yeah and we're also looking in that apartment at twenty-seven-hundred West
19 Powell apartment D-two-two-six um, for knives, bladed weapons, clothing with
20 blood on it, gunpowder residue or other trace evidence, other items taken from
21 Michael Norton, like is that stereo gonna be in your apartment?



22 DT: No, sir.

12:12:01

23 BR: The amplifier or the fifteen inch kicker?

~~29:36~~ 30:54

24 DT: No, sir.

25 BR: That's not in your apartment? Okay and then uh, the search warrant also
26 included a search um, of your cell phone uh, the AT and T, HTC cell phone nine-
27 seven-one-two-two-one-zero-seven-six-five. That's your cell phone right? The
28 one that you had with you that day at the hospital. Okay and then we got DNA
29 standards from you. So this is just a copy of the search warrant and the
30 paperwork there. So I, I, I think what you told us has chunks of truthfulness to it
31 but I don't, I know it's not the whole story actually, I mean, I know it's not. It's, it's,
32 it's just not um, this is your phone log from your phone okay so when we do a
33 download a phone and analyze those there are five calls, one, two, three, four,
34 five. This is Pre's number okay? This call happens at eleven-oh-five PM the night
35 of the shooting okay? You told me that you've never talked to him on the phone
36 or anything like that before so I, I wonder why he has your phone number in the
37 first place but then also the time frame, this happens right after the shooting so



3

Leave

IN

1 he was even calling you when you were at the hospital because you got to the
2 hospital about what like eleven-thirty I think?

3 MB: Eleven-oh-three.

4 BR: Eleven-oh-three. Yeah, so all these are when you're at the hospital. So he's
5 calling to check on ya because he knows you got shot but [Background Noises]
6 [Pre wasn't the one with the knife that night. Okay, can we agree on that, that Pre
7 didn't have the knife?] 4

8 DT: Yeah, I didn't have any weapons on me.

9 BR: [But Pre didn't have any weapons on him either. Did he? He didn't have a knife.] 5

10 DT: M- I don't know what did Pre have on him. All I know.

11 BR: [But Pre never held a knife to Michael Norton's neck. Pre never had a knife, Pre
12 never had a knife and, and cut Michael Norton. That never happened.] 6

13 DT: I don't know what, what he did but I'm just [Unintelligible] to what I did and that
14 was [Unintelligible Simultaneous Speaking]

15 BR: [Right and that's what I wanted to, okay so [Vocal Sounds] as a police officer
16 investigating this, a lot a different things can happen. During a robbery, if a guy
17 commits a robbery with a weapon, okay, it's just a robbery, okay, it stays a
18 robbery. However, if in the course of in the investigation the cops hear that it
19 wasn't a robbery like that guy was actually trying to kill the person, it would be
20 something more like an attempted murder charge okay, so it's been my
21 experience generally speaking guys do more time for an attempted murder
22 charge when they're trying to kill some ber- somebody versus a robbery charge.
23 A robbery charge is usually less time okay? So I'm, I'm just wondering like were
24 you guys trying to actually just straight up kill Mike Norton cause you didn't like
25 him or was it just a robbery gone bad?] 7

26 DT: I didn't, I didn't know the dude, I'm sayin'.

27 BR: Okay. So you're saying you didn't wanna kill him.

28 DT: I don't know.

29 BR: Okay.

30 DT: [Unintelligible] I don't know, I'm sayin'.

31 BR: Nkay.

32 DT: The only person who knew was Pre.

33 BR: Uh hu.

- 1 DT: I'm sayin'.
2 BR: Right.
3 DT: So.
4 BR: And that's right, I've talked to Michael Norton, he said he's never met you either,
5 he didn't know you either. Okay, he said he only knew Pre, I knew that, that Pre
6 is kinda the middle man with all this. Was there anybody else there? There
7 wasn't a girl there?
8 DT: [Vocal Sounds]
9 BR: You sure? You positive about that?
10 DT: Positive just me and Pre.
11 BR: Okay. Nobody else there was, had a knife? Cause I, I'm telling you I know Pre
12 didn't have a knife.] 8
13 DT: I didn't, I don't know what Pre had. I can't vouch for him.
14 BR: But before you told me that he had a knife and he held it to Michael Norton's
15 neck and now you're saying that you don't know what he had.
16 DT: No, I said that he was [Unintelligible] and I thought, I didn't know if he had it on
17 him or not, I'm sayin'.
18 BR: Well, wouldn't he have it on him if he pulled the knife out? Wouldn't a guy have
19 in, a, a knife on him if he pulled it out? But Pre never had a knife.] 9
20 DT: [Unintelligible] I'm just telling you what I saw. [Unintelligible Simultaneous
21 Speaking]
22 BR: Well, let, let me, let me, let me put this in your head Darius okay? When was the
23 last time you talked to Pre?
24 DT: The last time I talked to Pre?
25 BR: Before you got shot, the night you got shot?
26 DT: Uh hmm [Affirmative Response].
27 BR: Okay, that was the last time you saw him and talked to him?
28 DT: [Unintelligible]
29 BR: Or have you s-, have you talked to him since then? Okay, cause we've actually,
30 other gang officers, we contacted Pre and we talked to him.] 10
31 DT: [Unintelligible Simultaneous Speaking]

1 BR: What, what do you think he told us?

2 DT: I don't know.

3 BR: Would it surprise you if he said yeah, we were there uh, there was a struggle for
 4 a gun, Darius had a knife, I didn't get shot, I thought Darius got shot so I was
 5 trying to get in touch with him to see if he was okay but I never had a knife.
 6 Would it surprise you if he told police that?

7 DT: [Vocal Sounds] I wouldn't be surprised if he did.

8 BR: So that wouldn't surprise you if he said that you had the knife?

9 DT: It wouldn't, it wouldn't surprise me.

10 BR: Okay.

11 DT: Because I never met this dude a day in my life, why would I wanna I'm sayin'.

12 BR: You never met Pre?

13 DT: No I, I met Pre but I never, I'm sayin'.

14 BR: No but what I'm saying is if, if Pre told us that, if Pre, if Pre told us that you were
 15 the one with the knife during the robbery would that surprise you?

16 DT: It wouldn't surprise me.

17 BR: It wouldn't surprise you okay. *Leave*

18 DT: Hu umm.

19 BR: Do you think he's lying? *in*

20 [Background Noises] *12:17:06* *36:00*

21 DT: I'm, I'm, if I had [Unintelligible] damn.

22 BR: Well and then let me show you something else that makes me wonder. It's, it's
 23 why I asked you your uh, your middle name just to me sure. You've got a
 24 Facebook page right? You've got a Facebook page and it's under uh, N-O
 25 Lashawn Thompson, that's yours? So let me read you one of the comments on
 26 your Facebook. It says, say my GB's I'm in Portland killing these divinity, and I'm
 27 not sure what you mean by that, then you say lol and then you say I have robbed
 28 every pussy niggardly and fake bitch out here. How many ro- how many
 29 robberies have you committed? Are you we gonna have a bunch more people
 30 come and tell us that you've robbed them? We've got three people here, we've
 31 got Mike Norton that's got a cut hand and a cut neck.

32 DT: [Unintelligible Simultaneous Speaking] *cut out*

11
12
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24



1 BR: We've got the woman that you took her cell phone from and then she challenged
2 you about it and you pulled a knife on her and then we've got the guy that you
3 got punched in the face and you took his wallet. Are there any other robbery
4 victims out there that are gonna come forward and talk about this?

5 DT: I'm I'm just, I was just making it all [Background Noises] up. Was trying to be,
6 trying to be [Background Noises] in.

7 BR: The boss, you call yourself Da Boss.

8 DT: I'm just, I was just trying to fuckin' make myself bigger than what the fuck I am
9 I'm sayin'. Like I don't, come on man.

10 BR: Well and I asked you at the hospital if you were a gang member and you said
11 you weren't and yet there's, there's stuff all over your Facebook page where
12 you're, you're clearly bangin'.

13 DT: Yeah, but you asked me if I was a Sixties.

14 BR: Okay, but you're not a Sixties. What gang are you a member of?

15 DT: I'm GD [Unintelligible] but I don't bank GD [Unintelligible] out here man, I just, I
16 stay to myself.

17 BR: Cause [Unintelligible] a bunch a GD's from Mississippi are still BS-ing with you
18 on your, on your Facebook page back and forth. I mean, and not that that
19 matters, I don't care if you talk to gang members personally, I mean, that doesn't
20 matter to me but what does matter to me is the fact that, like I said, I'm pretty.

12:18:49

Start Here

37:44

cut out ↑

21 DT: [Unintelligible Simultaneous Speaking]

22 BR: I'm pretty convinced that you were the one that had a knife that night and it was a
23 robbery gone bad and there was a struggle for a gun that Mike had on him.

25

24 DT: [Unintelligible]

25 BR: And you got shot and you were the one with the knife.

Leave in

26

26 DT: No, I didn't have a knife, sir. [Unintelligible] Pre had me there for backup. I'm
27 sayin' [Unintelligible].

28 BR: Pre is tiny. Pre is tiny, do you think Pre could've pulled a knife and actually, Mike
29 Norton is bigger than Pre.

27

30 DT: Basically I think he was gunnin' at Pre and the thing is.

31 BR: But Pre was never in the passenger seat of the car, you were in the passenger
32 seat next to Mike Norton in the car. Would there be any reason that your
33 fingerprints would be in the car? None.

-28

1 DT: None.

2 BR: None okay.

12:19:37

38:30



3 DT: Take my fingerprints [Unintelligible]

4 BR: Well, you've already been fingerprinted when you've been uh, arrested before so
5 I'm sure they'll be on file.

6 DT: [Unintelligible Simultaneous Speaking]

Cut out

7 BR: And they're gonna, they're gonna take your fingerprints again today. Um, but I'm
8 not gonna take your fingerprints right now.

9 DT: I have no problem giving my fingerprints, sir. I, I was not in the passenger seat.

Cut out

10 MB: It's just we just don't need to, we already have 'em.

11 BR: Yeah.

12:19:54

38:47



12 MB: We just already have 'em.

13 BR: Darius what I'm saying is like, like I already, like I already posed it to you man
14 there, there are gonna be people that are gonna look at this whole case and
15 they're gonna wonder to themselves [Background Noises] was he trying to kill
16 Mike Norton because he was pissed off at him or som'm like that or was it just a
17 robbery gone bad. Cause I know, I know that Mike Norton wasn't there to rob
18 anybody, Mike Norton was there to try to sell some stereo equipment. Mike
19 Norton was scared when he had a knife pulled on him and Mike Norton pulled a
20 gun out and shot because he thought he was gonna get really hurt. He told me
21 that he thought he was gonna get dead.

Leave

IN

29

Leave

IN

22 DT: [Unintelligible] pulled a knife on this kid.

30

23 BR: Then why did you lie from the get go when we first contacted you at the hospital?

31

24 DT: [Unintelligible]

25 BR: You lied at the hospital, you lied to me again when you said there were co- cars
26 that drove by and the car shot at you and then it's just today that you tell me.

31

27 DT: [Unintelligible]

28 BR: That it was Michael Norton that shot you and you have his ID and his social
29 security card.

32

30 DT: [Unintelligible] I don't wanna, I don't want this dude to get in trouble for, for
31 shooting me I'm sayin'.

32 BR: Why would you not want him to get in trouble for shooting you?

- 1 DT: Because, because he didn't know any better bro. He's just shooting at s-
2 somebody that he thinks.
- 3 BR: Did he not know any better or was he defending himself because he was getting
4 robbed?
- 5 MB: Let's say that what you're saying is true and that you genuinely felt for this guy's
6 situation and you understood why he shot.
- 7 DT: Yeah, I do.
- 8 MB: You, I understand that, a reasonable person understands that they can tell the
9 police that and then choose not to be a crime victim. Which is the case.
- 10 DT: I don't, I don't want this dude to get in trouble for shooting [Unintelligible] because
11 basically I understand bro, Pre brought him to my, to my attention you I'm sayin'.
12 Pre brought him around you I'm sayin'? I never once ha-
- 13 BR: Did Pre bring him to you because Pre knows that you hit licks? 33
- 14 DT: Yeah. 34
- 15 BR: Pre. He did? 35
- 16 DT: [Unintelligible]
- 17 BR: Okay.
- 18 DT: And, and basically, I mean, he had nothing that I wanted.
- 19 BR: So Pre knows that you rob people so Pre was bringing him to you for the purpose 36
20 of having a robbery go down.
- 21 DT: Basically to have me there as protection wa- and I wasn't [Unintelligible]
- 22 BR: Okay so Pre knew this was gonna go down though. Pre knew there was gonna, 37
23 you guys were gonna hit a lick and take this guy's stereo and shit.
- 24 DT: No.
- 25 BR: And, and you were gonna try to take his gun too cause Pre knew he had t-, t- a
26 gun right?
- 27 DT: [Unintelligible] Pre, Pre told me afterwards like oh I wanted his gun. I said well,
28 what the fuck I'm sayin'?
- 29 BR: Uh hmm.
- 30 DT: I said bro I, I get shot over something you're doing.
- 31 BR: Yeah, you guys brought a knife to a gun fight.

1 DT: Not me. Cause I didn't know Pre was gonna do this.

2 BR: But you just told me, you just told us that y- you knew it was gonna be a robbery.

3 DT: But I didn't know Pre was gonna, gonna pull out a knife I'm sayin'? The whole
4 time the dude was blowing his horn and yelling Pre I will, I will, bro I'll kill for you
5 bro, I'll do anything for you. I'm sayin'? And as Pre got out the passenger s-
6 [Unintelligible Simultaneous Speaking]

7 BR: Yeah, cause it sounds like Pre and Mike actually, I don't know if they go back a
8 ways but they've known each other a while right?

Leave
in

9 DT: Right know I'm sayin'?

10 BR: Then all of a sudden Pre's setting him up to get fucked and get robbed.

12:22:55

41:48

↑

11 DT: I'm say like I never, never once pulled a knife on him, I wasn't even in his vehicle
12 I'm sayin'?

13 BR: Right but the, the, the issue that I have and like believing you right now Darius is
14 the fact that like it's not just Mike Norton that's saying he's gotten robbed. It's
15 Melissa Workington, it's Bradley Graham and that's why I'm asking ya, are there
16 other people out there that are gonna say that you robbed 'em? And then you're
17 posting on Facebook that you're robbing all those people.

cut
out ↓

18 MB: And then their stuff's winding up in your apartment.

19 BR: Yeah

12:23:16

42:09

↑

20 DT: Everyone said [Unintelligible] find any evidence in my house wi- so.

21 MB: You just told us that Mike Norton's [Unintelligible Simultaneous Speaking]

22 BR: Yeah, you just told us Mike Norton's ID is there.

23 DT: Yeah, because it was brought to me.

24 MB: And I understand that's what you told us.

Leave
in

25 BR: Right but.

26 MB: But you understand [Unintelligible Simultaneous Speaking]

27 BR: Mike Norton told us that you guys stole his wallet that had his ID and his social
28 security card and cash in it.

29 DT: [Unintelligible]

30 BR: And you told, and you just told us that you set up for a robbery.

31 DT: Never had any of his cash.

- 1 BR: None of his cash.
- 2 DT: [Unintelligible] no.
- 3 BR: Did Pre get the cash?
- 4 DT: He was the only one in the car, never got in [Unintelligible] [Background Noises]
5 I'm sayin'.
- 6 BR: But the plan was is that you and Pre were gonna rob the guy.
- 7 DT: Pre told me that he wanted his gun. Didn't know a thing. I knew none of that. I'm,
8 I'm with my family I'm sayin'.
- 9 MB: Then why go, even go out to the parking lot man? You know more about how
10 these things go than we do. I've never robbed anybody but you knew, if you
11 know Pre's going out there to get the guy's gun and you, if what you're telling us
12 is true that you wanted no part of it, why are you even going out in that parking
13 lot?
- 14 DT: Because I wanted to see what Pre was do, do, you know, I was being curious, I
15 was being a dumb ass, I'm sayin'. I thought I wanted a part of it and I didn't and I,
16 in the long run I still get shot.
- 17 BR: Do you realize how lucky you are man?
- 18 DT: I'm, I really, really realize that and I don't want this dude to get in trouble
19 [Background Noises] I'm sayin'.
- 20 BR: You could be dead.
- 21 DT: I understand that on a, on account of Pre.
- 22 MB: Your sister could be dead. It wasn't more than a few weeks ago off d- Officer
23 Robertson and I had to investigate a call where a little girl got shot through an
24 apartment wall from the parking lot.
- 25 DT: It's, and, and the thing about it is I never wanted a part of this I'm sayin'. I wa- I
26 was being a dumbass and thought I did and I didn't and the [Unintelligible
27 Simultaneous Speaking] *12:25:00* *43:54*
- 28 BR: Well, were you being a dumbass those other two times then with those other
29 people? And what was going on on those days?
- 30 DT: Never once robbed 'em. She gave me her phone as an exchange for drugs. I'm
31 sayin'.
- 32 BR: Yeah but.
- 33 DT: The dude, the dude downstairs, the dude downstairs from me.

Cut out ↓

- 1 BR: Uh hmm.
- 2 DT: I'm sayin'. He came and set it, I punched him in his face. I'm sayin'.
- 3 BR: You punched the dude that lives below you in the face. Or he said that or that
4 happened or what?
- 5 DT: Yeah, said I took his wallet, I never, the police told him his w- they [Unintelligible]
6 wallet in your pocket sir. I'm sayin'?
- 7 BR: Uh hmm was, he, so he's trying to set you up?
- 8 DT: I dude m-.
- 9 BR: Did you give the wallet back after he got slugged or?
- 10 DT: No.
- 11 BR: No.
- 12 DT: Never took his wallet.
- 13 BR: Kay.
- 14 MB: And I'm sorry but could you just run us through that one incident one time fr- I,
15 I'm not clear what you're saying happened.
- 16 BR: Yeah, like what happened that day?
- 17 MB: I don't know if you actually hit him or he just said you hit him or what. I just, cause
18 your version with the dude with the wallet that supposedly got punched in the
19 face, what happened with that guy?
- 20 DT: My sister told me about it and she had a couple friends there and basically the
21 dude said, cause I wasn't home at the time. The dude said that I punched him in
22 the face and took his wallet. That's why when you said a fifty year old dude and I
23 was like [Background Noises] and then it, it dawns to me now the downstairs
24 neighbor.
- 25 BR: He's about that old?
- 26 DT: I don't, I'm not, I'm not sure how old he is.
- 27 BR: Okay.
- 28 DT: But he said I punched him in his face and took his wallet and the police officer
29 said the wallet, looks like the wallets in your pocket right there sir.
- 30 MB: So were you there for that part?
- 31 DT: Hu umm [Negative Response].

1 MB: Were you there for any of this?

cut out

2 DT: Hu umm [Negative Response].

3 MB: Kay. How do you know the police officer said that to him? I wasn't there either,
4 I'm just asking.

5 DT: Um, my, my sister's friend and stuff was there. But they tried to come in the
6 house but my sister was pregnant and they said nobody, nobody punched
7 nobody in the face sir.



8 BR: Um.

start Here Please

12:27:02

45:54

9 MB: Um.

10 BR: So what's happening right now Darius is there are other officers from the East
11 Metro Gang Team and uh, detective's that are helping us out on this whole case
12 and they're at the apartment now searching it, is there gonna be any stolen stuff
13 in there? Like are there gonna be any stolen stereos, cell phones, anything like
14 that? Any stolen items in there? Any guns in there? Gonna be dru- any drugs in
15 there? Okay. Anything that police would be interested in while they're searching
16 that apartment? Anything that you think you could get in trouble for or that
17 Stephanie could get in trouble for.

38

18 DT: Um, basically a friend of mine named Shadow.

Leave

39

19 BR: Uh hu.

20 DT: Brought me a Safeway, Safeway bag and it was full a stuff.

IN

40

21 BR: Like what kinda stuff? Like drugs or stolen stuff?

41

22 DT: [Unintelligible] I don't know if it's stolen or not.

42

23 BR: Okay.

43

24 DT: He left it at my apartment.

44

25 BR: What kinda.

45

26 DT: [Unintelligible]

46

27 BR: What, what stuff is in the bag though? Like is it.

47

28 MB: Is it stuff from Safeway or is it pe- random stuff that happens to be in a Safeway
29 bag?

48

30 DT: [Unintelligible] look through it.

49

1 BR: But is it like electronics? Is it a gun? Is it toiletries? Is it uh, clothes? You don't
2 know, you have no idea what it is, you just know that it's in a Safeway bag.

JO

3 MB: And we're not drug cops Darius but, I mean, you said that uh, that lady gave her,
4 gave you her phone in exchange for drugs, I'm not trying to make a drug unit
5 case on you man, but are there drugs in your apartment? Okay. Just asking.

Cut
out

6 BR: Alright. Um, the bag that you brought with us there, there's just marijuana in
7 there?

8 DT: Marijuana, meth pipe.

9 BR: And a meth pipe? Okay, I'm not gonna charge you with those things but I gotta
10 take 'em outta the bag and destroy 'em. Do you understand that? Okay. There's
11 nothing else in there though? Nkay. Um, well this is what's gonna happen is I am
12 go- you're te- you're under arrest right now on a PV detainer okay? And also
13 you're gonna get charged right now with i- d- an identity theft because you used
14 Marcus Tyler's ID when you went to the hospital right? There's a very good
15 chance that you're probably gonna get charged with robbery two [Background
16 Noises] but you're not getting charged with that today, alright? I'm telling you this
17 because uh.

↓

18 DT: ID theft, I didn't [Unintelligible]

* All remaining video
should be cut out

19 BR: Well, I'm telling you that, that case is still ongoing, we're gonna inv- investigate
20 the robberies okay?

21 DT: But you, but you told me, tol me I wouldn't get in trouble for the ID [Unintelligible]

22 BR: I said you probably would and I said I wasn't sure or not.

23 MB: You gotta understand that we never reco- we, we don't, it's the district attorney
24 that decides who gets charged with what. We can't lie, we can't pretend that
25 didn't happen.

26 BR: Right.

27 DT: But I, [Unintelligible] which I didn't wanna go to jail that day because I thought my
28 PO had a detainer on me I'm sayin'.

29 BR: Well, I mean, I'm sorry this has to happen like this, dude, but it's uh, it's kind of a
30 shit show and now all of it has to get sorted out so uh, I wanna stop my audio
31 recording and it is twelve-thirty PM, November twenty-sixth-two-thousand-
32 fourteen. Officer Robertson DPSST five-zero-zero-four-two. Officer Brooder.

33 MB: Four-nine-nine-zero-zero.

34 [Background Noises]

35 BR: Um.

↓

- 1 DT: [Unintelligible]
- 2 BR: I'm gonna have to ask you to s- sit in here for a second. We gotta go outside,
3 make a couple calls and sort some things out.
- 4 [Vocal Sounds]
- 5 BR: And then.
- 6 MB: [Unintelligible] stuff in a bag.
- 7 BR: Yeah.
- 8 MB: Bag okay?
- 9 BR: Yeah. So just be cool. You want a glass of water, cup of coffee or anything?
- 10 DT: Glass of water please.
- 11 BR: Water? Okay, I'll get you some water.
- 12 [Background Noises]
- 13 DT: [Unintelligible] you guys [Unintelligible] I, I never meant for none of this to happen
14 bro like.
- 15 MB: We just, we s- we, we need the truth, Darius.
- 16 BR: Yeah.
- 17 DT: I gave you the truth.
- 18 BR: Well.
- 19 MB: This is a week after.
- 20 BR: Fourth time around.
- 21 MB: [Unintelligible] We're, we're not leaving.
- 22 [Background Noises 35 Minutes and 26 Seconds]
- 23 UNK: Yeah. I got it. What's up man, we haven't met yet. I'm una be taking you down
24 [Background Noises] to jail. Um, this back here. Those go under there. Obviously
25 we can't take you to jail with weed, meth pipes, things like that so those are no
26 longer in the backpack. Here's a receipt right here for uh, looks like they took a
27 cell phone, a pipe and a flashlight.
- 28 [Background Noises]
- 29 DT: So was uh, you took the phone?

1 UNK: Yeah, yeah I guess and I'm, I'm not connected with your case so I can't probably
2 answer everything that you might be asking but I can tell you that your case
3 revolves around phones, so they're probably seizing that to write a warrant to
4 download the phone.

5 DT: So.

6 UNK: That'd be my guess.

7 DT: What was the um, this is property that's in custody?

8 UNK: Yes, that will be lodged as evidence. The weed and stuff that, I don't know,
9 that's.

10 DT: What's the glass pipe for?

11 UNK: Um, well I'm guessing it has something to do with the contents that are in that
12 flashlight. Just a guess though. So, all I'm, all I'm telling you is that you're not
13 leaving here with everything that was in here, [Background Noises] that's the
14 stuff that's not in there plus the weed was destroyed.

15 [Background Noises]

16 DT: So are they charging me with all this?

17 UNK: What's that?

18 DT: I was getting charged with this?

19 UNK: You're not getting charged with any, no, those are items. Those aren't crimes.

20 DT: Oh that they took from me?

21 UNK: Uh hmm [Affirmative Response] yeah, the, it's like uh, it's just a receipt is all it is
22 and because we're taking something from you we have to give you a receipt. So
23 just letting you know those three items are not in the bag like they were when you
24 came here.

25 DT: So would I get 'em back once I get outta jail?

26 UNK: Uh, that, I don't know man. I'm guessing the flashlight probably not, maybe after
27 they take the, the dope out of it. I'm [Unintelligible] put this money right here
28 [Background Noises] and then [Unintelligible] put that in there too.

29 DT: Um, what am I being charged with?

30 UNK: Uh, the paper they gave me shows that there's a detainer so you, you have a PO
31 and he issued a detainer I guess. Um, and then there's a robbery charge and an
32 ID theft charge.

- 1 DT: Why a robbery charge?
- 2 UNK: Again, I'm sorry dude, I don't wanna sound like I'm just blowing smoke, I don't
3 know man. I'm guessing it has to do with the stuff they were questioning you
4 about but again it's not my case so it's not.
- 5 DT: Is there any way that I could talk to 'em?
- 6 UNK: To who? The guys you were talking to? I can go see, see if they're still here. The,
7 I'm here because they're gone, they got other stuff to do and they don't need to
8 take you to jail, that's what they use me for.
- 9 DT: So they're charging me with rob what?
- 10 UNK: Robbery one is what the statute is. So, let me go see. [Unintelligible]
- 11 [Background Noises/Voices for 9 Minutes and 7 Seconds]
- 12 UNK: Alright, ready to roll? Let's go.
- 13 [Background Noises]
- 14 DT: So are they charging me with Rob one?
- 15 MB: The DA's office is yeah.
- 16 UNK: Alright [Unintelligible]
- 17 DT: Why?
- 18 UNK: Hey, hey real important okay.
- 19 DT: Uh hmm.
- 20 UNK: I'm gonna take that handcuff off and then we're gonna put hands behind the back
21 [Unintelligible]
- 22 DT: Yes, sir.
- 23 UNK: Nothing [Unintelligible] I'm una release the hounds right here to my right okay.
- 24 DT: Yes, sir. Yes, sir.
- 25 MB: [Unintelligible]
- 26 UNK: Alright.
- 27 [Background Noises]
- 28 DT: So why are you charging me with Rob one?

1 MB: They're putting it on there for now and they're gonna keep deciding what they
2 wanna issue [Unintelligible] if anything.

3 DT: Rob one and what else?

4 MB: ID theft detainer.

5 DT: ID theft and that detainer?

6 MB: Well, it's an ID theft detainer. You're.

7 UNK: Just relax your arms [Unintelligible Simultaneous Speaking] relax, there you go.

8 MB: Detainers been issued for you because of the ID theft so if they decide they
9 wanna actually pursue it with a criminal charge of ID theft they'll have to do
10 [Unintelligible] a formal investigation indictment and everything.

11 DT: So basically like [Unintelligible]

12 [Background Noises/Conversations for 4 Minutes]

13 END OF RECORDING

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Transcribed verbatim by: Jill S. Mick, Admin Asst. II
05/14/2015 10:30

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Read, reviewed and approved as typed by:
Detective Brad Robertson / DPSST #50042

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 3, 2022, 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 Fujita Munsey, attorneys for Petitioner on Review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 13,384 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(3)(b).

/s/ Jennifer S. Lloyd

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