

FILED: June 4, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOHN ALBERT SINES,
Defendant-Appellant.

Deschutes County Circuit Court
06FE1054AB

A146025

Alta Jean Brady, Judge.

Argued and submitted on September 10, 2012.

Lisa A. Maxfield argued the cause and filed the brief for appellant.

Rolf Moan, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Duncan, Judge, and Brewer, Judge pro tempore.

DUNCAN, J.

Convictions on Counts 1 through 4 reversed and remanded; otherwise affirmed.

1 DUNCAN, J.

2 In this criminal case, defendant appeals a judgment convicting him of four
3 counts of first-degree sexual abuse, ORS 163.427, of his nine-year-old daughter, T. The
4 jury acquitted defendant or deadlocked on eight other counts, two pertaining to T and six
5 to defendant's son, V. Defendant contends that the trial court erred in (1) declining to
6 suppress evidence obtained through the seizure and testing of a pair of T's underwear; (2)
7 ruling that an expert witness, a forensic pathologist, was unqualified to offer his opinion
8 on the probable source of spermatozoa found in T's clothing; and (3) admitting as
9 exhibits foster mother's handwritten notes relating the circumstances of her conversations
10 with T and V about sexual abuse by defendant.¹ We conclude that the seizure of the
11 underwear was unlawful and, accordingly, the underwear and evidence derived from it
12 should have been suppressed. That error was not harmless. Accordingly, we reverse and
13 remand. We do not address defendant's second argument, regarding the defense
14 pathologist. We also do not address defendant's argument regarding foster mother's
15 notes. *See* OEC 803(5) (providing that, if admitted, a memorandum of past recollection
16 "may be read into evidence but may not itself be received as an exhibit unless offered by
17 an adverse party").

18 Defendant raises three arguments in support of his view that evidence
19 derived from the seizure and testing of the underwear should have been suppressed:

¹ Defendant also contends that nonunanimous jury verdicts are unconstitutional. In light of our disposition of the case, we need not reach that argument.

1 First, defendant contends that acts of his employees, who took the underwear from his
2 home and gave it to the police, constituted "state action," implicating the Oregon and
3 United States constitutions, and, accordingly, probable cause and a warrant or an
4 exception to the warrant requirement were required for the search and seizure. Second,
5 defendant contends that the acceptance of the underwear by police--who knew that it had
6 been stolen from defendant's home--constituted an additional seizure. Third, defendant
7 argues that the testing of the underwear for spermatozoa and seminal fluid, which
8 involved cutting numerous holes in the underwear and using laboratory equipment to
9 examine its contents, was an additional search.

10 We agree that the initial search of defendant's home and seizure of the
11 underwear was state action subject to Article I, section 9, of the Oregon Constitution.²
12 No warrant authorized the search or the seizure, and the state does not argue that any
13 exception to the warrant requirement justified them. Accordingly, the search and seizure
14 were unlawful, and we do not reach defendant's other arguments regarding the motion to
15 suppress.³

16 In reviewing the denial of a motion to suppress, we are bound by the facts
17 found by the trial court as long as there is constitutionally sufficient evidence to support

² Article I, section 9, provides, in part, "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]"

³ We refer to the search (of defendant's home) and the seizure (of the underwear) as "the seizure of the underwear."

1 them. *State v. Baker*, 350 Or 641, 650, 260 P3d 476 (2011). In the absence of a specific
2 finding of fact, where there is evidence from which the trial court could have found a fact
3 in more than one way, we presume that the court's finding was consistent with its
4 ultimate conclusion. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). We state the facts
5 consistently with those standards.

6 Offizer was defendant's housekeeper. Defendant employed Taylor to help
7 him with his business, which he ran from an office above his garage. On March 16,
8 2006, Offizer and Taylor discussed whether they should report their suspicion that
9 defendant was sexually abusing T.

10 On March 20, Offizer called the Department of Human Services (DHS)
11 anonymously to report her concerns. She told a DHS employee with whom she spoke,
12 Cleavenger, that she had seen "discharge" on several pairs of T's underwear that
13 "[l]ooked like maybe a 19-year-old was wearing [the underwear]." She told Cleavenger
14 that she was considering taking a pair of T's underwear from defendant's house, and she
15 asked Cleavenger what authorities could tell from it if she did so. Cleavenger told her
16 that he could "hook her up" with someone in the law enforcement community who could
17 have the underwear scientifically tested, thereby confirming or refuting her concerns.
18 Offizer asked what would happen if she obtained the underwear, and Cleavenger told her,
19 more than once, that he could not tell her to do that. Cleavenger gave Offizer his direct
20 telephone number.

21 Cleavenger then consulted with Lieutenant McMaster at the Deschutes

1 County Sheriff's Office. Although DHS policy required the completion of a safety check
2 within 24 hours of a report of possible abuse--that is, an immediate response--in the
3 absence of good cause for a delay, Cleavenger and McMaster decided to assign the case
4 as a five-day response instead. Cleavenger later testified, "there was a likelihood--and I
5 felt like a good likelihood--that the case was going to get stronger when [Offizer] made
6 [her] decision." Cleavenger did not tell Offizer that he had delayed the safety check.⁴

7 On the afternoon of March 20, Offizer called Taylor and reported her
8 conversation with DHS. Offizer told Taylor that her DHS contact had said, "We can't do
9 anything without physical evidence," and Offizer and Taylor agreed that a pair of T's
10 underwear would be the best type of physical evidence to get. Offizer was not scheduled
11 to work at defendant's home the following day, but Taylor was, so Taylor said that she
12 would try to obtain a pair of T's soiled underwear while she was at work.

13 The next morning, while defendant was taking the children to school,
14 Taylor went into the laundry room in defendant's house, took the first pair of underwear
15 she saw, put it in a plastic baggy, and put the baggy in her lunch bag. The underwear had
16 a large amount of discharge in the crotch. After work, Taylor went to Offizer's house and
17 gave her the underwear. Offizer called Cleavenger to tell him that she had the
18 underwear. He told her to put it in a paper bag to prevent the destruction of any physical
19 evidence. Cleavenger also arranged for Offizer to bring the underwear to the police the
20 following morning.

⁴ It appears that Cleavenger did not discuss safety checks with Offizer at all.

1 On the morning of March 22, Offizer met another DHS employee,
2 Cloninger, and Detective Quick of the Deschutes County Sheriff's Office in a Wal-Mart
3 parking lot, where Offizer gave them the paper bag containing the underwear and
4 described some of her concerns regarding defendant's possible abuse of T and V. She
5 asked Quick, "[D]id I do good by bringing this bag?" Offizer and Taylor testified at the
6 suppression hearing that their purpose in taking the underwear was to assist law
7 enforcement.

8 Quick and Cloninger immediately delivered the underwear to the Oregon
9 State Police (OSP) Crime Lab in Bend. The lab director, Bordner, conducted two tests to
10 determine whether the underwear contained spermatozoa or seminal fluid. No warrant
11 was obtained for either of the tests. Later that day, Bordner informed Quick that she had
12 identified at least three spermatozoa heads on T's underwear.

13 The same day, Quick prepared a search warrant application using the test
14 results and information he had gathered from Offizer, Taylor, and Cleavenger. That
15 night, the warrant was executed, defendant was arrested, and additional property was
16 seized, including a nightgown, pajama pants, a bathing suit, and jeans, all belonging to T.
17 Later testing of those items revealed additional spermatozoa heads on all of them and, on
18 the nightgown, evidence of seminal fluid as well.

19 Defendant was eventually charged with nine counts of sexual abuse in the
20 first degree, one count of rape in the first degree, and two counts of sodomy in the first
21 degree. The charges involved abuse of both T and V. Defendant filed a motion to

1 suppress and supporting memorandum, asking the court to exclude

2 "all evidence, including derivative evidence and statements, obtained
3 through the unlawful and warrantless (a) search of the laundry hamper in
4 his home, (b) seizure of the underwear from the hamper, (c) seizure of the
5 underwear by police and (d) the destruction and testing of the underwear by
6 the Oregon State Crime Lab."

7 After a hearing, the court concluded that (1) no state action was involved in
8 Taylor and Officer's taking of the underwear, (2) Quick's seizure of the underwear was
9 lawful because Quick had "an objectively reasonable belief that the child's underwear
10 contained evidence of a crime," and (3) the testing of the underwear did not constitute an
11 unlawful search because, "[b]ased on the information [Quick] received from Defendant's
12 housekeeper and his visual examination of the underwear, he had an objectively
13 reasonable belief that * * * the underwear contained evidence of a crime and the testing
14 would provide confirmation of that belief." Accordingly, it declined to suppress the
15 evidence obtained from the underwear.

16 At defendant's trial, the state introduced the results of the testing of the
17 underwear, which had eventually identified 17 spermatozoa. The state also introduced
18 the results of the testing of the nightgown, pajama bottoms, bathing suit, and jeans. The
19 jury convicted defendant of four counts of first-degree sexual abuse of T; it acquitted or
20 deadlocked on the other eight counts. This appeal followed.

21 As described above, defendant first contends that Taylor's taking of the
22 underwear constituted state action to which the Oregon and federal constitutions apply.
23 We evaluate defendant's argument under the Oregon Constitution before evaluating his

1 federal claim. *State v. Rogers*, 330 Or 282, 293-94, 4 P3d 1261 (2000). Article I, section
2 9, of the Oregon Constitution does not protect against a search by a private party. *See*
3 *State v. Tanner*, 304 Or 312, 321, 745 P2d 757 (1987) (an interest protected by Article I,
4 section 9, "is an interest against the state; it is not an interest against private parties").
5 When the state is sufficiently involved in a search or seizure conducted by a private party,
6 however, state constitutional protections are implicated. *State v. Tucker*, 330 Or 85, 90,
7 997 P2d 182 (2000). Article I, section 9, precludes government "officials from
8 participating or engaging indirectly in searches [or seizures] which would be illegal if
9 conducted by the official." *State v. Becich*, 13 Or App 415, 419, 509 P2d 1232 (1973).
10 There is no "hard and fast rule" for what constitutes state action, and we will consider any
11 facet of state involvement that relates to the alleged search or seizure. *State v. Lowry*, 37
12 Or App 641, 652, 588 P2d 623 (1978), *rev den*, 285 Or 195 (1979).⁵ Although this case
13 presents a close question, we conclude that the state was sufficiently involved that the
14 seizure of the underwear was state action.

15 Neither we nor the Supreme Court has explained with precision how much
16 or what kind of state involvement is sufficient to trigger the protection of Article I,

⁵ Although the issue in *Lowry* was "whether there was sufficient official police involvement in [a private party's eliciting of statements from the defendant] to bring into play the exclusionary protection of the Fifth Amendment," 37 Or App at 650, we applied the same test that we had applied--and continue to apply--in cases like the present one, where the question is whether evidence must be excluded under Article I, section 9. *Id.* at 652 (citing and quoting *Becich*, 13 Or App 415); *see also State v. Waterbury*, 50 Or App 115, 119, 622 P2d 330, *rev den*, 290 Or 651 (1981) (citing and quoting *Lowry* on an Article I, section 9, issue [question of state action]).

1 section 9. *See, e.g., Tucker*, 330 Or at 90 (where a private party conducts a search at the
2 request of a law enforcement officer, the search is subject to Article I, section 9); *State v.*
3 *Becich*, 13 Or App at 419-20 (where a private party "volunteered" to conduct a search in
4 response to an officer's demand for the return of stolen property and the officer drove by
5 the defendant's home while the private party conducted the search, search was subject to
6 Article I, section 9); *State v. Padilla*, 9 Or App 162, 166, 496 P2d 256 (1972) (where the
7 defendant's roommate independently searched the apartment after police had finished
8 searching it, search was not subject to Article I, section 9). However, our two holdings in
9 *Lowry* provide context for our analysis here.

10 In *Lowry*, the state appealed the trial court's suppression of inculpatory
11 statements elicited from the defendant by a police informant, Reed, while the defendant
12 and Reed were lodged in the same cell in the Clackamas County Jail. 37 Or App at 643.
13 Reed had been moved into the cell with, among others, the defendant and a murder
14 suspect, "Mr. X," in order to gather information from Mr. X about an uncharged crime.
15 *Id.* at 644-45. In addition to gathering information from Mr. X, Reed elicited inculpatory
16 statements from the defendant about a robbery with which the defendant had been
17 charged. Reed met with his law enforcement contact, Detective Forristall, on February
18 28 to discuss Mr. X; during that meeting, Reed also told Forristall about the defendant
19 and the statements that he had made. Forristall did not know of the defendant before that
20 meeting. At the February 28 meeting,

21 "[a]fter Reed related on his own initiative the information concerning
22 defendant and the armed robbery, Forristall warned him that he 'could not

1 act as an agent' for Forristall and that the detective 'didn't want him to go in
2 there and start asking a whole bunch of questions of anybody from then
3 on.'"

4 *Id.* at 646.

5 Despite those admonitions, Reed continued to collect inculpatory
6 information from the defendant. On March 6, he met with Forristall again to discuss Mr.
7 X and also gave Forristall more information obtained from the defendant. After that
8 meeting, Forristall called Harris, who was the detective in charge of the defendant's case,
9 and Harris asked to meet with Reed. Reed was scheduled for transfer to a federal
10 penitentiary, but Forristall delayed the transfer for 24 hours so that Harris could obtain a
11 taped statement from Reed.

12 The next day, March 7, the two detectives met with Reed and he relayed
13 some of the information that the defendant had given him. After that meeting, Reed
14 testified, he realized that he should elicit more detailed information from the defendant
15 because of the detectives' interest. He went back to his cell and immediately "began one
16 of his well-practiced approaches--which he termed a 'sales pitch'--to get more information
17 from [the] defendant." *Id.* at 648. The "sales pitch" succeeded, and that afternoon, Reed
18 related the details of the robbery to the detectives. Then the detectives paid him for a
19 taped version of his information, which was subsequently used as evidence against the
20 defendant.

21 We held that the information that Reed obtained before the March 7
22 meeting was admissible because, until then, Reed had been acting independently, without

1 the knowledge or tacit approval of Forristall or Harris. First, we explained that, before
2 February 28, Reed had interrogated the defendant "for his own purposes without any
3 suggestion from the police. Detective Forristall did not even know of [the] defendant's
4 existence before his conversation with Reed on February 28." *Id.* at 652-53. As to the
5 period between February 28 and March 7, we explained:

6 "Although Forristall knew after the February 28 conversation that Reed was
7 discussing defendant's case with him, the only evidence is that Forristall
8 tried to make it clear to Reed that he did not condone such conduct. He
9 cautioned Reed that he could not act as Forristall's agent and that he should
10 not be asking questions of any inmate. (Mr. X had been transferred by that
11 time.) Having attempted to make it clear that further information-gathering
12 activity was not condoned, Forristall clearly was not responsible for Reed's
13 continued questioning."

14 *Id.* at 654. Thus, as to the information that Reed obtained before March 7, the state was
15 not sufficiently involved to trigger constitutional protections: At first, Forristall lacked
16 any knowledge of Reed's conduct and, after he learned of Reed's conduct, he expressly
17 admonished Reed not to ask any more questions.

18 However, the information that Reed obtained after the March 7 meeting had
19 to be suppressed. We explained:

20 "Were it not for the intervention of Detective Forristall, Reed would
21 by then have been transferred to the federal penitentiary. Although he was
22 detained in order to make it possible for a taped statement to be obtained,
23 that additional detention also made it possible for him to continue his
24 interrogation. Moreover, when Detective Harris showed up with a tape
25 recorder and expressed interest in defendant, Reed was given positive
26 encouragement to obtain additional incriminating statements. * * *

27 "Reed interpreted Harris' display of interest as an opportunity to
28 make some additional money. From past experience he apparently knew
29 that the more detailed the statement, the better the reward. During the
30 March 7 morning meeting Reed told Harris and Forristall that he needed

1 money. Both Forristall and Harris were familiar with Reed's techniques.
2 Nevertheless, after Harris asked about defendant and after Reed stated that
3 he needed money they allowed Reed to go back to the cell and did nothing
4 to discourage him from interrogating defendant further."

5 *Id.* at 655-56. Thus, our second conclusion in *Lowry* rested on two grounds: First, it was
6 significant that Forristall delayed Reed's transfer because it gave Reed time to continue
7 his interrogation of the defendant. Second, by expressing interest in the defendant, the
8 detectives demonstrated to Reed that it would be to his advantage to provide them with
9 detailed information. Reed confirmed that proposition by stating that he needed money.
10 Given that both parties then knew what Reed was likely to do, the detectives were
11 sufficiently involved in Reed's decision to further interrogate the defendant to turn that
12 interrogation into state action.

13 The facts here are not akin to the first scenario in *Lowry*. There, when
14 Forristall learned that Reed had elicited information from the defendant, he told Reed not
15 to ask any more questions. Here, when Cleavenger learned that Officer was considering
16 taking underwear from defendant's home, he did not tell her not to take it. However, that
17 fact, alone, does not determine the outcome of our analysis.

18 The second scenario in *Lowry* is more similar to the facts here. In *Lowry*,
19 at the March 7 meeting, the detectives' conduct conveyed to Reed that they were
20 interested in the defendant, and Reed's comment that he needed money suggested that he
21 would attempt to learn more. Here, Cleavenger avoided telling Officer that she should

1 take the underwear; although he did not discourage her from taking it,⁶ he also told her
2 that he could not tell her to take it.⁷ He did explain that, if she took the underwear, he
3 could "hook her up" with someone in the law enforcement community to test it. Like the
4 detectives in *Lowry* after the March 7 meeting, after speaking with Officer, Cleavenger
5 knew that it was likely that Officer would procure the underwear from defendant's house.

6 Despite the difference from the circumstances of *Lowry*, we conclude that
7 Officer's search was state action. That is so because Cleavenger knew that it was likely
8 that Officer would procure underwear from defendant's home, delayed the safety check to
9 allow her more time to do so, and not only failed to do or say anything to prevent her
10 from doing so, but actually offered law enforcement support if she procured the
11 underwear. Most notably, Cleavenger's decision to postpone the safety check, which was

⁶ Cleavenger's statements to Officer to the effect that he could not tell her to take the underwear did not constitute discouragement. In defendant's view, those statements communicated that, although Cleavenger was prohibited from telling Officer to take the underwear, he would have done so if he had been able to. The state contends that, in light of the trial court's disposition of the motion, those statements may not be interpreted as implicit encouragement to take the underwear. However, regardless of whether the statements constituted encouragement, they did not constitute affirmative discouragement. Under any reasonable interpretation, saying "I can't tell you to take the underwear" is not the equivalent of saying "do not take the underwear."

⁷ At the suppression hearing, Cleavenger characterized the end of his second conversation with Officer as follows: "[W]e left it that she was going to have to search her own heart for the answer to th[e] question [whether to take the underwear]." Defendant asserts that Cleavenger was suggesting that the moral decision would be to assist the state. The state argues that it is not clear that Cleavenger actually told Officer to "search her own heart," and, even if he did, he was simply advising her to make an independent decision. In keeping with the trial court's disposition, we assume that Cleavenger did not make that statement and, instead, that he used the phrase to describe the general tone of his conversation with Officer. In light of our analysis, we need not, and do not, decide whether that tone put pressure on Officer to take the underwear.

1 made after consultation with the Deschutes County Sheriff's Office, represented a
2 conscious choice to delay an evaluation of T's welfare in order to allow Officer time to
3 procure the underwear. Although Cleavenger may not have conveyed to Officer that he
4 wanted her to take the underwear, he nevertheless knew that it was likely that she would
5 take it, and he deviated from ordinary DHS procedures and delayed the safety check in
6 order to facilitate her search and seizure.

7 The state argues that this case is controlled by *State v. Waterbury*, 50 Or
8 App 115, 120, 622 P2d 330, *rev den*, 290 Or 651 (1981), where we stated that a deputy
9 might have given an informant some "implicit encouragement" in a search of the
10 defendant's marijuana-growing operation but nevertheless concluded that there was no
11 state action. In *Waterbury*, the defendant appealed a conviction for manufacturing
12 marijuana, arguing that an informant's search of the defendant's marijuana-growing
13 operation and seizure of marijuana was state action. 50 Or App at 117. The trial court
14 had found the following facts:

15 "[In response to a phone call] Deputy Nores met the informant on
16 the steps of the courthouse. The deputy had never seen the informant prior
17 to that time. The informant related that he had discovered what he thought
18 were marijuana plants. He was vague about the location. He told of the
19 necessity to climb a rope or lower himself into a pit to reach the plants.
20 The officer believed from that description the plants were probably in a
21 narrow canyon. Actually they were in a building with a high barricade
22 around all the walls. The officer asked the informant if the plants were on
23 private or public property. The informant professed not to know, but that
24 "he thought it was private property." The informant resisted answering
25 inquiries concerning a more definite location of the plants. He finally told
26 the deputy that he would meet him at a designated spot within a specific
27 time. There was no clear understanding on the part of the deputy about
28 what the informant was going to do, but a reasonable expectation could

1 have been that the informant was going to produce further evidence to
2 enable the deputy to obtain a search warrant. The informant met the deputy
3 at the designated spot and brought with him some plants which the deputy
4 immediately recognized as marijuana. The deputy and the informant then
5 personally went before Judge Poole and obtained the search warrant."

6 *Id.* (insertion in *Waterbury*). On appeal, the defendant argued that "the officer
7 encouraged the informant to make a search and then stood by waiting for the results,
8 making an otherwise private search unlawful state action." *Id.* at 119.

9 We concluded that the informant's search was not state action. We
10 explained:

11 "The trial court found that 'there was no clear understanding about what the
12 informant was going to do, but a reasonable expectation could have been
13 that the informant was going to provide further evidence to enable the
14 deputy to obtain a search warrant.' While it could be said that the informant
15 had some implicit encouragement from the police, absent any request or
16 direct participation by the sheriff, we think such 'circumstantial
17 encouragement,' if any, was insufficient official involvement to warrant
18 applying the constraints of the exclusionary rule."

19 *Id.* at 120. That is, in the absence of a "clear understanding" by the deputy about what the
20 informant's conduct would entail--whether it involved entering private property and what
21 the informant would bring to or say at their next meeting--the deputy's agreement to meet
22 the informant again, although it might have provided "implicit encouragement" for the
23 informant to act, did not transform the search into state action.

24 The state contends that, because, in *Waterbury*, we referred to "[a] request
25 or direct participation" by the state, *id.* at 120, express encouragement from a state actor
26 is required to transform a private search into state action. *Lowry* demonstrates that that
27 understanding of *Waterbury* is too broad. In *Lowry*, it was not necessary for the

1 detectives to expressly encourage Reed to interrogate the defendant for Reed's conduct to
2 constitute state action. Instead, the detectives' knowledge that it was likely that Reed
3 would question the defendant was sufficient.

4 In addition, the facts of *Waterbury* are distinguishable from the facts in this
5 case. In *Waterbury*, our comment that the deputy might have implicitly encouraged the
6 informant was made in light of the trial court's finding that the deputy lacked a clear
7 understanding of what the informant was going to do: The deputy did not know whether
8 the marijuana was on private or public property and he did not know what kind of
9 evidence or information to expect at their next meeting. When the deputy sought that
10 information, the informant refused to provide it with any specificity. Because the deputy
11 knew in only the vaguest terms what the informant's conduct might entail, he could not
12 have known whether the informant's conduct would involve a "search[] which would be
13 illegal if conducted by the [deputy]." *Becich*, 13 Or App at 419. In light of that
14 uncertainty, the deputy's agreement to meet the informant again did not transform the
15 informant's search into state action.

16 Here, there was no uncertainty about Officer's proposed course of action.
17 Cleavenger knew that Officer's plan was to steal the underwear--defendant's personal
18 property, *see* Donald T. Kramer, I *Legal Rights of Children*, §8.12 (2d ed 1994) (parents
19 retain property rights in items, like clothing, provided to their children for support or
20 maintenance)--from defendant's home, and he believed, from their conversation, that she
21 was likely to do it. Unlike the deputy in *Waterbury*, who may have implicitly encouraged

1 conduct about which he lacked a clear understanding by agreeing to meet the informant
2 again, Cleavenger had a clear understanding of Officer's proposed conduct; it was
3 obvious that taking the underwear involved a search and seizure "which would be illegal
4 if conducted by [DHS or the police]." *Becich*, 13 Or App at 419. Nevertheless,
5 Cleavenger delayed the safety check to give Officer time to carry out her plan.

6 Because Cleavenger (1) knew what Officer planned to do and that she was
7 likely to do it, (2) communicated with Officer about her plans and offered law-
8 enforcement support if she conducted the seizure that the state could not carry out
9 without a warrant, and (3) delayed the safety check to allow Officer to accomplish the
10 planned seizure, the seizure was state action subject to Article I, section 9, of the Oregon
11 Constitution. Thus, because the underwear was seized without a warrant, it should have
12 been suppressed unless the state showed that there was probable cause for the seizure and
13 it fell within an exception to the warrant requirement. *Tucker*, 330 Or at 88-89; *State v.*
14 *Davis*, 295 Or 227, 237, 666 P2d 802 (1983). The state did not, and does not, argue that
15 any exception applies. Accordingly, the underwear-related evidence should have been
16 suppressed.

17 The state contends that any error in failing to suppress the underwear-
18 related evidence was harmless. In its view, even if that evidence had been suppressed,
19 the jury still would have heard evidence of spermatozoa and semen found in T's
20 nightgown, pajama bottoms, bathing suit, and jeans. Evidence regarding those garments,
21 it contends, renders the evidence of the spermatozoa found in the underwear cumulative.

1 The state's argument rests on the premise that defendant's motion to
2 suppress was not sufficient to notify the trial court or the state that he sought suppression
3 of the evidence from the other items of clothing, all of which were seized pursuant to the
4 warrant. As set out above, in his motion, defendant requested suppression of "all
5 evidence, including derivative evidence and statements, obtained through" the seizure of
6 the underwear. The state contends that, in the absence of a more specific explanation of
7 which evidence derived from the seizure of the underwear, defendant's request was
8 insufficient to alert it and the trial court to the fact that defendant sought suppression of
9 items, including the clothing, seized pursuant to the warrant. Accordingly, in the state's
10 view, even if the trial court had granted defendant's motion to suppress and excluded the
11 underwear-related evidence, the jury still would have heard evidence regarding the other
12 items of clothing. That evidence, the state argues, would render the underwear-related
13 evidence cumulative and, accordingly, harmless. *See State v. Maiden*, 222 Or App 9, 13,
14 191 P3d 803 (2008), *rev den*, 345 Or 618 (2009) (harmless error analysis requires court
15 to assess "any differences between the quality of the erroneously admitted evidence and
16 other evidence admitted on the same issue").

17 A brief review of the facts is helpful as we consider the state's argument.
18 As explained above, Taylor took the underwear from defendant's house and gave it to
19 Officer. Officer gave the underwear to Cloninger and Quick, who took it to the OSP
20 Crime Lab for testing. Bordner called Quick to tell him that she had discovered
21 spermatozoa on the underwear, and that call prompted Quick to begin the search warrant

1 application. In the application, Quick relied on Bordner's lab results and information that
2 he and Cleavenger had obtained from Offizer and Taylor. Pursuant to the resulting
3 warrant, police seized the nightgown, pajama pants, jeans, and bathing suit.

4 We agree with the state that defendant could have made it more clear, in his
5 motion to suppress, that he intended his challenge to extend to items--including the
6 nightgown, pajama bottoms, jeans, and bathing suit--seized pursuant the warrant.
7 However, in light of the evidence and argument at the suppression hearing, we conclude
8 that the trial court and the state had fair notice of defendant's contention--which he
9 proved--that the unlawful seizure and testing of the underwear led to the issuance of the
10 warrant. It is undisputed that the nightgown, pajama pants, jeans, and bathing suit were
11 seized pursuant to the warrant. Accordingly, if the trial court had suppressed the
12 underwear-related evidence, it also would have suppressed evidence derived from the
13 nightgown, pajama pants, jeans, and bathing suit.

14 At the suppression hearing, the parties and the court were aware that
15 defendant contended that the seizure and testing of the underwear caused Quick to apply
16 for the warrant. In cross-examining Cloninger, defense counsel asked whether "it was
17 after the lab results came back that Detective Quick then made the decision to get a
18 warrant." Cloninger replied, "Yes." Defense counsel confirmed that "[t]here had been no
19 discussion about getting a warrant in advance of the lab results," and Cloninger replied,
20 "Correct. Not to me." Defense counsel also questioned Quick about his decision to seek
21 the warrant:

1 "[Defense Counsel:] * * * [I]t's also true that it was when you got
2 the telephone call from Pam Bordner that you began immediately to write
3 your search warrant affidavit--

4 "[Quick:] That's absolutely correct.

5 "[Defense Counsel:] So it's also true that it was Pam Bordner's call
6 that was the--that prompted you to begin the search warrant application?

7 "[Quick:] Yes."

8 The prosecutor recognized, and responded to, defendant's contention that
9 the seizure and testing of the underwear caused Quick to apply for the warrant. The
10 prosecutor sought to elicit testimony regarding information that Quick had received from
11 Taylor while the underwear was being tested and on which Quick relied in applying for
12 the warrant. That testimony was relevant to, among other things, an attempt to prove
13 that, even without the test results from the underwear, there was probable cause for the
14 warrant to issue. In response to an objection by defense counsel, the prosecutor stated
15 that evidence regarding the information in the warrant application other than the lab
16 results was relevant to determinations about probable cause for subsequent events,
17 including the issuance of the warrant:

18 "[Prosecutor]: Your honor, I believe [information that Quick
19 received from Taylor] is going to go to the probable cause regarding after
20 the underwear was seized and what was done with the underwear, because
21 there were some other things that were done with the underwear, including
22 a search warrant that was obtained as well.

23 "The Court: I'll overrule--

24 "[Prosecutor]: And I know there's not been a specific motion to
25 controvert the warrant or a motion to suppress the warrant, but I believe it
26 is relevant."

1 Thus, the prosecutor recognized that the seizure and testing of the underwear led to
2 Quick's application for the warrant, and he believed that information that Quick obtained
3 after the underwear had been seized and after testing had begun was relevant to the
4 court's determination of whether there was "probable cause regarding [events, including
5 the issuance of the warrant] after the underwear was seized." The court accepted that
6 argument and allowed the testimony.

7 Because the trial court ruled that the seizure and testing of the underwear
8 were not unlawful, it did not consider the subsidiary question of which other evidence
9 derived from the seizure and testing of the underwear. However, the court and the parties
10 were aware of the subsidiary question, and defendant met his burden of showing a
11 minimal factual nexus between the seizure and testing of the underwear and the issuance
12 of the warrant. *See State v. Hall*, 339 Or 7, 25, 115 P3d 908 (2005) (explaining the
13 burden of a defendant seeking suppression). The state did not show that, notwithstanding
14 that causal relationship, the warrant--or the evidence seized pursuant to it--did not derive
15 from that seizure.⁸ *See id.* (explaining the state's burden). The seizure of the nightgown,
16 pajama pants, jeans, and bathing suit derived from the seizure of the underwear, and the
17 trial court should have suppressed the evidence from the other items of clothing as well

⁸ As noted above, the state presented evidence regarding the information, other than the test results, on which the warrant application was based, and it informed the court that that information was relevant to whether there was probable cause, *inter alia*, for the warrant to issue. However, that is not sufficient to overcome defendant's proof that the seizure and testing of the underwear caused the issuance of the warrant because no evidence suggests that Quick would have applied for a warrant in the absence of the seizure and testing of the underwear.

1 as the underwear-related evidence.

2 Finally, the state raises another harmless argument: It asserts that the
3 jury could not have relied on any of the evidence of spermatozoa and seminal fluid on T's
4 garments because it acquitted defendant of the counts involving sexual intercourse. In
5 the state's view,

6 "[a]lthough spermatozoa on T's underpants would have supported
7 convictions on count 5 (rape) and 6 (sodomy via anal intercourse), the jury
8 *acquitted* defendant of those counts. To prove counts 1-4, the state relied
9 exclusively on T's testimony (and on her pre-trial statements to others) that
10 recounted defendant's conduct in touching her vaginal area, touching her
11 breast, and kissing her lips."

12 (Emphasis in original.)

13 We disagree with that characterization of the state's use of the evidence. In
14 closing argument, the prosecutor treated the physical evidence the same way with respect
15 to all of the counts. The prosecutor listed the types of evidence that the state was relying
16 on: testimony and statements of T and V, circumstantial evidence, and physical
17 evidence--including "the expert testimony provided by Pam Bordner and the DNA
18 scientist"--and then argued that the jury could "base [its] decision on [T and V's]
19 testimony alone, but that's not all we have in this case." The only time the prosecutor
20 discussed the counts individually during closing argument, he followed each count
21 number with the statements of T or V that supported that count; he never asserted that
22 jury should consider the physical evidence as to some counts but not others.

23 Thus, the state did not rely exclusively on T's testimony and pretrial
24 statements as to Counts 1-4; rather, it encouraged the jury to consider all of the evidence.

1 The evidence of spermatozoa and seminal fluid was relevant to Counts 1 to 4 in order to
2 show that defendant's contacts with T were "sexual contact," ORS 163.305(6), and there
3 is no reason to believe that the jury did not consider it. Accordingly, we cannot conclude
4 that the erroneous failure to suppress evidence of spermatozoa and seminal fluid on T's
5 garments was harmless.

6 Convictions on Counts 1 through 4 reversed and remanded; otherwise
7 affirmed.