

**FILED: June 26, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

DANYELLE LYNNE KINSLOW,  
Defendant-Appellant.

Josephine County Circuit Court  
10CR0107

A146208

Pat Wolke, Judge.

Argued and submitted on December 28, 2012.

Stephanie J. Hortsch, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Michael A. Casper, Deputy Solicitor General, argued the cause for respondent. On the brief were John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Rebecca M. Johansen, Assistant Attorney General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Conviction for first-degree kidnapping reversed; remanded for resentencing; otherwise affirmed.

1 SCHUMAN, P. J.

2 Defendant and the victim were using methamphetamine at defendant's  
3 house when defendant was angered by a text message she read on the victim's phone.  
4 Defendant summoned to the house an accomplice who, along with defendant, assaulted  
5 the victim at the house over the course of a day and a half. After the victim escaped,  
6 defendant was charged with ten different offenses, including first-degree kidnapping and  
7 various drug-related offenses. Defendant was convicted on all counts and now appeals.  
8 On appeal, she argues that (1) the trial court erred in denying her motion for a judgment  
9 of acquittal on the kidnapping charge, because she did not move the victim from "one  
10 place to another," ORS 163.225(1)(a); (2) the trial court erred in denying her motions for  
11 judgments of acquittal on the charges of manufacturing, delivering, and possessing  
12 methamphetamine, because the state presented insufficient evidence that those offenses  
13 were "commercial drug offenses" within the meaning of ORS 475.900; and (3) the trial  
14 court erroneously admitted a laboratory report that identified substances found at the  
15 house as methamphetamine, because the author of that report did not testify. We reverse  
16 defendant's kidnapping conviction, remand for resentencing, and otherwise affirm.

17 Because defendant challenges the trial court's denial of her motions for  
18 judgments of acquittal, we state the underlying facts in the light most favorable to the  
19 state. *State v. Cervantes*, 319 Or 121, 125, 873 P2d 316 (1994). On a Saturday evening,  
20 defendant and the victim were using methamphetamine in defendant's house, which was  
21 one half of a duplex. At some point, defendant read text messages on the victim's phone,

1 including a message in which the victim referred to spanking defendant's four-year-old  
2 son. After reading the text, defendant was angered and called one of her acquaintances,  
3 Warren, and asked him to come to the house. Defendant offered to pay Warren to beat  
4 up the victim, and Warren agreed to assault the victim in exchange for a pair of shoes and  
5 methamphetamine.

6           When Warren arrived, he walked through the front door of defendant's  
7 house and hit the victim in the living room. He told the victim to empty his pockets onto  
8 a bed in the living room, and the victim placed his cell phone and some cash on the bed.  
9 Warren then began calling the victim a child molester and hit and stomped on the victim's  
10 face. After approximately 20 minutes, Warren picked up a studded belt and used it to  
11 beat the victim. By that point, the assault had moved to the kitchen area, which was  
12 connected to the living room. Defendant remained present throughout the beating,  
13 standing in her living room.

14           After a short break, Warren began throwing things at the victim, striking  
15 him in the eye with a cigarette lighter and a pen. He also sprayed bleach in the victim's  
16 face while the victim was sitting on a couch. After the bleach incident, Warren  
17 "pretended like everything was fine," offering the victim water and a cigarette, and they  
18 smoked cigarettes in the living room. At some point that night, defendant also picked up  
19 a belt and threatened to punch the victim with it.

20           The following morning, Warren resumed the beatings. Warren and  
21 defendant left the victim alone in the house for a few hours on Sunday afternoon, but the

1 victim was too scared and exhausted to escape. The victim awoke to find defendant back  
2 in the house. He asked defendant whether he could leave the house, and defendant told  
3 him to wait until Warren returned.

4           On Sunday evening, Warren returned and began hitting the victim again.  
5 Warren sprayed a bottle of fabric deodorizer in the victim's face, threw the bottle at him,  
6 and sat on the victim's chest. Also that evening, Warren said to the victim, "Come here, I  
7 want to talk to you." The victim reluctantly followed Warren to the bathroom, where  
8 Warren proceeded to strangle the victim with a belt. When the victim was about to pass  
9 out, Warren loosened the belt and then retightened it. He also held a knife to the victim's  
10 throat and slightly cut his neck. Defendant, meanwhile, was in the living room. She  
11 could not see into the bathroom from the living room, but she could hear what was  
12 happening.

13           That same evening, Warren and the victim went outside to smoke a  
14 cigarette. Warren told the victim "to stand in the dark so nobody would see [him]" and  
15 that he "better not run." Warren stood within an arm's reach of the victim while they  
16 were outside.

17           At some point during the ordeal, defendant called someone on the phone to  
18 find a cabin where Warren could take the victim. Warren, meanwhile, told the victim  
19 that, at the cabin, he would either kill him or break his hands, tie him up, and leave him  
20 there.

21           The victim eventually passed out again from exhaustion. When he woke on

1 Monday morning, Warren was gone and defendant and her son were asleep on the bed in  
2 the living room. The victim walked out the front door and went to a friend's house,  
3 where he was encouraged to go to the hospital. The victim went to the hospital, and  
4 police were notified of his injuries.

5           The following week, police executed a search warrant at defendant's home,  
6 where they discovered a "dirty" scale, multiple Ziploc baggies, a methamphetamine bong,  
7 a snort tube, and drug records. Defendant admitted to police that she had sold  
8 methamphetamine; in fact, drug users were present and purchasing drugs from defendant  
9 at times when the victim was being assaulted. When searching defendant's vehicle,  
10 which was parked at the house, police found the victim's cell phone.

11           Defendant subsequently was charged with first-degree kidnapping, first-  
12 degree robbery, unlawful use of a weapon, fourth-degree assault, strangulation,  
13 menacing, manufacture of methamphetamine, delivery of methamphetamine, possession  
14 of methamphetamine, and child neglect. The trial court granted a motion for a judgment  
15 of acquittal on the first-degree robbery charge and instructed the jury on the lesser-  
16 included offense of third-degree robbery. Defendant was convicted, as an accomplice or  
17 principal, on all counts.

18           On appeal, defendant advances five assignments of error. In her first  
19 assignment, she argues that the trial court erred in denying her motion for a judgment of  
20 acquittal on the kidnapping charge, because the evidence was legally insufficient to  
21 establish the asportation element of the crime--that is, that the victim was taken "from

1 one place to another," as alleged in the indictment.<sup>1</sup> In defendant's view, the parts of the  
2 house--the living room area, the kitchen area, and the bathroom--were not qualitatively  
3 different places, and any movement among those areas merely was incidental to other  
4 crimes (assault, menacing, and strangulation). *See State v. Sierra*, 349 Or 506, 513, 254  
5 P3d 149 (2010), *adh'd to as modified on recons*, 349 Or 604, 247 P3d 759 (2011) ("[A]  
6 defendant can be said to have moved the victim from 'one place' to 'another' only when  
7 the defendant changes the position of the victim such that, as a matter of situation and  
8 context, the victim's ending place is qualitatively different from the victim's starting  
9 place."). The state responds that, when Warren "moved the victim from the living room  
10 to the bathroom, the destination was, in context, a 'qualitatively different' place."<sup>2</sup>

11           The parties' competing asportation arguments echo those that we recently  
12 addressed in *State v. Opitz*, 256 Or App 521, \_\_\_ P3d \_\_\_ (2013). In *Opitz*, the defendant  
13 argued that his movement of the victim between rooms in a single apartment was not the  
14 type of movement "from one place to another" that is required for the crime of  
15 kidnapping. We began our analysis by discussing *Sierra*, the Supreme Court's most  
16 recent decision on the subject of asportation. Because that discussion is equally

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<sup>1</sup> The state did not allege, and does not argue on appeal, that the evidence was sufficient to prove kidnapping on the ground that Warren or defendant had "[s]ecretly confine[d] the [victim] in a place where the person is not likely to be found." ORS 163.225(1)(b). We therefore do not address that issue.

<sup>2</sup> Although there is evidence that the victim was allowed outside the house to smoke a cigarette, and was warned to stay out of sight during that time, \_\_\_ Or App at \_\_\_ (slip op at 3), the state has never suggested that the movement to outside the house, or from outside back inside, was sufficient to constitute kidnapping.

1 instructive here, we reproduce part of it:

2 "In *Sierra*, as pertinent to our analysis here, two victims were  
3 patrons at a truck stop restaurant. 349 Or at 509. Those two victims 'heard  
4 a commotion' in the adjoining convenience store and entered through a door  
5 near the front of the store to investigate. *Id.* They found the defendant  
6 pointing a loaded crossbow at a store clerk, who was on his knees behind a  
7 counter near the back of the store. *Id.* at 509-10. Hoping to assist the clerk,  
8 one victim 'attempted to divert [the] defendant's attention so that [the other  
9 victim] would be able to restrain' the defendant. *Id.* The defendant yelled  
10 at the victims to leave. *Id.* When they refused to leave, the defendant  
11 pointed the crossbow at them and directed them to move to the back of the  
12 store and kneel beside the clerk. *Id.* The victims did as they were  
13 instructed. *Id.* In relation to those acts, and with respect to those two  
14 victims, the defendant was convicted of second-degree kidnapping. We  
15 affirmed without opinion. *State v. Sierra*, 228 Or App 149, 206 P3d 1153  
16 (2009).

17 "On review, the parties' dispute centered on 'the meaning of the act  
18 element of kidnapping by asportation.' *Sierra*, 349 Or at 512. In resolving  
19 the issue, the Supreme Court examined *State v. Murray*, 340 Or 599, 136  
20 P3d 10 (2006), and *State v. Walch*, 346 Or 463, 213 P3d 1201 (2009).

21 \* \* \* \* \*

22 "Against that precedential backdrop [of *Murray* and *Walch*], the  
23 defendant in *Sierra* argued that, 'as a general rule, movement within a  
24 single structure (such as a home, building, or car), including room-to-room  
25 movement, will not be movement to a qualitatively different place in terms  
26 of interference with a victim's liberty.' 349 Or at 512. The state agreed  
27 'that the beginning place and ending place must be qualitatively different,  
28 but argue[d] that place-to-place movement requires only proof that the  
29 defendant moved the victim' to a more restrictive or isolated place. *Id.*  
30 (internal quotation marks omitted). Both parties recognized that 'the state is  
31 not required to prove that defendant took the victim a substantial distance.'  
32 *Id.* (citing *Walch*, 346 Or at 473).

33 \* \* \* \* \*

34 \* \* \* [T]he Supreme Court in *Sierra* rejected the defendant's  
35 proposition that 'movement of a victim within a single structure will *never*  
36 be place-to-place movement.' *Id.* at 517 (emphasis in original). Instead, the  
37 court concluded that, in the particular 'situation and context' of *Sierra*, the

1 facts were insufficient to allow a rational trier of fact to conclude that the  
2 defendant moved the two victims 'from one place to another.' *Id.* That was  
3 so, the court explained, because '[t]he beginning location (inside a  
4 convenience store, near the front door) and the ending location (inside the  
5 same room, behind a \* \* \* counter near the back of the room) of [the]  
6 defendant's contact with [the victims] are not "qualitatively different"  
7 locations.' *Id.* Accordingly, the court concluded that 'the state introduced  
8 insufficient evidence to prove the two charges of kidnapping in the second  
9 degree.' *Id.* at 518."

10 *Opitz*, 256 Or App at 531-34.

11 We ultimately distilled the following principle from *Sierra*: "For purposes  
12 of our review, the issue reduces to whether, viewing the evidence in the light most  
13 favorable to the state, 'as a matter of situation and context, the victim's ending place [was]  
14 qualitatively different from the victim's starting place.'" *Id.* at 534 (quoting *Sierra*, 349  
15 Or at 513-14). Then, turning to the facts in *Opitz*, we proceeded to answer that question  
16 in the negative:

17 "Here, the victim's 'starting place' was the living room of her  
18 apartment. Defendant moved her from the living room to the kitchen, from  
19 the kitchen to the bathroom, back to living room, and ultimately down the  
20 hallway to the bedroom. \* \* \* To be sure, each of those rooms was--as the  
21 state emphasizes--*functionally* distinct, but *Sierra*, *Murray*, and *Walch*  
22 instruct us that generic functional distinctions do not establish the requisite  
23 'qualitative difference' *vis-a-vis* the commission of the crime of kidnapping.  
24 The hallmark of 'qualitative difference' is whether the difference between  
25 the starting and ending places promotes or effectuates a substantial  
26 interference 'with another's personal liberty.' ORS 163.225(1). *In the*  
27 *'situation and context' of this case, the functional differences among the*  
28 *rooms in the victim's apartment had no effect on the extent to which*  
29 *defendant interfered with the victim's personal liberty. Accord State v.*  
30 *Gerlach*, 255 Or App 614, 619-20, 300 P3d 193 (2013) (analyzing ORS  
31 163.225, for merger of conviction purposes, and observing that the  
32 gravamen of the crime of kidnapping is a defendant's substantial  
33 interference with another's personal liberty).



1 "In that respect, we also note that the state adduced no evidence that,  
2 in moving the victim between rooms of her apartment, defendant intended  
3 or accomplished transporting the victim to a place where he could exert  
4 greater control over the victim or increase her isolation. \* \* \*

5 "The state posits, nevertheless, that, '[b]ecause the bathroom had a  
6 bathtub and shower, and consequently was able to serve a different and  
7 additional function than other rooms in the residence, it was "qualitatively  
8 different" from other rooms in the residence.' Specifically, the state points  
9 to the fact that the bathroom 'served as a location--distinct from any other  
10 room in the residence--where defendant could clean the blood from the  
11 victim's body and clothing.' With respect, that is a *non sequitur* because,  
12 with respect to any restraint of the victim's personal liberty, the degree of  
13 restraint was no different in the bathroom than at the 'starting place,' that is,  
14 in the living room.

15 "Finally, the evidence here demonstrates that, during the course of  
16 the nearly seven-hour assault, [the] defendant moved the victim in the  
17 course and in furtherance of the ongoing assault. The movement, thus, was  
18 'only incidental' to the assault. The assault ended when [the] defendant and  
19 the victim fell asleep in the bedroom. \* \* \*. The state adduced no evidence  
20 that [the] defendant moved the victim during the two days that [the]  
21 defendant remained in the victim's apartment following the assault."

22 *Opitz*, 256 Or App at 534-36 (first emphasis in original; second emphasis added).

23 For those reasons, we concluded in *Opitz* that "the state introduced  
24 insufficient evidence for a rational trier of fact to determine that [the] defendant moved  
25 the victim 'from one place to another.' ORS 163.225," and that the trial court erred in  
26 denying the defendant's motion for a judgment of acquittal on the kidnapping charge. *Id.*  
27 at 536.

28 In light of *Opitz* and the cases discussed therein, we conclude that the state  
29 failed to adduce sufficient evidence to prove the crime of kidnapping in this case. As  
30 described above in greater detail, defendant's accomplice, Warren, moved the victim from  
31 the living room and kitchen area, where he assaulted the victim, to the bathroom, where

1 he then strangled the victim and held a knife to his throat. Given the "situation and  
2 context"--that is, a day-and-a-half-long assault in defendant's home--there were no  
3 "qualitative differences" between the various rooms of the small house. Whatever  
4 functional differences between the living room, kitchen, and bathroom, there was nothing  
5 about any one of those rooms that, on these particular facts, increased Warren's or  
6 defendant's control over the victim or further isolated the victim. Contrary to the state's  
7 suggestion, there is no evidence in the record that would allow a trier of fact to conclude  
8 that, when the victim was taken into the bathroom, he was "away from whoever else  
9 might be there to see what was going on." The state did not offer any evidence that the  
10 bathroom door was even closed during the assault there; in fact, the only evidence on that  
11 point was that a person in the living room could hear whatever was occurring in the  
12 bathroom. Thus, as was the case in *Opitz*, "the degree of restraint was no different in the  
13 bathroom than at the 'starting place,' that is, in the living room."<sup>3</sup> *Id.* at 535-36.

14 Because the state failed to prove that the victim was taken "from one place  
15 to another" for purposes of ORS 163.225(1)(a), the trial court should have granted  
16 defendant's motion for a judgment of acquittal on the charge of first-degree kidnapping.  
17 We therefore reverse defendant's conviction on that charge.<sup>4</sup>

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<sup>3</sup> The state also posits that, while in the bathroom, the victim was further from the front door of defendant's house, which "made it more difficult for the victim to escape the house." Suffice it to say that the record does not support an inference that the distance between the bathroom and front door effectuated any increased interference with the victim's liberty.

<sup>4</sup> Because we agree with defendant that the state did not prove that the rooms of the

1           In her second through fourth assignments of error, defendant argues that the  
2 trial court erred in denying her motions for judgments of acquittal on three commercial  
3 drug offenses (possession of methamphetamine, delivery of methamphetamine, and  
4 manufacture of methamphetamine). She reprises the argument she made below--which  
5 the trial court rejected--that her possession of the victim's cell phone was insufficient to  
6 elevate her drug offenses to "commercial drug offenses" under ORS 475.900(1)(b).  
7 Under that statute, "possession, delivery or manufacture is a commercial drug offense for  
8 purposes of this subsection if it *is accompanied by* at least three of the following factors,"  
9 including "(F) The offender was in possession of stolen property[.]" (Emphasis added.)  
10 In defendant's view, her possession of the victim's cell phone was related only to the  
11 assault of the victim, not to her drug offenses; possession of stolen property, she argues,  
12 turns drug offenses into "commercial drug offenses" only if the possession of that  
13 property is "somehow related to the drug offense and not just exist[ing]  
14 contemporaneously with it."

15           We have previously rejected a similar argument regarding the factors  
16 "accompanying" a drug offense. In *State v. Moore*, 172 Or App 371, 382-83, 19 P3d 911,  
17 *rev den*, 332 Or 250 (2001), the defendant contended that, "even if the state presented  
18 sufficient evidence to establish three subcategory factors, it nevertheless did not prove

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house were qualitatively different, we need not address defendant's contention that any  
asportation was merely incidental to the crimes of assault, strangulation, and unlawful use  
of a weapon.

1 that the factors 'accompanied' the drug offenses," as required by ORS 475.900(1)(b).<sup>5</sup>

2 Specifically, the defendant in *Moore* argued:

3 "[T]he legislature was not just listing factors which would increase a  
4 defendant's sentence if they happened to exist with a drug offense as if by  
5 coincidence. Instead, it was listing factors which would indicate that the  
6 drug offense was something more than just a singular episode, that it was  
7 part of a larger commercial enterprise. It was termed a 'commercial drug  
8 offense.' *For the factors to indicate that larger enterprise, they must*  
9 *somehow be related to the drug offense and not just exist*  
10 *contemporaneously with it.*"

11 172 Or App at 382 (emphasis in *Moore*). We found that argument unpersuasive,  
12 explaining:

13 "To 'accompany' means 'to exist or occur in conjunction with.' *State v.*  
14 *Norris*, 40 Or App 505, 508, 595 P2d 1261, *rev den*, 287 Or 355 (1979).  
15 Here, officers found the track lighting in the growing room. Dons, acting  
16 as a guard, equipped with camera and monitor, defended the operation with  
17 deadly force. Finally, the structural modifications directly facilitated the  
18 operation. *All three factors occurred or existed in conjunction with, and*  
19 *thus accompanied, the drug offenses for which defendant was convicted.*  
20 We conclude that the state presented sufficient evidence that the factors  
21 accompanied the drug offenses."

22 172 Or App at 382-83 (emphasis added).

23 "[W]e do not lightly overrule our own statutory interpretations. Ordinarily,  
24 we regard them as binding precedent unless they are plainly wrong." *Aguilar v.*  
25 *Washington County*, 201 Or App 640, 648, 120 P3d 514 (2005), *rev den*, 340 Or 34  
26 (2006). In this case, defendant has not persuaded us that our earlier interpretation of the  
27 statute was wrong, let alone "plainly wrong." *See State v. Cam*, 255 Or App 1, 9, 296

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<sup>5</sup> When *Moore* was decided, the statute was codified as ORS 475.996(1)(b). In 2005, ORS 475.996 was renumbered by Legislative Counsel as ORS 475.900, but the relevant text is identical.

1 P3d 578, *adh'd to as modified on recons*, 256 Or App 146, 300 P3d 208 (2013)  
2 (following *Moore* and explaining that the "factors listed in ORS 475.900 need not relate  
3 to the specific underlying drug offense. \* \* \* There is no requirement of a nexus between  
4 the underlying drug offense and the listed factors."). We therefore adhere to that  
5 interpretation and consider whether the state presented evidence from which a trier of fact  
6 could find that the stolen cell phone "occurred or existed in conjunction with" defendant's  
7 drug offenses.

8           The state offered proof that defendant stole the victim's cell phone during  
9 the course of the assault at her home and possessed that phone in her vehicle, which was  
10 parked outside her house. Thus, the stolen property was possessed by the same  
11 individual, defendant, who was also possessing, delivering, and manufacturing  
12 methamphetamine, and she possessed that stolen property in a vehicle directly connected  
13 to the drug site, her residence. Those facts were sufficient to allow a jury to find that the  
14 stolen property existed in conjunction with defendant's drug offenses and was, along with  
15 other factors--namely, drug scales, ORS 475.900(1)(b)(D), and drug transaction records,  
16 ORS 475.900(1)(b)(E)--part of a commercial drug operation. The trial court did not err  
17 in denying defendant's motions for judgments of acquittal on the charges of possessing,  
18 delivering, and manufacturing methamphetamine.

19           In her final assignment, defendant argues that the trial court erred in  
20 admitting into evidence a crime laboratory report that identified a substance found in  
21 defendant's home as methamphetamine. The report was admitted without requiring its

1 author to testify, because defendant received a certified copy of the report but did not file  
2 a written objection to the report at least 15 days before trial. *See* ORS 475.235(4)  
3 ("Notwithstanding any other provision of law, in all prosecutions in which an analysis of  
4 a controlled substance or sample was conducted, a certified copy of the analytical report  
5 signed by the director of a state police forensic laboratory or the analyst or forensic  
6 scientist conducting the analysis shall be admitted as prima facie evidence of the results  
7 of the analytical findings unless the defendant has provided notice of an objection in  
8 accordance with subsection (5) of this section."); ORS 475.235(5) ("If the defendant  
9 intends to object at trial to the admission of a certified copy of an analytical report as  
10 provided in subsection (4) of this section, not less than 15 days prior to trial the defendant  
11 shall file written notice of the objection with the court and serve a copy on the district  
12 attorney.").

13           According to defendant, ORS 475.235(4) and (5) place "the burden on the  
14 defendant to enforce her confrontation right," thereby violating state and federal  
15 constitutional protections. *See Melendez-Diaz v. Massachusetts*, 557 US 305, 129 S Ct  
16 2527, 174 L Ed 2d 314 (2009) (describing Sixth Amendment right to confront witnesses  
17 who prepare laboratory reports for use in criminal prosecutions, and explaining that the  
18 state cannot shift the burden to the defendant to subpoena the lab analyst); *State v.*  
19 *Birchfield*, 342 Or 624, 631-32, 157 P3d 216 (2007) (holding that "the trial court's  
20 admission of the laboratory report without requiring the state to produce at trial the  
21 criminalist who prepared the report or to demonstrate that the criminalist was unavailable

1 to testify violated defendant's right to confront the witness against him under Article I,  
2 section 11, of the Oregon Constitution").

3           We have previously rejected an argument under the Sixth Amendment that  
4 "the provisions of ORS 475.235(4) and (5) unconstitutionally shift the burden to  
5 defendant by requiring defendant, rather than the state, to secure the testimony of a state's  
6 witness," *State v. Glass*, 246 Or App 698, 700, 268 P3d 689 (2011), *rev den*, 352 Or 25  
7 (2012), and we see no reason to revisit that question. *See id.* at 701 (holding that "ORS  
8 475.235 is precisely the type of notice-and-demand statute of which the Court explicitly  
9 approved in *Melendez-Diaz*," and that the defendant was "incorrect that its requirement  
10 that he raise his objection before trial violates the Confrontation Clause"). Accordingly,  
11 we reject defendant's Sixth Amendment challenge to the admission of the laboratory  
12 report under ORS 475.235(4) and (5).

13           We likewise reject defendant's challenge under the state constitution. In  
14 *Birchfield*, the Supreme Court held that, under Article I, section 11, the state cannot  
15 require the defendant to secure the attendance of the criminalist who prepared the  
16 laboratory report. At the same time, the court sanctioned the very procedure that is now  
17 set forth in ORS 475.235(4) and (5). The court explained:

18           "It is the state that seeks to adduce the evidence as to which the criminalist  
19 will testify. The defendant has a constitutional right to confront the  
20 proponent of that evidence, the criminalist. *The legislature may require the*  
21 *defendant to assert that right or to design a procedure to determine*  
22 *whether the defendant agrees that a written report will suffice. But, to*  
23 *require that a defendant do more changes the right to insist that the state*  
24 *present evidence the 'old-fashioned way' into an obligation to procure a*  
25 *witness for the state."*

1 342 Or at 631 (emphasis added).

2                   ORS 475.235(4) and (5) do not impermissibly shift the burden to a  
3 defendant to procure a criminalist but, rather, set forth a constitutionally permissible  
4 process for determining whether the defendant intends to object to the written report.  
5 Having failed to follow that procedure in this case, defendant cannot now challenge the  
6 admission of the laboratory report on confrontation grounds.

7                   Conviction for first-degree kidnapping reversed; remanded for  
8 resentencing; otherwise affirmed.