

**FILED: July 03, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

CELSO AVILA-NAVA,  
Defendant-Appellant.

Washington County Circuit Court  
C092845CR

A146527

Rick Knapp, Judge.

Argued and submitted on November 27, 2012.

Jedediah Peterson, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Christina M. Hutchins, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Haselton, Chief Judge, and Sercombe, Judge.

HASELTON, C. J.

Reversed and remanded.

1 HASELTON, C. J.

2 Defendant, who was convicted of first-degree burglary, ORS 164.225; first-  
3 degree robbery, ORS 164.415; first-degree kidnapping, ORS 163.235; unlawful use of a  
4 weapon, ORS 166.220; and unauthorized use of a motor vehicle, ORS 164.135, appeals,  
5 challenging all of his convictions. He assigns error solely to the trial court's admission of  
6 statements that he contends were unlawfully elicited after he had invoked the right to  
7 remain silent. The state remonstrates that defendant's invocation was equivocal. The  
8 state argues, in the alternative, that, even if defendant's statement constituted an  
9 unequivocal invocation of his right to remain silent, the interrogating officer's  
10 interactions with defendant after that invocation were constitutionally permissible. We  
11 conclude that defendant unequivocally asserted his right to remain silent and that the  
12 interrogating officer's questions following that assertion violated defendant's right against  
13 self-incrimination. Or Const, Art I, § 12.<sup>1</sup> Accordingly, the trial court erred in admitting  
14 defendant's statements; we further determine that the erroneous admission of defendant's  
15 statements was not harmless, and, thus, we reverse and remand.

16 We explained the applicable standard of review in *State v. Holcomb*, 213  
17 Or App 168, 173, 159 P3d 1271, *rev den*, 343 Or 224 (2007):

18 "The admissibility of a defendant's statements during custodial  
19 interrogation is an issue of law. *State v. James*, 339 Or 476, 481, 123 P3d  
20 251 (2005). We review the trial court's legal conclusion regarding whether  
21 a defendant invoked his Article I, section 12, right for legal error. *State v.*

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<sup>1</sup> Article I, section 12, of the Oregon Constitution provides, in pertinent part, "No person shall \* \* \* be compelled in any criminal prosecution to testify against himself."

1           *Terry*, 333 Or 163, 172, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002).  
2           The question of what transpired during a custodial interrogation is a  
3           question of fact for the trial court, and we are bound by the trial court's  
4           findings of fact if they are supported by evidence in the record, although  
5           'we assess anew whether th[ose] facts suffice to meet constitutional  
6           standards.' *James*, 339 Or at 481."

7           (Brackets in *Holcomb*.)

8                         We state the material facts consistently with those standards. On December  
9           23, 2009, Hillsboro police officers, who were investigating a robbery in which defendant  
10          was a suspect, stopped an SUV that defendant was driving. At the scene of the stop, after  
11          defendant was handcuffed and taken into police custody, an officer read the *Miranda*  
12          warnings in Spanish from a prepared card to defendant, who did not speak English.  
13          Defendant indicated that he understood his rights. The police then transported defendant  
14          to the Hillsboro Police Department, where detectives Ganete and Hahn would interview  
15          him. Ganete again advised defendant of his *Miranda* rights in Spanish,<sup>2</sup> from a prepared  
16          card, translated by Ganete as follows:

17                         "It is my [duty] to inform you before you make a declaration: You  
18                         have the right to remain silent. Anything you say may be used against you  
19                         in a court of law or a judicial tribunal. You have the right to speak to an  
20                         attorney and to [have him or her] present during the interrogation. If you  
21                         do not have the funds to contract an attorney, the Court will assign one to  
22                         you without cost."

23                         After Ganete had advised defendant of his *Miranda* rights--defendant's  
24          second *Miranda* warning that day--Ganete inquired whether defendant understood those

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<sup>2</sup>           Ganete's exchange with defendant occurred entirely in Spanish. The account of their exchange is derived exclusively from Ganete's testimony at a pretrial evidentiary hearing.

1 rights. Defendant replied, "I have a question. Do I have to answer your questions?"  
2 Ganete explained that defendant "did not have to answer any questions or talk to [Ganete]  
3 if he chose [not] to." Defendant then asked, "Why did mister call the police?" Ganete  
4 insisted that defendant needed first to understand the *Miranda* warnings before they could  
5 discuss the events that led to defendant being in police custody. At that point, "to help  
6 [defendant] understand," Ganete "took each right line by line and asked if he understood  
7 each right." During that process, the following exchange occurred:

8 Ganete: "Anything you say may be used against you in a court of law."

9 Defendant: "I don't understand what this means."

10 Ganete: "What is it that you don't understand?"

11 Defendant: "Anything I say can be used against me."

12 Ganete: "That's correct. Anything you say can be used against you."

13 Defendant: "*I won't answer any questions.*"

14 (Emphasis added.)

15 Ganete "didn't accept [the italicized statement] as unequivocally  
16 [defendant] saying, 'I don't want to talk to you.'" Instead, Ganete interpreted defendant's  
17 statement "as a question that he was pondering to me from lack of understanding."

18 Ganete asked defendant, "*Are you saying you don't want to talk to me at all? You just  
19 want me to go away?*" (Emphasis added.) Defendant responded, "No, I can't talk to you  
20 if I don't understand what this right means because you're telling me I have the right to  
21 remain silent. I don't understand what this means." As Ganete began to repeat,

1 "Anything you say can be used against you," defendant interrupted, "Pardon. I'm not  
2 trying to be disrespectful. How can I say this? Anything I say can be used against me.  
3 It's like I'm lying?"

4 At that point, Ganete felt that defendant was "kind of hung up on this  
5 right," so Ganete decided to move on to the remaining warnings pertaining to defendant's  
6 right to counsel.<sup>3</sup> Defendant indicated that he understood his right to counsel. Ganete  
7 then asked if defendant understood his rights, with the exception of "anything you say  
8 can be used against you." Defendant responded, "That's exactly what I don't understand."  
9 Because he thought that defendant might understand the statement if he read it himself,  
10 Ganete inquired about defendant's education. Defendant responded that he had gone to  
11 school through sixth grade and that he could read Spanish. Ganete then gave defendant  
12 the *Miranda* warning card and asked him to read it aloud, which defendant did. The  
13 following exchange ensued:

14 Defendant: "It is my duty to inform you before you make a  
15 declaration: You have the right to remain silent.' [pause] You can just ask  
16 questions then?"

17 Ganete: "If you tell me that you wish to remain silent, I can't  
18 question you."

19 Defendant: "Now I understand."

20 (Brackets in original.) Ganete further explained to defendant that there is a significant  
21 difference between wanting to speak with him and agreeing to speak with him. Ganete

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<sup>3</sup> Ganete explained that he moved on "because we were at this point where we weren't making any progress of understanding; so I thought that, 'Okay. We'll come back to that right afterwards and see if he would understand then.'"

1 also told defendant that he "may choose to answer or not answer specific questions, and  
2 that was fine." This exchange followed:

3 Ganete: "Do you understand your rights?"

4 Defendant: "Yes."

5 Ganete: "Do you understand the *Miranda* warning card you read?"

6 Defendant: "Yes."

7 Ganete: "Do you want to speak with me freely?"

8 Defendant: "Yes."

9 Ganete then questioned defendant about the reported robbery, and  
10 defendant made the statements that are the subject of this appeal.<sup>4</sup>

11 In a pretrial motion, the state requested a hearing on the admissibility of  
12 statements made by defendant. ORS 135.037. At that hearing, defendant argued that the  
13 statements that he made after his statement, "I won't answer any questions," were  
14 obtained in violation of *Miranda* and, thus, must be suppressed. Specifically, defendant  
15 contended:

16 "[T]he conversation never should have continued after [defendant] said, 'I  
17 won't answer any questions.' That was him exercising his right to remain  
18 silent. And, for that reason, despite the fact that upon further prodding,  
19 [defendant did] agree to speak with the detective, I'd ask that his statements  
20 not be admitted for *Miranda* violation."

21 The state, for its part, contended that defendant had not unequivocally

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<sup>4</sup> As described below, \_\_\_ Or App at \_\_\_ (slip op at 7), various of defendant's statements to Ganete were irreconcilable with the account that defendant rendered in his trial testimony--and, indeed, were demonstrably false.

1 invoked his right to remain silent. Rather, in the state's view, defendant's statement, "I  
2 won't answer any questions," was, "as the detective indicated, not an assertion of a right  
3 in the context of the conversation that was taking place, but rather a statement by  
4 defendant of questioning what those rights were." The state argued that, because that  
5 statement was "equivocal," Ganete was permitted to ask questions to clarify defendant's  
6 intent--and that, ultimately, defendant understood and voluntarily waived his rights.

7           The trial court agreed with the state's position that defendant's statement, "I  
8 won't answer any questions[,] \* \* \* was posed as a quandary," and "defendant didn't quite  
9 understand what was going on at the time." The court observed that it did not believe  
10 that Ganete "was trying to manipulate defendant in the situation" and noted that Ganete  
11 "spent a lot of time with defendant making sure he understood his *Miranda* rights." The  
12 court continued, "The question is then did defendant waive his *Miranda* rights or was this  
13 comment, 'I won't answer any questions,' an unequivocal exercise of his *Miranda* rights?  
14 And that's where I say I think in the totality of the facts that it's not an unequivocal  
15 exercise of rights." Accordingly, the court determined that Ganete's ensuing questions--  
16 including, "Are you saying you don't want to talk to me at all?" and "You just want me to  
17 go away?"--did not violate defendant's rights and allowed defendant's subsequent  
18 statements to be admitted.

19           Defendant testified at trial and the state impeached him by pointing to  
20 material inconsistencies between defendant's trial testimony and his statements during  
21 interrogation. Specifically, in response to the prosecutor's questions during cross-

1 examination, highlighting those inconsistencies, defendant admitted that he had "lied" to  
2 Ganete during the interrogation. The prosecution's case was predicated on the testimony  
3 of the robbery complainants, who recounted defendant's purported criminal conduct.  
4 Thus, an assessment of defendant's credibility was essential to the jury's consideration--  
5 indeed, in closing, the prosecutor told the jury that, "if you believe the victims in this  
6 case, the defendant is guilty \* \* \*. If you believe the defendant, then he is not guilty."  
7 The jury found defendant guilty as charged.

8           Defendant appeals his convictions, challenging the admission of the  
9 statements that he made in response to interrogation. Defendant contends, as he did  
10 before the trial court, that he had unequivocally invoked his right to remain silent when  
11 he said that he would not answer any questions, and, thus, his subsequent statements  
12 should have been suppressed. Defendant argues that the trial court's "finding" that his  
13 statement "I won't answer any questions" was not an unequivocal invocation of his right  
14 to remain silent was not supported by the evidence, and that "police cannot avoid the  
15 *Miranda* requirements by choosing whether to accept a defendant's statement."

16           The state responds that defendant did not unequivocally invoke his right to  
17 remain silent; rather, "defendant was attempting to understand his *Miranda* rights." In  
18 any event, the state argues, even if defendant had unequivocally invoked his right to  
19 remain silent, "Ganete was entitled to continue to explain defendant's *Miranda* rights."  
20 Put differently, and in perhaps a more nuanced way, the state contends that the  
21 "clarification about whether defendant understood his rights" was not "custodial



1 interrogation" and, therefore, Ganete's continued questioning of defendant did not violate  
2 his right against self-incrimination.

3           In *State v. Harding*, 221 Or App 294, 300-01, 189 P3d 1259, *rev den*, 345  
4 Or 503 (2008), we outlined the applicable inquiry for assessing whether an accused's  
5 right against self-incrimination was violated during custodial interrogation:

6           "Under Article I, section 12, police must stop interrogation when a suspect  
7 in police custody unequivocally invokes the right to remain silent. *State v.*  
8 *Meade*, 327 Or 335, 339, 963 P2d 656 (1998). However, police may  
9 reinitiate contact with a defendant who has invoked that right, give new  
10 *Miranda* warnings, and obtain a valid waiver of the right after a reasonable  
11 period of time has elapsed. *State v. Holcomb*, 213 Or App 168, 174, 159  
12 P3d 1271, *rev den*, 343 Or 224 (2007) (citing *State v. Rowe*, 79 Or App  
13 801, 805-06, 720 P2d 765, *rev den*, 302 Or 86 (1986)). When a suspect  
14 makes an equivocal invocation of the right to silence, police are required to  
15 ask follow-up questions to clarify what the suspect meant before  
16 proceeding with interrogation. [*State v.*] *Charboneau*, 323 Or [38,] 54,  
17 [913 P2d 308 (1996)]. In determining whether a defendant's statement is an  
18 unequivocal or equivocal invocation, or neither, we view the statement in  
19 light of the totality of the circumstances at and preceding the time that it  
20 was made, 'to ascertain whether a reasonable officer in the circumstances  
21 would have understood that defendant was invoking his rights.' *Holcomb*,  
22 213 Or App at 176."

23 (Footnote omitted.)

24           Applying those principles, and with the parties' arguments so joined, we  
25 first must determine whether a reasonable officer in the circumstances would have  
26 understood defendant's statement--"I won't answer any questions"--to be an unequivocal  
27 invocation of defendant's right to remain silent. As explained, if defendant's statement  
28 was equivocal, then the officer was permitted--indeed, required if the interrogation was to  
29 continue--to ask follow-up questions to clarify defendant's intent. If, however, defendant

1 unequivocally invoked, the scope of the officer's subsequent statements to defendant is  
2 much narrower. The state's secondary, alternative argument requires us to examine the  
3 contours of that proscription.

4           We first conclude that defendant's statement--"I won't answer any  
5 questions"--was an unequivocal invocation of his right to remain silent. The words that  
6 defendant used were unambiguous; that is, they were susceptible to only one reasonable  
7 understanding--an unqualified declaration that defendant would not answer any  
8 questions. Ganete's contrary understanding--that defendant's words, immediately after  
9 Ganete reiterated that "[a]nything you say can be used against you," were a "question"  
10 inviting further inquiry--was not reasonable. *See State v. Dahlen*, 209 Or App 110, 118,  
11 146 P3d 359, *modified on recons*, 210 Or App 362, 149 P3d 1234 (2006) ("A reasonable  
12 officer would interpret [the] defendant's words consistently with their ordinary meanings  
13 and would not understand the defendant to say something he did not actually say."); *see*  
14 *also State v. Kell*, 303 Or 89, 99, 734 P2d 334 (1987) (citing *Connecticut v. Barrett*, 479  
15 US 523, 529, 107 S Ct 828, 93 L Ed 2d 920 (1987) ("Interpretation is only required  
16 where the defendant's words, understood as ordinary people would understand them, are  
17 ambiguous.")).

18           Further, we agree with defendant that "police cannot avoid the *Miranda*  
19 requirements by choosing whether to accept a defendant's statement." Here, the trial  
20 court improperly relied on Ganete's unreasonable decision not to accept defendant's  
21 unambiguous statement as an unequivocal invocation of his right to remain silent.

1 Nor can any of the interaction between Ganete and defendant serve to  
2 render defendant's unequivocal invocation retroactively equivocal. Again, the  
3 determination of whether a statement is "an unequivocal or equivocal invocation" is  
4 based exclusively on "the totality of the circumstances *at and preceding the time that it*  
5 *was made.*" *Harding*, 221 Or App at 301 (emphasis added); accord *Smith v. Illinois*, 469  
6 US 91, 98-99, 105 S Ct 490, 83 L Ed 2d 488 (1984) (explaining that "[u]sing an accused's  
7 subsequent responses to cast doubt on the adequacy of the initial request *itself* is \* \* \*  
8 intolerable," because "[n]o authority, and no logic, permits the interrogator to proceed \* \*  
9 \* on his own terms and as if the defendant had requested nothing, in the hope that the  
10 defendant might be induced to say something casting retrospective doubt on his initial  
11 statement that he wished to speak through an attorney or not at all" (internal quotation  
12 marks omitted; emphasis in original)). Here, nothing that preceded defendant's  
13 invocation "casts any doubt" on the meaning and effect of defendant's declaration.  
14 Accordingly, the trial court erred in characterizing defendant's declaration as, at best, an  
15 equivocal invocation.

16 As we explained earlier, our analysis does not end with the conclusion that  
17 defendant unequivocally invoked his right to remain silent. The state contends that, even  
18 in the face of such an invocation, an officer is permitted to complete the *Miranda*  
19 warning and to ask questions aimed at determining whether defendant understands his  
20 rights.

21 It may well be that, even after an unequivocal invocation, an officer may

1 continue to advise an accused of the remaining *Miranda* warnings. Nevertheless, we  
2 need not resolve that question here because, in all events, Ganete did not limit himself to  
3 merely completing the reiterated advice of *Miranda* rights. Rather--and without *any*  
4 intervening voluntary reinitiation on defendant's part--Ganete asked defendant questions  
5 pertaining to his invocation. Specifically, Ganete's questions "Are you saying you don't  
6 want to talk to me at all?" and "You just want me to go away?" were the sorts of  
7 "clarifying" questions permissible only with respect to an *equivocal* invocation. *See, e.g.,*  
8 *Charboneau*, 323 Or at 54. Such "follow up" is expressly precluded with respect to  
9 unequivocal invocations. *State v. Isom*, 306 Or 587, 593, 761 P2d 524 (1988) (explaining  
10 that Article I, section 12, requires that, upon an unequivocal invocation, "questioning not  
11 only 'should' but must cease"). The continuation of the interaction, which flowed from  
12 Ganete's constitutionally precluded questioning, culminated in defendant's agreement to  
13 answer Ganete's questions regarding his possible criminal involvement. That is,  
14 defendant's ultimately inculpatory statements were the product of the constitutional  
15 violation.<sup>5</sup>

16 Finally, we must assess whether that error was harmless. Or Const, Art VII  
17 (Amended), § 3 ("If the supreme court shall be of opinion, after consideration of all the  
18 matters thus submitted, that the judgment of the court appealed from was such as should  
19 have been rendered in the case, such judgment shall be affirmed, notwithstanding any

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<sup>5</sup> The state does not assert that defendant reinitiated contact with the police or that a reasonable period of time had elapsed after the invocation so that Ganete was permitted to give defendant new *Miranda* warnings and seek a waiver of defendant's rights.

1 error committed during the trial[.]"); *see Holcomb*, 213 Or App at 182-83 (analyzing  
2 whether erroneous admission of the defendant's statements required reversal of the  
3 defendant's convictions, even in the absence of any party arguments regarding  
4 harmless). In assessing harmless, the pertinent inquiry is "whether there was  
5 little likelihood that the error affected the jury's verdict." *State v. Davis*, 336 Or 19, 32,  
6 77 P3d 1111 (2003). As noted, \_\_\_ Or App at \_\_\_ (slip op at 7), admission of the  
7 challenged statements provided the state an opportunity to impeach defendant in a case in  
8 which defendant's credibility was vital to his defense. Thus--and the state does not  
9 contend otherwise--the admission of those statements was not harmless. *See, e.g., State*  
10 *v. Irons*, 162 Or App 512, 524, 987 P2d 547 (1999) (holding that erroneous admission of  
11 evidence tending to affect "the jury's all-important assessment of credibility" was not  
12 harmless).

13                   Reversed and remanded.