IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Appellant
Cross-Respondent,

v.

HOMER LEE JACKSON, III,
aka Homer Jackson, aka Homer Lee Jackson,
Defendant-Respondent
Cross-Appellant.

(CC 15CR46257) (SC S065372 (Control), S065425)

En Banc

On direct appeal of orders of the Multnomah County Circuit Court under ORS 138.060 and ORAP 12.05.*

Argued and submitted June 27, 2018.

Paul L. Smith, Deputy Solicitor General, Salem, argued the cause and filed the brief for appellant. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Marc D. Brown, Deputy Public Defender, Office of Public Defense Services, Salem, argued the cause and filed the briefs for respondent. Also on the brief was Ernest G. Lannet, Chief Defender.

WALTERS, C. J.

The orders of the circuit court are affirmed.

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* Michael A. Greenlick, Judge.

WALTERS, C. J.

In this criminal proceeding, the state has filed an interlocutory appeal of the circuit court's two pretrial rulings suppressing evidence. *Former* ORS 138.060 (2015), *renumbered as* ORS 138.045 (2017). Defendant has been charged with 12 counts of aggravated murder, relating to the deaths of four victims that occurred in the 1980s. He was brought to the police station for questioning regarding those offenses in October 2015, and the present appeal concerns the trial court's suppression of evidence derived from a two-day interrogation. The trial court concluded that certain inculpatory statements that defendant had made during and immediately after the interrogation were not voluntary.[1] For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS BELOW

Because this case is in a pretrial posture, facts concerning the underlying crimes have not been established. However, we provide some background facts based on materials in the record and representations made by counsel during pretrial proceedings. The murder victims were EJ, whose body was found in March 1983 near Overlook Park in north Portland; TH, whose body was found in July 1983 near West Delta Park in Portland; AA, whose body was discovered in September 1983 in a house in north Portland; and LW, whose body was found was found near a sidewalk in Portland in March 1987. All of the victims were believed to have engaged in prostitution activities in north Portland. Evidence from the crime scenes eventually was tested for DNA, and the police discovered the DNA of multiple individuals at the various crime scenes.

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[1] Defendant has filed a cross-appeal arguing that, if the trial court erred in granting his motion to suppress based on voluntariness, it nonetheless should have suppressed the same evidence because the detectives violated his right to counsel under Article I, section 12, of the Oregon Constitution. Given that he is not seeking a modification of the trial court's ruling, his alternative challenge may be more accurately described as a cross-assignment of error. *See, e.g.*, *Behrle v. Taylor*, 362 Or 509, 512, 412 P3d 1179 (2018) (describing cross-assignment of error). In any event, given our disposition, we need not reach defendant's alternative argument concerning his right to counsel, and therefore dismiss the cross-appeal as moot.

Defendant is a schizophrenic.[2] He has a fairly long history of interactions with police in the Portland area.[3] Defendant does not appear to have been a suspect early in the investigation, but he became a suspect after subsequent examination of the evidence. As relevant here, it appears that defendant's DNA was found on evidence near AA's body and on LW's body. In addition, defendant could not be excluded as a contributor to DNA found near the location of TH's body.

At the hearing on defendant's motion to suppress, the following evidence was presented. On the morning of October 15, 2015, plainclothes detectives brought defendant to the Portland Police Bureau for questioning. Those detectives told defendant that they wanted to discuss issues from the 1980s but did not give him any additional information at that point. At the police station, defendant was placed in a small room. He was interrogated in that room between approximately 10:00 a.m. and 6:00 p.m. on October 15, then again from about 8:30 a.m. to 10:30 a.m. on October 16. The interrogation was video recorded and defendant's statements during two cigarette breaks were audio recorded. The trial court received those recordings into evidence and they are part of the record on appeal.

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[2] Defendant acknowledged during the interrogation that he had been treated for schizophrenia, and that diagnosis is indicated on his booking report as well.

[3] During the interrogation, defendant acknowledged that he had been convicted of various property crimes in the late 1970s and early 1980s. During the interrogation, the detectives also discussed with defendant his arrest on suspicion of rape in the 1980s; the detectives indicated that the charges had been dropped. Defendant's booking report reveals that he was convicted of driving under the influence of intoxicants and reckless driving in 2006.

At the hearing on the motion to suppress, police reports were admitted indicating that defendant had been taken into custody in 2006 and 2007 during incidents in which he was experiencing delusions. In the 2006 incident, defendant fired a rifle through the door to his balcony, believing intruders were breaking in despite the fact that there was no way for intruders to access the balcony. Defendant also asked one of the investigating officers about the woman standing next to the officer; nobody was standing next to him. In 2007, police responded to multiple calls from defendant during which he indicated that he believed that people were breaking into his house and that he had a gun. Investigating officers concluded that defendant likely was hallucinating. Defendant was armed with a long stick, and was taken into custody at gunpoint. The 2006 and 2007 incidents resulted in hospitalizations.

A. *Interrogation Before First Cigarette Break on October 15*

Shortly before 10:00 a.m., detectives Lawrence and Hopper joined defendant in the interrogation room. The detectives introduced themselves, offered defendant beverages, and asked him about his medications. Defendant indicated that he took medication for his heart, for high blood pressure, for depression, and for sleep, and that he had taken his medications that morning. Lawrence then told defendant that, if he felt sick or needed to take a break, to let the detectives know. After that, defendant was read *Miranda* warnings and asked if he understood his rights. He said that he did and signed a document indicating that he understood his rights.

The interview began with Lawrence asking defendant general questions about his life, his background, and his romantic relationships. Defendant answered those questions, albeit sometimes in a confusing manner.[4] Defendant told the detectives that he received disability services and had a family member acting as a live-in care provider. He said that he needed assistance with shopping, could not drive, and had a limited ability to walk. He also talked about drinking alcohol and described some of his problems with his memory.

Lawrence told defendant that the detectives wanted to talk to him about some of his prior contacts with police. Defendant acknowledged his participation in minor property crimes when he was young, including an incident in which he had broken into a fast-food restaurant because he was hungry. Lawrence said that he wanted to talk about incidents in the 1980s for which defendant had been arrested, although the charges had been dismissed. Defendant replied that he had memory problems, that it was difficult to remember what he had done the day before, and that when he went to a store, he would not be able to remember what he was shopping for if it was not written down. Lawrence replied that defendant would probably remember because the charges

[4] For example, defendant gave conflicting information to the detectives about the dates and lengths of his marriages. At another point in the interrogation, when asked about his mother, defendant—who was in his mid-50s—indicated that his mother was between 60 and 65 years old.

were for rapes of two women. Defendant responded that he had not raped anyone and reiterated that "I can barely remember what I did yesterday, much less 20, 30 years ago." Lawrence said that he wanted to talk to defendant about "some things similar to that" and that he wanted to know about prostitution in the 1980s. He asked if defendant had frequented prostitutes back then, and defendant at first denied doing so. However, when pressed, defendant said that before his second marriage, he had had contact with prostitutes in Portland every few weeks.

Lawrence also asked about defendant's history of drinking and fighting. Defendant at first claimed that he had few problems with fighting, but then acknowledged that he had been stabbed at one point, and, in another incident, had been shot by his brother-in-law, causing injury to his heart and a lung. He also acknowledged that he suffered from depression. Over the course of the next few hours, defendant also revealed that he had used significant amounts of alcohol, marijuana, amphetamine, and cocaine during the 1980s, and had experienced blackouts on numerous occasions as a result. Lawrence asked defendant what type of prostitutes he liked, and defendant replied that he liked "black girls."[5] Lawrence then showed defendant pictures of three of the murder victims, and defendant said that he did not recognize them, but that one looked like his ex-wife's niece. Lawrence indicated that all three had been prostitutes in Portland, and defendant denied any contact with them. At that point, Lawrence revealed to defendant that they had been killed, and that they all had defendant's "DNA associated with them." Lawrence said that they knew how the crimes had occurred but wanted to know why they had occurred. Defendant denied that he had killed the victims. Lawrence stated: "I've concluded that you are responsible for this and what I'm trying to do is explain, have you explain to me so that we can explain together to everybody why this occurred." Defendant repeatedly denied that he had killed the victims, and, when asked why his DNA would be associated with them, defendant responded that maybe he had had sex with them. Hopper interjected that

[5] All four victims in this case were black.

she was confident that defendant was involved in the murders. Lawrence added that the victims' families were waiting for answers and that the only way the families would forgive defendant was if they understood why he had committed the crimes. Lawrence offered that he believed that defendant was no longer violent and he wanted "to be able to explain to people that you are different now." He said that defendant needed "to explain to us why this occurred so we can help explain to these families why they lost a loved one and so they can help find forgiveness for you, because they want that as well." Defendant responded that he was trying to cooperate, but that he did not remember the victims. Lawrence said that "everything turns out for the best for everybody" if defendant explained to them why the crimes had occurred, and told defendant that he knew that defendant could recall the murders. Defendant again denied that he could recall. Lawrence indicated that he believed that defendant's depression and other ailments were a result of having committed the murders. Both detectives told defendant—and reiterated throughout the morning—that they were certain that defendant had committed the crimes.

Lawrence stressed what a relief it would be for defendant to acknowledge his crimes and take responsibility, "because today is the day." He stated that when the case was tried, the jury would "hear what the physical evidence is that links you to these three, and then your next response is 'I'm, I, I can't explain it.' I mean, what do you think, how do you think those people are gonna react? They're not [going to] react favorably, are they?" Lawrence described the physical evidence against defendant as a "done deal," stressing the accuracy of DNA testing. Again, defendant maintained his innocence.

The detectives changed tactics, stressing religious atonement of sins and telling defendant that God was giving him a chance to explain what had happened. After defendant reiterated that he could not help the detectives, Hopper took a more hostile stance, accusing defendant of "playing a game" with them. She added: "How do you think that's gonna sound a year from now when you're in front of the courtroom? I can remember everything about this burglary

about this goofy fast food thing when I was hungry and needed food *** but I don't remember killing these three women." When defendant again stated he did not remember, Lawrence said that he did remember, and asked defendant how would be able to explain the presence of his DNA, adding "I'll tell you right now it's gonna sound bad." Shortly thereafter, defendant asked for a break to smoke a cigarette.

B. *Interrogation After the First Cigarette Break on October 15*

When they returned from the cigarette break, Lawrence noted that defendant had been crying, but defendant denied crying and continued to deny involvement in the crimes. Lawrence then indicated that, although they had shown defendant pictures of three victims, those were only to get started; Lawrence told defendant that they were investigating other cases as well. Lawrence reiterated that the detectives already knew what had happened and they just wanted defendant to tell them why. Lawrence claimed significant expertise about people's motivations and said that he could help defendant "figure that part of it out," but that first defendant must give him information. The detectives then began talking about the locations of the crimes and showing defendant pictures of the locations. They showed defendant a picture of the house where AA's body had been found, but he denied that he recognized it. Lawrence told him that his DNA had been found there. Defendant then was shown pictures from two other murders, but he again denied any knowledge. During this part of the interrogation, defendant's cell phone rang, and Lawrence asked defendant to turn it off.

Noting defendant's lack of emotion, Hopper asked why defendant was not more upset by the crime scene photos, referring to him as "cold-blooded."[6] Lawrence said that they were trying to help defendant, and "I can't impress upon you enough that this train is moving down the tracks and when I say this train I mean this case." Lawrence added: "And I would rather see you as a passenger than get run over by it because as a passenger you still have some control

[6] Defendant's affect did not change significantly throughout the interrogation.

over your future." Lawrence said that, if defendant maintained that he did not remember, then "other people determine the course of your future for you." Hopper then joined in, stating that, "when we're all sitting in a courtroom and we're showing these pictures and the jurors are listening to your words," and defendant was maintaining that he could not remember, "you know what that makes a person think on the outside? He really doesn't remember because he's killed so many of 'em." She continued, "I'm telling you right now, that's what people are gonna think and they're gonna think you're a monster." When defendant again maintained that he had not killed anyone, Hopper responded, "that's a lie," and Lawrence added that it was a "flat out blatant lie." Both detectives continued to insist that defendant was lying and that he had killed more than one woman, but defendant continued to maintain his innocence. Lawrence then told defendant that not confessing indicated that there was more that the detectives did not know about, and that made defendant "an even bigger monster." Hopper suggested that people would understand if defendant explained that he had had a rough childhood, was abused, and had anger issues. When defendant made another denial, Hopper again called him a "monster" and said, "You deserve what's comin' to ya and I hope you get every bit of it." She added, "[W]e will do everything we can to make sure you spend as much time in prison as we can put you there for."

Lawrence told defendant that he would be going to jail that day, and defendant replied that he was aware of that. Lawrence then told him that he had been brought in for questioning rather than being booked because "we actually care about not only these victims' families, but how this case proceeds for you." Lawrence claimed that he could tell from defendant's body language that he had recognized the crime scenes, that he was giving defendant an opportunity to explain, and "this is really the only chance you're gonna get to do that that is going to have meaning. Because beyond this it's gonna look like you're cooking a story." Lawrence stated that he had dealt with people who deny crimes that "have no remorse" and "are truly evil people," and added, 'I don't want that to be you." Lawrence stated that "we are literally trying to save you from you because when you go

down this road and say I don't remember, I didn't do it, you make it worse." He added that, when defendant reached the point of saying "here's what I do remember," that would be "the point where now we're working together to help these victims' families." Lawrence then returned to his train analogy, saying that "this train is moving," and "I want you to be a passenger, I don't want you to get run over by it." Lawrence told defendant that it was important for him to explain when he had stopped killing people, because they were investigating other cases as well: "And when you don't talk about it and you don't help us get that understanding there's potential that there's more and that's what we don't want." Lawrence said that he was ready to spend all day to "get through this," and "I want to do it with you, I don't want us working from opposite ends." At that point, defendant asked for a second bathroom and smoke break.

C. *Interrogation During the Second Cigarette Break on October 15*

During the second cigarette break,[7] the detectives talked with defendant about having lunch, after which all three engaged in casual conversation about the transit police, defendant's health problems, fishing, and smoking and drinking. Defendant then talked quite a bit about his various relatives, then asked, "So I am going to jail today?" Lawrence replied that he would at some point, but that it would not necessarily be that day, stating that they could "put you up tonight if we need to if it's taking us time to get to the point where we can get all this stuff worked out." Lawrence explained that defendant would be kept overnight at the police station. Then the following exchange occurred:

> "[DEFENDANT]: Okay, so is there a possibility like, after a little while, can I make a couple of phone calls?
>
> "LAWRENCE: We need to get through this first before we allow you to make some phone calls.
>
> "HOPPER: At some point though.

[7] The first and second cigarette breaks were audio recorded, and the recordings are, at times, hard to understand. The trial court made findings concerning the significant parts of the audio recordings, and those findings are not disputed on appeal.

"LAWRENCE: At some point you will—

"HOPPER: When we're all done—

"LAWRENCE: At some point, you'll be able to.

"HOPPER: Yes.

"LAWRENCE: When we get to the point—

"[DEFENDANT]: Yeah, 'cause my—

"LAWRENCE: —where we're working together on this, yes, we can allow you to—

"[DEFENDANT]: Okay.

"LAWRENCE: —use the phone.

"[DEFENDANT]: Cause my sister, this is her second time calling.

"HOPPER: Oh, yeah?

"[DEFENDANT]: So Dejaunay must've called her.[8]

"HOPPER: Well, sure.

"[DEFENDANT]: Yeah, right after I left out.

"HOPPER: Of course.

"LAWRENCE: Um-hm. And that's the thing is we want you to be able to make that phone call. But we need to start making some progress with this in order to do that because we don't want to have to explain to your family what's going on.[9] It's better that you s—, put it in your words.

"[DEFENDANT]: Yeah.

"LAWRENCE: Do you know what I mean?

"[DEFENDANT]: Yeah.

"LAWRENCE: Because that - that's just an awkward place for all of us to be. It's better that you do it, than we do

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[8] Defendant's nephew Dejaunay had been present when detectives had arrived at defendant's residence to take him to the police station that morning.

[9] Evidence was presented at the hearing that defendant's family tried throughout the two days during which defendant was being interrogated to find out from police what was happening to defendant, and were told that the police were almost through questioning him and that he would be released soon.

it. Then, once we've worked through some of these things, then it's, it's easier for everybody.

"HOPPER: We're gonna give you the opportunity to talk to your family.

"LAWRENCE: Ample—

"HOPPER: That's for sure.

"LAWRENCE: —opportunity.

"[DEFENDANT]: Uh-huh.

"HOPPER: We will give you an opportunity to (undiscernible).[10]

"[DEFENDANT]: Who I—all I need to do is call my sister. Like I said, she worries.

"HOPPER: Yeah.

"[DEFENDANT]: You know, especially with my health and stuff like that. Dejaunay probably made it sound a lot worse than—

"HOPPER: More dramatic?

"[DEFENDANT]: Yeah.

"LAWRENCE: Yeah.

"[DEFENDANT]: You know, oh they came and they took him away.

"HOPPER: Yeah.

"[DEFENDANT]: Then [my sister Kawana's] like, 'what? Oh hell no. Okay, let me call this person, let me call that person, let me...'

"HOPPER: Oh, I'm sure.

"[DEFENDANT]: And before I know it, it's all over town. Well, I'm about ready to go.

"LAWRENCE: Okay.

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[10] Defendant initially contended that the indiscernible portion of the recording referred to a lawyer, but Hopper testified at the suppression hearing that she had not referred to a lawyer, but to defendant's family. The trial court credited her testimony in that regard.

"[DEFENDANT]: I don't feel good, I and some of it, I don't remember all of them. I—I really don't.

"LAWRENCE: Okay.

"[DEFENDANT]: You know, but the girl in the house, I do remember that."

D. *Interrogation After the Second Cigarette Break on October 15*

After the second cigarette break, defendant and the detectives returned to the interrogation room. Defendant was shown more pictures and maintained that he did not remember two of the victims, but he acknowledged that he did recognize AA. Defendant said:

"I met her at Irvington Park. It was during the middle of the day um, I was sitting over by the playground and uh, it was me and a couple of friends and I think uh, two of [my] nephews 'cause I was watching them play. She came over and we started talking and everything was going pretty good so I, I told her I'd meet her again later on in the park, you know after I got, took the kids back home and, you know, got all that stuff situated. Uh, we met at the park and she was the one that recommended the house."

Defendant said that the victim knew which door was open at the house, and that he did not know what set him off, "But I know I did kill her. I think I strangled her. I think that's what I did." Lawrence asked him how, and defendant thought maybe it was with his hands. Lawrence offered to show defendant a different picture, "because there's a piece of her clothing that's kind of involved," and asked if that helped him remember. Defendant guessed "her shirt," then "her belt," and Lawrence offered that defendant could be "mixing the details up" and confusing that murder with a different one. He then asked if defendant remembered her shirt, and defendant offered that he thought it was dark colored. Lawrence then asked if there had been an incident where he had used a shirt and not just his hands to strangle someone. Lawrence asked if defendant remembered a weapon like a knife, and defendant offered that "I killed her with it, I, I believe." Lawrence then told defendant that AA had been strangled but had other injuries as well. He added that they would go through the other victims' injuries with

defendant, showing him "harder photographs" to help them understand "how things happened with them and why you left them in the state you did." The detectives then took a lunch break, providing defendant with a sandwich, leaving him in the interrogation room, but taking his phone with them.

After the lunch break, Lawrence returned to the topic of AA, and defendant suggested that he might have been drunk or high, explaining that, at that point, he had been getting drunk every day and using a lot of cocaine. He emphasized that he could barely remember what happened the previous day or his mother's birthday, much less something that had happened more than 30 years earlier. Lawrence then went over photographs from the location where AA had been found, asking defendant about various things depicted in the pictures and pointing out various details. Lawrence asked defendant about how many other times he had done things like this. Defendant said that he did not know, and Lawrence suggested that there might be as many as seven victims. The detectives went over photographs of different crime scenes, asking defendant if he remembered various aspects of the crimes depicted, but defendant maintained that he had no memory of them. Lawrence said that defendant knew there was more than one victim, and defendant responded, "Yeah it must be more than one." Defendant said he thought about his crimes once in a "blue moon," which he described as when his head was clear, when he was not drunk, and when his medication had not "kicked in." Defendant maintained throughout the day that he had no memory of the other crimes, although he acknowledged being familiar with some of the areas where the bodies were found.

At various points throughout the afternoon, the detectives suggested that, because defendant had already confessed to one murder, he was likely to spend the remainder of his life in prison, and there was no reason not to confess to additional crimes. Defendant continued to deny any memory of additional crimes. At some points, the detectives returned to a more aggressive or hostile approach, asserting that they were able to tell that defendant was lying and that he

was "messing with" them. The detectives described various scenarios of how they believed the crimes might have happened, but defendant expressed considerable doubts about the detectives' speculations. The detectives also returned to the theme of helping the victim's families. Defendant acknowledged, "I have to remember what I did" and said he was doing his best, but he still had no memory of the crimes. He attributed his lack of memory to drug use and blackouts. Detective Lawrence said that he was disappointed in defendant for failing to confess to additional crimes. That day's interrogation concluded at about 6:00 p.m., and defendant was held at the police station that night. His medications had been retrieved from his home during the interrogation, so he was able to take them that evening.

E. *Interrogation on the Morning of October 16*

The interrogation resumed the following morning at approximately 8:30. Lawrence told defendant that, before they started the booking process, he would have a chance to call his family. Defendant said that he wanted to call his mother and sister. Lawrence told him that he would be allowed to make the calls but would need to make them on a speaker phone to make sure that he and his family were not devising an escape plan. Lawrence assured defendant that the detectives would not talk during the calls. The detectives did not arrange for defendant to make the requested calls immediately, however. Instead, they continued to interrogate him.

Lawrence brought out the form that defendant had signed the day before, waiving his *Miranda* rights, and asked if defendant remembered it. Defendant confirmed that he did, and that he understood his rights. The detectives then proceeded along the same lines as they had the previous day. Lawrence stressed the strength of the state's evidence, the need for the victims' families to know what had happened, and that the "absolute worst that could happen" for defendant was for him not to tell them about the crimes "up front," which would "actually put [defendant] in a much better position, the way the community would view [him], the way these families would view [him]." Defendant repeated that he did not remember any victims other than AA and "I

can't just say, okay I did something and I don't even know if I did it or not." The detectives again went over with defendant the details of the various crimes scenes, but, although defendant acknowledged some familiarity with some of the areas, he maintained that he did not remember the crimes. At various points, the detectives told defendant that they were certain of his guilt, that he was trying to "game" them, and that, by failing to admit to additional crimes, he had "torpedoed" himself, and that he "would regret this."

The detectives showed defendant a video of AA's mother, thanking defendant for admitting having killed AA, as well as a video of LW's son, in which he asked defendant to "talk to these detectives about my mom and admit[] that you killed her." Hopper asked defendant what he would tell his own family, and he replied that he would tell them what he knew and what he had done. Defendant ultimately acknowledged that he may have committed two of the other crimes, but that he had no memory of them. The detectives asked if they could tell the families that he acknowledged responsibility for those murders, and defendant said no, because he was not sure if he had committed those crimes.

Defendant then asked for a cigarette and bathroom break, and Lawrence told him that he would be allowed to take the break and use the telephone afterward. When defendant returned the from the break, Lawrence indicated that another officer—who apparently had been with defendant during the break—thought that defendant had something to tell them.[11] Defendant referred to the EJ murder, stating that he "may have done that one." Defendant said, "I don't know if I rolled her down, threw her down or whatever, I—that's something I don't know. You know I can't remember it."

F. *Defendant's telephone calls*

The detectives then allowed defendant to call his family on a speaker phone. Defendant left a voice mail for his mother that he was being booked for murder, and Lawrence interjected, "aggravated murder." Defendant's mother called back and he spoke briefly with her, indicating that he was

[11] The record does not contain a recording of that break.

being held for murder. She expressed disbelief and said that she would text defendant's sister. A call was then placed to defendant's sister, and defendant told her that he was in jail for murder for something that he did in 1983. He said, "Yeah, I did one, uh, the others I'm not sure about." His sister asked if he was hallucinating and if he had been up all night. Defendant said he had had a "little bit of sleep last night." His sister asked who the victim was, and Hopper interjected that it was a 14-year-old girl. The sister asked defendant if someone had made him say this, and defendant replied, "No." She asked if defendant had his attorney there, and defendant said he did not. His sister asked, "how can you say yes to something if you don't have an attorney?" Defendant replied, "Because I did it." His sister said, "I think you may have just been up too long and badgered too long and probably agreed to anything." His sister then talked to the detectives and asked about defendant's lack of representation. They told her that he had agreed to talk to them without an attorney. The sister explained that she had been trying to find out what was happening at the police station all night, and added that, in light of defendant's health problems, "he could probably say anything." After the call was completed, Lawrence told defendant that he should make sure to "be honest" with his sister about how well they had treated him, "because what I don't want her to do is to get herself so worked up that we did something bad to you."

Shortly thereafter, defendant was booked into the jail, and he was charged by indictment later that day with 12 counts of aggravated murder.

G. *The Trial Court's Rulings*

Defendant moved to suppress evidence of his admissions. He argued, in pertinent part, that suppression was warranted in light of case law interpreting ORS 136.425 and Article I, section 12, of the Oregon Constitution. At the conclusion of the hearing on defendant's motion to suppress, the trial court made oral observations about what had occurred, characterized aspects of the interrogation, and determined that evidence of defendant's statements during and following the second cigarette break on October 15 should be suppressed. The court concluded:

"I am finding that the State has not met its burden of proof in this case when it comes to ORS 136.425.

"I believe that when I consider the totality of the circumstances, many of which I've already discussed, but the length of time that the defendant was subject to interrogation; the fact that he was told repeatedly and clearly that he would be found guilty and that there was [u]ncontroverted proof of his guilt; the fact that he was not only given indications that the police would assist him, that it would be better for him, and that they would actively—not that it would just be a natural consequence of his continuing to deny his involvement or continue to state he doesn't remember—it wasn't just that the natural consequence would be a certain thing, but the police would actively work to make things as bad as possible for him, which I think is very different than what you see in some circumstances where somebody is just told, 'Hey, if you don't admit, then this will happen.' It's like, 'If you don't admit, then you will be considered a monster; we will consider you a monster; and we will actively work to make this as bad as possible for you.'

"When I consider all those things together, the fact that he was cut off from his family, by itself wouldn't mean anything. But when he was essentially told that, 'You're not going to have contact with your family,' and the flip side is, 'We will let you have contact with your family if we're working together," all of these things by themselves would not have been enough. But given the totality of the circumstances, what I consider to be a very close call, I feel the State has not met its burden.

"By convincing the defendant that he would be found guilty regardless of whether he remembered killing anyone, he could have easily considered it for the better to confess regardless of whether he had a memory of killing. Or he could have concluded that he murdered the victim—it could very well in this case have been that he murdered the victim in the case in which he had limited memory of her and the place of her murder.

"And I've got to tell you, although I don't need to make a finding that his confession was false or wrong, and I'm not doing that now, it sure appears that the defendant became convinced tha the must have committed murders that are—one plausible thing here is that he became convinced that he committed the murders of which he had no memory,

> and so he took responsibility for the one where he had some memory, at least of the person and the place.
>
> "And the fact that the defendant remembers [AA] or remembers being at a place where she took johns does not—obviously does not mean that he committed murder on this particular date 30 years ago—34 years ago.
>
> "He definitely—when I consider the totality of circumstances, I believe that it could have—the defendant could have started to believe that he would suffer a number of detrimental consequences, including the judge and jury would consider him to be a monster, the police would seek their longest possible penalties; the victims would be angry and influence the prosecution negatively.
>
> "It might also have been reasonable for him to believe that the interview might not end until he cooperated, and that he would not *** be able to let his family know what was going on.
>
> "There was no inducement of immunity in this case. But there was an inducement that the police would help him or that the case would be helped at times; and at other times, obviously a hostile threat that bad things would happen. Police threatening a worse punishment if convicted I believe is coercive."

The court then went on to further express why it viewed defendant's confession as problematic, again noting defendant's ongoing lack of memory and providing incorrect details of AA's murder. The court observed that it is a legal and common interrogation technique to lie to defendants about the strength of the state's case, but also noted the downside to that technique: that having convinced a defendant of the inevitability of his conviction, "there is much more of a risk that—when the police then start threatening and inducing with leniency—that it is going to be the type of thing that will have much more of an influence on the defendant." Or, as the court put it, if a defendant thinks that he has no chance of prevailing in court, he "is much more susceptible to being under the influence of threats and inducements because it's a little bit of 'what harm will it do for me to confess?'" The court also concluded that showing defendant his *Miranda* waiver form on the second day did not "dispel the taint on the first day," and, to the extent that

defendant made any admissions during the interrogation before the phone calls on the second day, those too should be suppressed. The court therefore granted defendant's motion to suppress admissions made during the interrogation.

The court then turned to the parties' arguments about whether defendant's telephone admission to his sister that he had committed a murder, made immediately after the interrogation on the second day, also should be suppressed. The court observed that the interrogation on the second day had proceeded similarly to that on the first day and, that, although defendant was shown his *Miranda* waiver form, he was not given new *Miranda* warnings. The court noted that the detectives continued to emphasize the strength of their case and told defendant that the "worst thing that could happen" was defendant failing to admit his involvement in other murders, that he had "torpedoed himself" by failing to make further admissions, and that he would "regret this." The court observed that defendant also was told during the interrogation to think about what he would tell his family later that day. Ultimately, the court concluded that defendant's admission to his sister should be suppressed. The court noted that the detectives had interrogated defendant up to the time when they allowed him to call his family, that the detectives had participated in the calls, and that defendant had understood before he made the calls that the interrogation would continue after the calls were completed. Thus, the court explained, the coercive influences of defendant's first admissions were not dispelled. The court concluded that defendant's admission made during the telephone call should be suppressed.

II. ANALYSIS

The legal question that the state raises in this interlocutory appeal is whether the trial court erred in concluding that the state failed to prove that defendant's statements during and after the second cigarette break on October 15, as well as his admissions on October 16, were voluntary. ORS 136.425(1) provides that "[a] confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against the defendant when it was made under the influence

of fear produced by threats." Similarly, under Article I, section 12, of the Oregon Constitution,[12] the voluntariness of an admission or confession depends on whether or not, in the totality of the circumstances, a defendant's free will was overborne and his or her capacity for self-determination was critically impaired. *State v. McAnulty*, 356 Or 432, 459, 338 P3d 653 (2014) (citing *State v. Acremant*, 338 Or 302, 324, 108 P3d 1139 (2005). This court has recognized that both the statute and Article I, section 12 embody the common-law rule that confessions made by a defendant in custody that were "'induced by the influence of hope or fear, applied by a public officer having the prisoner in his charge,'" are inadmissible against the defendant. *State v. Powell*, 352 Or 210, 218, 282 P3d 845 (2012) (quoting *State v. Wintzingerode*, 9 Or 153, 163 (1881)); *see also State v. Smith*, 301 Or 681, 690, 725 P2d 894 (1986) ("We know of no case that interprets or applies ORS 136.425 independently of the common-law rules on confessions and admissions.")

Voluntariness is a question of law for this court. *State v. Terry*, 333 Or 163, 171, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). This court reviews the voluntariness of defendant's statements anew, but is bound by the trial court's findings of fact if supported by the record. *Id.* To the extent that the trial court did not make express findings, this court will presume that the court decided the facts in the light most favorable to the defendant, who prevailed below. *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968). "It is well established that confessions are initially deemed to be involuntary and that the state has the burden to overcome that presumption by offering evidence affirmatively establishing that the confession was voluntary." *State v. Powell*, 352 Or at 225-26; *see also State v. Stevens,* 311 Or 119, 137, 806 P2d 92 (1991) (state must prove voluntariness of a defendant's statement by a preponderance of the evidence). The provision of *Miranda* warnings is not a guarantee that statements made after the warnings are voluntary. *See McAnulty*, 356 Or at 459 (considering whether coercive tactics rendered a defendant's post-*Miranda* statements involuntary); *State v. James*, 339 Or 476, 488-89, 123 P3d 251 (2005) (rejecting

[12] Article I, section 12, provides, in part, that "[n]o person shall *** be compelled in any criminal prosecution to testify against himself."

argument that statements made after waiver of *Miranda* rights are presumptively admissible).

Thus, the question for our consideration is whether the state met its burden to prove that defendant's free will was not overborne and his capacity for self-determination was not critically impaired, and that he made his statements without inducement from fear or promises. Those issues are interrelated and, as the trial court explained, we must look to the totality of the circumstances in reaching a legal conclusion about the voluntariness of defendant's statements. However, we find it helpful to begin with the issue of whether the officers who interrogated defendant induced him to make admissions by the influence of hope or fear.

On that issue, both parties rely in significant part on this court's decision in *Powell*. The facts in that case are not similar to those presented here, and we therefore do not recount them in detail, other than to note that, in *Powell*, fairly extensive suggestions of leniency were made. What we can learn from *Powell*, however, is that this court has long recognized that confessions made as a result of such inducements are not reliable. In *Powell*, the court began, as we will, with Oregon's first case on point, *Wintzingerode*, in which a defendant in custody made incriminating statements after an officer told him that it "'would be better for [him] to tell the whole thing.'" *Powell*, 352 Or at 218 (quoting *Wintzingerode*, 9 Or at 162). In concluding that that statement constituted an improper inducement, this court observed:

> "There seems to be no conflict among the numerous authorities as to the rule, that confessions made by a prisoner while in custody, and induced by the influence of hope or fear, applied by a public officer having the prisoner in his charge, are inadmissible in evidence against him.
>
> "The precise form of words in which the inducement is presented to the prisoner's mind is immaterial. It is sufficient if they convey to him the idea of temporal benefit or disadvantage, and his confession follows in consequence of the hopes thereby excited."

Id. at 163; *see also Powell*, 352 Or at 218 (quoting same). In *Powell*, the court then explained that that rule against the

admission of confessions made as a result of inducements—promises or threats—arose from the understanding that such confessions are not reliable: "As our cases consistently have recognized, confessions are unreliable when rendered under circumstances in which the confessor perceives that he or she may receive some benefit or avoid some detriment by confessing, regardless of the truth or falsity of the confession." *Id.* at 222 (citing cases). Thus, the court said, a court must make "an individualized inquiry into whether the alleged inducement was sufficiently compelling to influence defendant's decision to confess." *Id.* at 223.

In *Powell*, as well as in an earlier case, *State v. Ely*, 237 Or 329, 390 P2d 348 (1964), this court focused on the coercive effects of statements that implied that the defendant could avoid prosecution by confessing. *Powell*, 352 Or at 223-24; *see also Ely*, 237 Or at 334 (where defendant's employers warned him that they could not guarantee he would not be prosecuted, but that they did not intend to pursue a prosecution, that assurance "amount[ed] to the offering of an inducement and weaken[ed] the effect of any warning that the confession could be used against him"). As the state points out, such assurances were not present here. The detectives told defendant that he would be charged with murder, and they did not imply that there was anything he could do to avoid prosecution.

The hope of avoiding prosecution is not, however, the only inducement that may render a confession involuntary. The case of *State v. Linn*, 179 Or 499, 173 P2d 305 (1946), is illustrative. In *Linn,* the defendant had been arrested for rape and was interrogated by two police officers. One of the officers told the defendant that he was "in a tough spot," that another man involved in a similar offense had been sentenced to seven years in prison, and that it was the defendant's "best bet" to admit the crime and "throw himself on the leniency of the Court." *Id.* at 504. When asked whether he had told the defendant whether making a confession "would be better" for the defendant, the police officer answered that he had not told the defendant that it would be better, but that "it might be." *Id.* The officer acknowledged that "I told him I felt he would get a better deal if he walked

in and pled guilty." *Id.* at 506. The defendant testified that the officers had convinced him "that I was in an impossible predicament and that they were my friends and telling me the best thing to do." *Id.* The defendant also testified that one of the officers told him, if he "wanted to do it the hard way," that "they would fight [him] to the last inch." *Id.* at 506-07.

In analyzing those facts, this court acknowledged the rule of law from *Wintzingerode*, but drew a distinction between permissible "mere adjuration" and "adjuration accompanied by inducement." *Linn,* 179 Or at 510 (citations omitted). The court noted that it had upheld confessions in circumstances where defendants had been told, as a general matter, that it would better if they told the truth, or that they would feel better if they told the truth, concluding that "[t]he real question is whether the language used in regard to speaking the truth, taken in connection with all the attending circumstances shows the confession was made under the influence of some threat or promise." *Id.* at 512. The court concluded:

> "In the case at bar, the question does not relate to a mere adjuration to tell the truth, nor to a mere statement that it would be better to tell the truth. The inducements went much further and were calculated to induce a confession of guilt. In addition to the specifically undenied testimony of the defendant that if defendant did it 'the hard way' they would fight him to the last inch, the testimony of the officers themselves discloses a subtle attempt to instill in the mind of the defendant (1) fear of a seven year sentence and of official hostility if he refused to confess and (2) expectation of leniency if he admitted the crime."

Id. at 512-13. The observations in *Linn* are consistent with the statement in *Wintzingerode* that an impermissible inducement is one that conveys to a defendant the idea of a threat or promise. 9 Or at 163.

The state argues that, in this case, the detectives hewed to permissible inducements, describing their interrogation as involving three basic themes: helping the victims' families; relieving defendant's psychological or spiritual burden of having committed the crimes; and describing

the legal ramifications of defendant's failure to confess. All three of those themes were present throughout the interrogation, and we agree with the state that the first two of those themes—essentially, relieving defendant's conscience and easing the suffering of the victims' families—are not the sort of themes that have concerned this court in the past. Using the terms of *Linn,* those themes do not imply "adjuration accompanied by inducement" but rather are permissible "mere adjuration." *Linn,* 179 Or at 510.

The same cannot be said, however, of the detectives' statements concerning the legal ramifications of defendant's failure to confess. We reiterate some of the relevant facts, moving from the fairly benign to the more legally significant statements. The detectives told defendant that: (1) "everything would turn out best for everybody" if defendant confessed; (2) they were trying to "help" or "save" defendant by encouraging him to confess; (3) by way of analogy, that if defendant did not confess, defendant would be "run over" by a train, whereas, if he confessed, he would be a passenger on the train and "have some control over [his] future"; (4) they were investigating additional murders and that defendant needed to tell them when he stopped murdering women, implying that if he did not, he would become a suspect in additional murders; (5) the jury would hear irrefutable evidence that defendant committed the crimes and would react badly if defendant could not explain the evidence or if he claimed he could not remember the crimes, and would assume that he couldn't remember because he had committed so many murders; (6) the detectives themselves, as well as the victims' families and ultimately the jury, would view defendant as a "monster" unless he confessed; and (7) if defendant did not confess, the detectives would do everything they could to ensure that he received a harsh sentence.

In addition, the detectives also made some significant statements to defendant about how the interrogation itself would proceed. The detectives stated that: (1) they were giving defendant his only significant chance to confess because anything he said later would sound as if he were "cooking a story"; (2) they were prepared to continue the interrogation all day and into a second day; and (3) they

would be "working together" with defendant at the point when he told them what he remembered about the crimes, and that he would not be permitted to talk to his family until they had "worked through some of these things."

The state maintains that, under the circumstances of this case, those statements did not rise to the level of impermissible inducements under ORS 136.425 for two reasons. First, the state notes that, before any of those statements were made, defendant was given *Miranda* warnings, and defendant did not assert his right to remain silent or argue that he did not understand that right. The state is correct that *Miranda* warnings are, in essence, a prophylactic measure to try to ensure that a defendant's decisions made while in custody are made voluntarily, and that, if a defendant is not informed of the right to remain silent, the statements that a defendant makes will be deemed involuntary and be suppressed. *See, e.g., State v. Vondehn*, 348 Or 462, 467-69, 236 P3d 691 (2010) (so noting). But *Miranda* warnings are not a guarantee that statements made after the warnings are voluntary. *See McAnulty*, 356 Or at 459 (considering whether coercive tactics rendered a defendant's post-*Miranda* statements involuntary). If interrogators make impermissible inducements, a confession is unreliable and inadmissible, even when it follows a *Miranda* warning. We agree with the state that the fact that defendant was given *Miranda* warnings is an important factor in an analysis of whether—under the totality of the circumstances—defendant's will was overborne, but it is not determinative in an analysis of whether defendant was induced to speak by hope or threat of temporal benefits or disadvantages.

The state's second argument on that front is that this is not a case in which the detectives either implicitly or explicitly suggested that defendant could escape prosecution by confessing. Rather, it is undisputed that, before defendant's admission, the detectives had assured him not only that he would be charged with multiple murders, but also that he would be booked into jail after the interrogation concluded. The state reasons that the detectives' statements about the legal significance of defendant's silence amounted to no more than explaining to him the legal consequences of

the situation in which he found himself and that such explanations are permissible.

The trial court viewed the interrogation as going further, however. The court explained that defendant "was not only given indications that the police would assist him, that it would be better for him, and that they would actively—not that it would just be a natural consequence of his continuing to deny his involvement or continue to state he doesn't remember—it wasn't just that the natural consequence would be a certain thing, but the police would actively work to make things as bad as possible for him." In that regard, this case is similar to *Linn*. There, the defendant was told that the best thing for him to do—not just best in the moral sense but in the practical sense of how the case against him would proceed—was to confess. 179 Or at 504-05. An officer suggested to the defendant not only that it would be best to confess, but that, if he did not confess, he was likely to get a lengthy prison sentence, and the police would fight him "to the last inch." *Id.* at 506, 507. Similarly, in the present case, defendant was told that it would be best for him to confess so that the detectives might eliminate him as a suspect in additional crimes and because it would give him more control over how the case would proceed in the future; that the jury would think poorly of him if he did not confess; and that if he did not confess, the detectives would do their best to ensure that he received the maximum possible sentence. Defendant was also told that the detectives were prepared to continue to question him until they were "working together" and that he would not be permitted to talk to his family until they had "worked through some of these things." As the trial court recognized, those are the types of statements that are potentially problematic under ORS 136.425 because they conveyed to defendant that he "may receive some benefit or avoid some detriment by confessing, regardless of the truth or falsity of the confession." *Powell*, 352 Or at 222.

The trial court did not stand solely on that ground, however. It correctly looked to the totality of the circumstances and considered additional evidence about whether defendant confessed voluntarily or whether his will was

overborne. We proceed in the same fashion. *See, e.g.*, *State v. Foster*, 288 Or 649, 655-56, 607 P2d 173 (1980) (considering, in totality of circumstances, police questioning of defendant over the course of two days during which he remained in custody, officers' statements that defendant's predicament was hopeless and that he would benefit if he cooperated); *State v. Atkins,* 251 Or 485, 498, 466 P2d 660 (1968) (confession deemed involuntary where defendant had been placed in cell with dangerous inmate "for the purpose of gaining admissions" from defendant); *State v. Garrison*, 59 Or 440, 117 P 657 (1911) (in evaluating confession and applying rule from *Wintzingerode*, court made note of defendant's limited mental abilities and detective's method of extracting confession). The United States Supreme Court also takes a "totality of the circumstances" approach that considers characteristics of a suspect as well as aspects of the interrogation, and we look to those cases for guidance. *Lego v. Twomey*, 404 US 477, 478, 92 S Ct 619, 30 L Ed 2d 618 (1972) ("[C]ourts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances include not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health."); *see also Miller v. Fenton*, 474 US 104, 109, 106 S Ct 445, 449, 88 L Ed 2d 405 (1985) (recognizing that "certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment"); *Haynes v. Washington*, 373 US 503, 83 S Ct 1336, 10 L Ed 2d 513 (1963) (in determining voluntariness of confession, Court considered that defendant had been held for 16 hours and told he would not be allowed to telephone his wife until he "cooperated" with police).

On appeal in this court, defendant's focus is on both the interrogation techniques that the detectives used and defendant's physical and mental characteristics. Defendant submits that the detectives' interrogation followed the interrogation method that is generally known as the "Reid technique," citing, among other sources, S. Kassin et al., *Police Induced Confessions: Risk Factors and Recommendations*, 34

Law & Hum Behav 3 (2010). That technique involves isolating a suspect in a small room to increase anxiety; confronting the suspect with accusations of guilt and emphasizing the strength of the evidence against the suspect; offering sympathy and justifications or rationalizations to allow the suspect to minimize the crime; and encouraging the suspect to see confession as a means of terminating the interview. *Id.* at 3, 6.

Defendant also submits that, in addition to physical characteristics, a suspect's mental illnesses or developmental disabilities may be relevant factors, citing, among other sources, ABA Criminal Justice Mental Health Standards, Standard 7-5.8(b) ("Official conduct that does not constitute impermissible coercion when employed with a nondisabled person may impair the voluntariness of the statements of persons who are mentally ill or mentally retarded."). Defendant points to the fact that, at the time of the interrogation, he was in poor physical health, suffered from schizophrenia as well as depression, and had significant memory loss and a history of blackouts. Defendant argues that, given those characteristics, the detectives' interrogation methods—isolating him and cutting him off from his family, maintaining that proof of his guilt was incontrovertible and that things would be better for him in the course of the prosecution if he confessed and worse for him if he did not, and encouraging him to see confession as a means of terminating the interrogation—resulted in admissions that were not reliable.

The state's response is two-fold. First, the state contends that the type of personal characteristics that defendant highlights do not bear on the voluntariness of confessions. It asserts that cases that have relied in significant part on the mental characteristics of a defendant in making voluntariness determinations have involved defendants with more significant impairments than those at issue here, such as illiteracy and severe intellectual disabilities, citing as its sole example *Culombe v. Connecticut*, 367 US 568, 620, 81 S Ct 1860, 6 L Ed 2d 1037 (1961). However, *Culombe* is not the only Supreme Court case that discusses that issue. In *Colorado v. Connelly*, 479 US 157, 107 S Ct 515, 93 L Ed

2d 473 (1986), other aspects of a defendant's mental state were deemed relevant to voluntariness. There, a state court had concluded that a confession was involuntary because the defendant was suffering from chronic schizophrenia. The defendant had approached an off-duty police officer and, without prompting, confessed to a murder. The Court noted that the officer had done nothing coercive in securing the confession and concluded that the defendant's mental condition alone did not require suppression of his confession. The Court recognized that,

> "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus. *See Spano v. New York*, 360 US 315, 79 S Ct 1202, 3 L Ed 2d 1265 (1959). But this fact does not justify a conclusion that a defendant's mental condition, *by itself and apart from its relation to official coercion*, should ever dispose of the inquiry into constitutional 'voluntariness.'"

479 US at 164 (emphasis added). However, the Court contrasted the facts in *Connelly* to those in another case in which a defendant's mental condition rendered a confession involuntary—*Blackburn v. Alabama*, 361 US 199, 80 S Ct 274, 4 L Ed 2d 242 (1960). In *Blackburn,* the police, who were aware of the defendant's mental instability, exploited his mental problems with what the Court described as "coercive tactics," which included an eight- to nine-hour interrogation in a tiny room and the absence of the defendant's friends, relatives, or legal counsel. *Connelly*, 479 US at 164-65, citing *Blackburn*, 361 US at 207-08. We agree with defendant that a defendant's mental condition is a factor that must be considered, as part of the totality of the circumstances, in determining whether a defendant's confession was voluntary.

The state's second argument is that other factors demonstrate that, regardless of defendant's physical and mental condition, his statements to the detectives were clearly voluntary. The state points out that defendant ultimately did not confess to all the crimes about which he was questioned, and that every request that he made was honored, as he was provided with food and water, was given restroom and smoke breaks, and was not subjected to

physical violence.[13] The state is correct that those facts, and the fact that defendant spoke after he received and understood *Miranda* warnings, cut in the state's favor. There are several related facts that cut in the other direction, however. For instance, many of the statements that defendant made were demonstrably or apparently incorrect. Defendant was interrogated in a small room, and the trial court described the interrogation as becoming "intense" and "hostile" at points, a finding that the state does not contest and that is supported by evidence in the record. Defendant was isolated from his family, and, at the time defendant made his first admission, the interrogation already had lasted multiple hours. Thus, although defendant was not subjected to physical violence, he was interrogated in circumstances that were physically and mentally demanding. Of course, the fact that an interrogation is physically and mentally demanding does not necessarily make the admissions that are adduced involuntary and inadmissible. The type of interrogation that the detectives conducted here resembles the Reid technique described above—and may have been specifically designed to produce a confession, and to do so by putting significant pressure on defendant. But it is the work of detectives to solve crimes, and it may take the application of pressure to secure a voluntary confession. We do not suggest that the use of the Reid technique or other strategies to obtain information from a suspect is necessarily coercive or will always require the exclusion of inculpatory statements. The question that a trial court must decide is not whether a particular interrogation method was used, but whether, considering the totality of the circumstances, the suspect's will was overborne.

The trial court acknowledged that this is a close case. We agree. The detectives who conducted this interrogation were skilled, and they may have succeeded in convincing defendant to voluntarily tell them what happened, to the best of his memory. The detectives did not make any

[13] The *absence* of physical violence during the interrogation is not, strictly speaking, a part of the "totality of the circumstances." Rather, it its *presence* is dispositive of the issue: A confession obtained through physical violence or torture necessarily must be excluded from evidence based on due process. *Brown v. Mississippi*, 297 US 278, 56 S Ct 461, 80 L Ed 682 (1936).

promise of immunity, explaining that, no matter what defendant said, he would be charged with murder. They informed defendant of his right to remain silent and to consult with counsel, and he requested, and they permitted, cigarette and bathroom breaks. At times, the detectives' interrogation may have been hostile, but it was not consistently so. For the most part, the detectives' interrogation appealed to defendant's better nature and encouraged him to help the families of the victims. On the other hand, defendant is a schizophrenic who experienced delusions in the past, and who takes medication for depression and high blood pressure and to help him sleep. Defendant has significant memory problems. He needs assistance with shopping, cannot drive, and has a limited ability to walk. His limitations are so significant that he receives disability services and has a live-in care provider. The detectives isolated defendant from his family, removing his cell phone and not permitting him to make calls, despite his request to do so. Although defendant denied any memory of the murders, perhaps due to his history of drug and alcohol use and resulting blackouts, the detectives continued to question him for a significant length of time and told him that they would continue to do so until they were "working together." When they had "worked through some of these things," the detectives explained, they would permit defendant to talk to his family. The detectives told defendant that it would be best for him to confess so that the detectives might eliminate him as a suspect in additional crimes and because it would give him more control over how the case would proceed, observing that, if defendant did not confess, they would do their best to ensure that he received the maximum possible sentence. Viewed independently, none of those factors would be dispositive, but together they indicate that the detectives' methods and inducements may have persuaded defendant to tell the detectives what they wanted to hear, whether or not that was the truth. Considering the totality of the circumstances, we agree with the trial court; the state has not convinced us that defendant's admissions during and after the second cigarette break on October 15 were voluntary.

We turn now to the state's argument that, even if the trial court correctly suppressed defendant's statements

made during the detectives' interrogation, it nonetheless erred in concluding that defendant's admission during his call to his sister after the interrogation concluded need not be suppressed. As explained below, we conclude that the trial court correctly suppressed that admission as well.

In *Powell*, we addressed a similar issue and, again relying on *Wintzingerode*, concluded that a second set of statements concerning the same matter should have been suppressed based on the violation of ORS 136.425. We stated:

> "[T]he statute itself requires exclusion of the second set of statements unless the state proved that the improper coercion that compelled the first set of statements had been dispelled before the second set of statements were made. We derive that standard from the court's construction of the statute in *Wintzingerode*:
>
> "'[A]lthough an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts, may be admitted, if the court believes that from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. *** [I]n the absence of any such circumstances, the influence of the motives proved to have been offered will be presumed to continue and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected.'"

Powell, 352 Or at 227 (ellipsis in original; quoting *Wintzingerode*, 9 Or at 164-65). We explained that "confessions made subsequent to an improperly induced confession on the same subject are presumptively inadmissible under the statute." *Id.* To overcome such a presumption, the state must offer "clear evidence" that, at the time of the later confession, "the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled." *Id.* (quoting *Wintzingerode*, 9 Or at 165).

In *Powell*, after the defendant had made admissions to agents of his employer, the agents asked him to repeat his admissions to a police officer, which he did. 352 Or at 214-15. The state argued that, because the defendant had

been *Mirandized* by the police officer before the second set of statements, they did not need to be suppressed. This court rejected that argument, noting that in that circumstance, "*Miranda* warnings have significance only to the extent that they in fact had an appreciable effect in dispelling the operation of the prior coercive influences on defendant's mind." *Id.* at 229. But, if "the context or manner in which the officer gives the warnings downplays or minimizes their significance in defendant's mind, their effectiveness in serving as a causal break" may be compromised. *Id.* In that case, the warnings had been presented as a matter of "housekeeping," and a "formality," and thus did not create a causal break. *Id.*

In the present case, the state argues that three factors establish that the effects of improper coercion had been dispelled: (1) nearly a day had passed since defendant had made his first compelled admission; (2) defendant's *Miranda* warnings had been "renewed" on the second day; and (3) one of the coercive factors—defendant's ability to talk to his family—had been removed.

Turning to the state's first argument, we disagree that the key element of timing here concerns the time between defendant's first admission and the telephone call. In its initial ruling, the trial court did not simply suppress the first inculpatory statement defendant made. Rather, it suppressed statements made throughout the two-day interrogation, which continued up to the time when defendant was permitted to call his family. There was no significant break between the interrogation and the telephone call to defendant's sister. It would be fair to say that the telephone call, while not precisely interrogation itself, was a part of the detectives' ongoing efforts to get defendant to take responsibility for the crimes. During the interrogation, the detectives talked at several points about what defendant might say to his family about the crimes and told him that he was not being allowed to call them at an earlier point because it would be "awkward" to explain to them before defendant had "worked through" things with the detectives. The phone call itself was placed by one of the detectives and was put on speakerphone so that the detectives could listen in. And, as noted above, both detectives participated in the process by

providing information over the phone. The passage of time between the first admission and the telephone call is of little significance here, given that defendant was kept at the police station the entire time, and was subject to lengthy and intense interrogation between the first admission and the telephone call.

As for the state's argument that defendant received renewed *Miranda* warnings on the second day, the circumstances here, as in *Powell*, show that the significance of that warning was downplayed. Indeed, the warnings were only "given" on the second day in the sense that the detectives "gave" defendant the piece of paper he had signed the previous day that contained the *Miranda* warnings, and asked him if he understood his rights. The detectives did not tell defendant what those rights were on the second day. Warnings that are "given" in this manner are unlikely to "have an appreciable effect in dispelling the operation of the prior coercive influences on defendant's mind." *Powell,* 352 Or at 229.

Finally, we reject the state's argument that defendant's ability to call his sister dispelled the prior coercive influences. As described above, the coercion did not only involve withholding the ability to make telephone calls—that was but one of the significant factors in the totality of the circumstances here. Moreover, defendant did not simply choose to call a relative and confess after the interrogation had ended. Rather, the call was part of the inducement of the earlier admissions, and, ultimately, was carried out in the interrogation room, with the interrogating detectives placing, listening in on, and participating in the call.

The trial court did not err in determining that the state had failed to establish that the improper coercion that compelled defendant's admissions during the interrogation had been dispelled before the telephone call was placed to defendant's sister.

III. CONCLUSION

In sum, we conclude that the trial court did not err when it entered orders suppressing defendant's statements made to the detectives during his interrogation as well as

his admission to his sister during the telephone call at the conclusion of the interrogation.

The orders of the circuit court are affirmed.