IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

KEYLAN FRANKLIN KNAPP,
Defendant-Appellant.

Washington County Circuit Court
C100016CR, C090068CR, C091133CR;
A145259 (Control), A145260, A145261

On remand from the Oregon Supreme Court, *State v. Knapp*, 356 Or 574, 342 P3d 87 (2014).

Gayle Ann Nachtigal, Judge.

Submitted on remand February 24, 2015.

Peter Gartlan, Chief Defender, and Ingrid A. MacFarlane, Deputy Public Defender, Office of Public Defense Services, filed the briefs for appellant. Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Ingrid A. MacFarlane, Deputy Public Defender, Office of Public Defense Services, filed the supplemental brief.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Leigh A. Salmon, Assistant Attorney General, filed the answering brief for respondent. Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Rolf C. Moan, Assistant Attorney General, filed the supplemental brief.

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

DUNCAN, J. pro tempore.

Reversed and remanded.

DUNCAN, J. pro tempore

This consolidated case is before us on remand from the Supreme Court. In our prior decision, we reversed and remanded the trial court's judgments, holding that the trial court erred in denying defendant's motion to suppress evidence obtained during a warrantless search of a vehicle in which defendant had been a passenger. *State v. Knapp*, 253 Or App 151, 290 P3d 816 (2012), *vac'd and rem'd*, 356 Or 574, 342 P3d 87 (2014) (*Knapp I*). The Supreme Court remanded the case to us to reconsider our decision in light of, *inter alia*, its opinion in *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014). *State v. Knapp*, 356 Or 574, 342 P3d 87 (2014) (*Knapp II*). Following supplemental briefing by the parties, we conclude that the trial court erred in denying defendant's motion to suppress, because, contrary to the state's arguments in the trial court and on appeal, defendant had a protected privacy interest in the vehicle and in its contents, the search occurred during an unlawful seizure of defendant, and the state's argument that the challenged evidence inevitably would have been discovered even without the unlawful seizure is unavailing. Therefore, we reverse and remand.

We review the trial court's ruling denying defendant's motion to suppress for legal error, in light of the evidence that was before the trial court when it made its ruling. *State v. Quigley*, 270 Or App 319, 320, 348 P3d 250 (2015) (whether an officer unlawfully extended a traffic stop and whether evidence obtained after an unlawful extension of a traffic stop must be suppressed are questions of law, reviewed for legal error); *State v. Pitt*, 352 Or 566, 575, 293 P3d 1002 (2012) (as a general rule, a reviewing court evaluates a trial court's ruling on a pretrial motion "in light of the record made before the trial court when it issued the order, not the trial record as it may have developed at some later point"). When doing so, we are bound by the trial court's factual findings if there is constitutionally sufficient evidence in the record to support them. *State v. Maciel-Figueroa*, 361 Or 163, 165-66, 389 P3d 1121 (2017). If the trial court "did not make express findings and there is evidence from which the trial court could have found a fact in more than one way,

we will presume that the trial court decided the facts consistently with the trial court's ultimate conclusion." *Id*. at 166. Stated in accordance with those standards, the relevant facts are as follows.

I. HISTORICAL AND PROCEDURAL FACTS

Around 10 a.m. on the day at issue, a man, Beardall, was driving a Jeep, which he owned. Beardall was accompanied by another man, defendant, who was riding in the front passenger seat of the Jeep. An officer, Mace, initiated a traffic stop to investigate Beardall, because the Jeep's brake lights were not working, and to investigate defendant, because he was not wearing a seatbelt. *See* ORS 816.320(1)(d) (requiring brake lights);[1] ORS 811.210(1)(a)(H) (requiring passengers to wear seat belts).[2] Mace obtained identification cards from both Beardall and defendant. Defendant told Mace that he was on parole for armed robbery. Mace took the identification cards to his patrol car and contacted dispatch to run a records check. Dispatch informed Mace that defendant had "a caution for armed robbery and some other things." Mace requested backup and, when a backup officer arrived, Mace returned to the Jeep. Rather than proceed with his investigation of the traffic violations, Mace retained the identification cards and asked Beardall for consent to search the Jeep, which Beardall gave. Mace had Beardall and defendant step out of the car, and they were patted down and placed by the front of a patrol car. During the search of the car, Mace found scales with traces of suspected methamphetamine under the front passenger seat and a baggie of suspected methamphetamine between the front passenger seat and the center console.

---

[1] ORS 816.320 has been amended since the traffic stop; however, because those amendments do not affect our analysis, we refer to the current version of the statute in this opinion.

[2] ORS 811.210(1)(a)(H), which was numbered ORS 811.210(1)(h) at the time of the stop at issue in this case, provides that a person commits the offense of failure to properly use safety belts if the person "[i]s a passenger in a motor vehicle being operated on the highways of this state who is 16 years of age or older and who is not properly secured with a safety belt or safety harness as required by subsection (2) of this section." ORS 811.210(2)(d) provides, in part, that "[a] person who is taller than four feet nine inches must be properly secured with a safety belt or safety harness that meets requirements under ORS 815.055."

The state charged defendant with one count of unlawful possession of methamphetamine. ORS 475.894.[3] Defendant moved to suppress the evidence obtained during Mace's search of the Jeep, arguing, *inter alia*, that Mace had detained him in violation of Article I, section 9, of the Oregon Constitution by extending the traffic stop and that the challenged evidence had to be suppressed because it was the product of that constitutional violation.[4] Because the parties' arguments in the trial court and on appeal frame the question before us, we set them out in some detail.

In the trial court, defendant argued that Mace violated Article I, section 9, when he asked for consent to search, instead of proceeding with the traffic stop investigation:

> "The key issue is whether the officer's request to search occurred during an unavoidable lull in the investigation, or whether the officer paused his investigation into the traffic violation in order to extend the scope of the stop by asking [for] consent to search. When an officer has all of the information necessary to issue a citation but instead delays in processing it or in telling the motorist that he or she is free to go, the stop is no longer lawful unless the officer has reasonable suspicion of further criminal activity.
>
> "* * * * *
>
> "In this case, Officer Mace ceased his processing of the traffic violation and went down an unrelated path that unconstitutionally extended the length of the traffic stop. Because Officer Mace violated *** Article I, section 9, *** this court must suppress all evidence seized as a result of the search of the vehicle."

(Citations omitted.)

In response, the state argued that defendant did not have any "personal protected privacy interest" in the Jeep,

---

[3] ORS 475.894 has been amended since defendant committed his offense; however, because those amendments do not affect our analysis, we refer to the current version of the statute in this opinion.

[4] Article I, section 9, of the Oregon Constitution 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[.]" Evidence obtained in violation of a defendant's Article I, section 9, rights is inadmissible. *State v. Davis*, 313 Or 246, 253, 834 P2d 1008 (1992); *State v. Davis*, 295 Or 227, 233 n 5, 666 P2d 802 (1983).

because it belonged to Beardall. The state further argued, in the alternative, that even if defendant had such an interest and Mace unlawfully extended the traffic stop, the challenged evidence was admissible because Mace would have searched the Jeep even if defendant was not detained:

> "If *** [defendant] did have some basis for making a claim in this case of an unlawful extension to stop *** the search of the vehicle had nothing to do with [defendant]. As I said, maybe if his backpack was in the car and they found that, he might have a better argument. But because the car was going to be searched regardless of [whether defendant] was there or not; those drugs found there under his seat near him [*sic*]. So there is no nexus in an illegal stop or any legality[*sic*] relating to what they did find regarding [defendant]."

The trial court ruled that Mace had lawfully stopped both Beardall and defendant for traffic violations, and that Mace had extended the stop by asking for consent to search, at a time when he had everything he needed to proceed with the traffic stop. But, the trial court denied defendant's motion to suppress on the ground that defendant did not have a protected possessory or privacy interest in the Jeep or its contents. The court explained:

> "Well [defendant] is in a difficult position in many respects because he can't claim ownership of anything in the vehicle.***
>
> "I don't believe [defendant] is claiming ownership of the meth or anything [in] which the meth was contained. *** So what we have is [defendant] who was in a vehicle, that was lawfully stopped for not having brake lights. And additionally [defendant] was lawfully stopped for not wearing a seatbelt. So we have a lawful stop. *It was extended and Mr. Beardall may have had a valid basis for objecting to the discovery of the meth in his vehicle because apparently the officer had everything he needed in order to issue the citations at the point in time he asked for consent to search. But that's Mr. Beardall's issues, it's not [defendant's] issues.*
>
> "[Defendant] was there. He was not free to go because they still had his ID. *But he has no ownership interest or protected interest in anything in the vehicle*. At least he's not asserted any of those."

(Emphases added.) Because the trial court concluded that defendant did not have any protected possessory or privacy interest in the Jeep or its contents, it did not reach the state's alternative argument that, even if defendant had such an interest, the challenged evidence was admissible because Mace would have searched the Jeep even if he had not unlawfully extended the traffic stop.

The case proceeded to a jury trial, and the jury found defendant guilty of the single charged count of possession of methamphetamine. Based on defendant's conviction, the trial court revoked defendant's probation in two other cases.

Defendant appealed the judgment of conviction and the judgments revoking his probation, and the appeals were consolidated. On appeal, defendant argued that the trial court had erred in denying his motion to suppress. As he had in the trial court, defendant conceded that the initial traffic stop was lawful, but argued that Mace had unlawfully extended the stop and that the challenged evidence had to be suppressed because the state had failed to carry its burden of proving that it did not derive from that unlawful extension. Specifically, defendant argued that (1) Mace's request for consent to search the Jeep extended the duration of the traffic stop because Mace made the request "as an alternative to going forward with the next step in his investigation," (2) the extension of the stop was unlawful because it was not supported by reasonable suspicion of criminal activity, and (3) the challenged evidence was inadmissible because the state had failed to prove that the evidence "did not derive from the preceding illegality."

In response, the state also renewed the arguments it made in the trial court. Specifically, the state argued that, (1) because defendant was "a mere passenger in the car," he "did not have a possessory or privacy interest in it for purposes of Article I, section 9," and (2) even if defendant had such an interest, Mace's unlawful detention of defendant "had no bearing on [Mace's] search" of the Jeep, because, according to the state, Mace would have discovered the challenged evidence "regardless of whether defendant's rights *** were violated." In support of its second argument the

state asserted that, if Mace had told defendant that he was free to go, Mace "still would have extended the duration of the driver's stop by requesting consent to search in lieu of issuing the traffic citation, and the officer still would have discovered the drugs."

In reply, defendant reiterated his arguments that Mace had violated his rights by extending the traffic stop for the seat belt violation and that the state had failed to carry its burden of proving that the challenged evidence was not the product of that violation of his rights. According to defendant, the state's suggestion that Mace would have inevitably discovered the challenged evidence was mere "supposition."

As mentioned, on appeal, we reversed and remanded. *Knapp I*, 253 Or App 151. At the outset, we rejected the state's argument that defendant did not have a protected possessory or privacy interest in the Jeep or its contents. *Id.* at 155 (citing *State v. Tanner*, 304 Or 312, 321, 745 P2d 757 (1987) (observing that the fact "that [a home owner] controls access to the house does not preclude [a guest] from asserting a privacy interest against the state if it violates the privacy of the house")).

We then considered defendant's argument that Mace had unlawfully seized him by extending the traffic stop for the seat belt violation. We agreed with defendant that, although Mace's stop for the seat belt violation was initially lawful, it became unlawful when Mace ceased processing that violation and instead asked Beardall for consent to search. *Id.* at 153, 155 (citing *State v. Leino*, 248 Or App 121, 125, 273 P3d 228, *rev den*, 352 Or 76 (2012) (an officer may not inquire about unrelated matters as an alternative to going forward with processing a traffic violation)). We noted that, when Mace asked Beardall for consent, Mace "had all the information he needed to continue to process defendant's seat belt infraction or release defendant[,]" but he did not take either action. *Id.* at 155-56. And we further noted that the state had not argued that Mace had "any legitimate reason for not moving forward with that processing." *Id.* at 156. Indeed, the state had not disputed, in the trial court or on appeal, that Mace had unlawfully extended the traffic stops

of Beardall and defendant.[5] Consequently, we concluded that defendant had established that "his personal rights were invaded" because he was "unlawfully detained." *Id.* at 155.

Finally, we turned to defendant's argument that Mace's unlawful detention of defendant required the suppression of the challenged evidence, and we applied the analysis established in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), *overruled in part by State v. Unger*, 356 Or 59, 333 P3d 1009 (2014).[6] We first concluded that defendant had established a causal connection between the extension of the stop and the discovery of the evidence because Mace extended the stop in order to seek evidence. *Knapp I*, 253 Or App at 159 (the unlawful detention "occurred not simply at the same time and place as the discovery of the evidence, but occurred *because* the officer was seeking the evidence rather than proceeding with the traffic citation" (emphasis in original)). We then concluded that the state had failed to establish that "the discovery of the evidence was 'independent of, or only tenuously related to, the unlawful police conduct.'" *Id.* (quoting *Hall*, 339 Or at 35).

In reaching that conclusion, we rejected the state's "inevitable discovery" argument. *Id.* at 159-160. We held that the state had failed to establish that the challenged evidence "inevitably would have been discovered in the course of a *lawful* search." *Id.* at 160 (emphasis in original). That is, the state had failed to establish that a search based on Beardall's consent (which was obtained during the unlawful extension of Beardall's own stop) was lawful. Moreover, we

[5] At the time that the case was litigated, an officer could question a motorist about matters unrelated to a traffic infraction only during an unavoidable lull in the investigation, *State v. Rodgers*, 219 Or App 366, 372, 182 P3d 209 (2008), *aff'd sub nom State v. Rodgers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010), and it was the state's burden to prove that the inquiry occurred during an unavoidable lull, *State v. Berry*, 232 Or App 612, 616-17, 222 P3d 758 (2009), *rev dismissed*, 348 Or 71 (2010). The same rules apply today. *State v. Reich*, 287 Or App 292, 300-01, 403 P3d 448 (2017).

[6] In *Hall*, the Supreme Court held that, when a defendant challenges the admissibility of evidence obtained following unlawful police conduct, the defendant must first establish a "minimal factual nexus" between the unlawful police conduct and the discovery of the evidence and, if the defendant does so, the burden shifts to the state to establish that the challenged evidence "is admissible under Article I, section 9, by proving that the evidence did not derive from the preceding illegality." 339 Or at 25.

held, the state's inevitable discovery argument was unavailing because it was based on assertions about what would have happened had Mace not extended the traffic stop, which were "not supported by evidence in the record." *Id*. Finally, we held that the state had failed to establish that the connection between the unlawful detention and the discovery of the challenged evidence was "only tenuous." *Id*. at 160-62. We based that holding on the facts that unlawful detention was ongoing when the evidence was discovered, the state had not established (or even argued) that "the search actually was lawful—it merely took the position that the search did not interfere with *defendant's* possessory or privacy interests," and defendant did not volunteer the evidence. *Id*. at 162 (emphasis in original). Therefore, we reversed and remanded.

The state petitioned for review. The Supreme Court allowed review, vacated our decision, and remanded the cases for reconsideration in light of, *inter alia*, *Unger*.

In *Unger*, the court reiterated that, whenever a defendant challenges evidence seized following a warrantless search, the state bears the burden of proving the validity of the search. 356 Or at 75 (citing ORS 133.693(4); *State v. Tucker*, 330 Or 85, 87, 997 P2d 182 (2000)). The court also reiterated that evidence obtained as a result of exploitation of unlawful police conduct is inadmissible. *Unger*, 356 Or at 72-73 (citing *Wong Sun v. United* States, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963)). It is the tainted "fruit of the poisonous tree." *Wong Sun*, 371 US at 488 (internal quotation marks omitted). Whether a particular piece of evidence is tainted depends on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoted in *Unger*, 356 Or at 72).

In order for evidence obtained following unlawful police conduct to be admissible,

> "the state must prove that either (1) the police inevitably would have obtained the disputed evidence through lawful procedures even without the violation of the defendant's

> rights under Article I, section 9; (2) the police obtained the disputed evidence independently of the violation of the defendant's rights under Article I, section 9; or (3) the preceding violation of the defendant's rights under Article I, section 9, has such a tenuous factual link to the disputed evidence that that unlawful police conduct cannot be viewed properly as the source of that evidence[.]"

Hall, 339 Or at 25 (citations omitted).

In *Hall*, the Supreme Court had held that, when the state pursues the third option—that is, when the state seeks to prove that the causal connection between unlawful police conduct and challenged evidence is so tenuous that the unlawful conduct cannot be viewed properly as the source of the evidence—courts should consider three factors: the temporal proximity between the unlawful police conduct and the discovery of the evidence, the existence of any intervening circumstances, and the presence of any mitigating circumstances. *Id.* at 35. In *Unger*, the court retained those factors and identified two additional factors: the nature, extent, and severity of the unlawful police conduct, and the purpose and flagrancy of the unlawful police conduct. 356 Or at 80-83.

Following the Supreme Court's remand of this case, the parties submitted supplemental briefing. In his supplemental brief, defendant argues that the state failed to establish that Mace's unlawful extension of the traffic stop was attenuated from the discovery of the challenged evidence. He notes that we already held that the state had failed to establish attenuation using the *Hall* factors, and, regarding the additional factors identified in *Unger*, he asserts that the nature, purpose, and flagrancy of Mace's unlawful conduct weighs against a finding of attenuation because the unlawful conduct was a seizure of defendant's person and its purpose was to obtain evidence. In support of that assertion, defendant relies on *State v. Musser*, 356 Or 148, 335 P3d 814 (2014), in which the Supreme Court held that, where an officer unlawfully seized the defendant without reasonable suspicion and requested and received her consent to search, evidence discovered during the subsequent search was inadmissible. Defendant notes that, in *Musser*, the Supreme Court stated that police "are not authorized to detain and

question citizens merely to 'make sure they are [not] doing anything wrong'" and they may not detain a person in order to take "a 'shot in the dark' to check for criminal activity." *Id.* at 159 (brackets in *Musser*).

In its supplemental brief, the state renews its argument that defendant did not have a possessory or privacy interest in the Jeep, asserting that a person has protected interests only in property that the person owns or controls. The state also argues that, even if defendant had a protected interest in the searched property and Mace unlawfully seized defendant, the state carried its burden of proving that the search was not the product of that unlawful seizure because it was minimal in duration and severity and not flagrant or egregious.

To summarize, in the trial court, defendant moved to suppress the evidence obtained during Mace's warrantless search of the Jeep, and he argued that the evidence was derived from unlawful police conduct, specifically, Mace's unlawful extension of the traffic stop. In response, the state argued that defendant did not have a protected possessory or privacy interest in the Jeep, and, in the alternative, even if defendant had a protected interest and Mace had unlawfully extended his stop of defendant, suppression was not required because the Jeep "was going to be searched regardless of [whether defendant] was there or not[.]" The trial court accepted the state's argument that defendant did not have a protected interest in the Jeep or its contents. Defendant appealed, and the parties renewed the arguments they made in the trial court. On appeal, we rejected the state's argument that defendant did not have a protected interest in the Jeep; we also held that Mace had unlawfully extended his stop of defendant, and we rejected the state's argument that it had established that Mace inevitably would have discovered the challenged evidence through a lawful search even if he had not unlawfully extended the stop. We went on to hold—unnecessarily, as explained below—that, as defendant argued, the state had failed to establish that the connection between Mace's unlawful detention and the discovery of the evidence was attenuated. Thereafter, the state petitioned for review, the Supreme Court vacated our

decision, and remanded the case to us for reconsideration in light of, *inter alia*, *Unger*.

II. ANALYSIS

As mentioned, in *Unger*, the Supreme Court reiterated that the state bears the burden of proving the admissibility of evidence obtained in a warrantless search. 356 Or at 75. Here, the state made two arguments for the admission of the evidence Mace found in the Jeep, both of which defendant challenged on appeal and we rejected. On remand, we adhere to our earlier analysis of those two arguments, for the reasons that follow. Because those two arguments are the only two the state made at trial and on appeal and are unavailing, we reverse and remand. Because the state did not make an attenuation argument in the trial court or on appeal, it is not necessary for us to address defendant's argument that the state failed to prove attenuation.

First, defendant had a protected interest in the Jeep and its contents because he was a passenger in the Jeep and, according to the state, was carrying property in it. As we explained in our prior decision, in *Tanner*, the Supreme Court held that a guest has a protected privacy interest against government intrusion into an area, despite the fact that the host could allow government officers in. *Tanner*, 304 Or at 323; *see also State v. Breshears*, 98 Or App 105, 110, 779 P2d 158 (1989) (defendant had a protected privacy interest in an apartment in which she and some of her possessions were present). Even more to the point, both we and the Supreme Court have rejected the argument that "a passenger in an automobile has no protected privacy or property interest in the automobile or its contents." *State v. Tucker*, 330 Or 85, 88-89, 997 P2d 182 (2000) (automobile passenger had a protected interest in camera case found in automobile after it was involved in an accident and towed); *State v. Silva*, 170 Or App 440, 446, 13 P3d 143 (2000) (driver and passenger, who were codefendants, had constitutionally protected interests in duffel bag found in vehicle in which they had been traveling); *see also State v. Snyder*, 281 Or App 308, 314, 383 P3d 357 (2016) (passenger had a protected interest in vehicle and its contents). Nothing in *Unger* alters that case law.

Second, the state failed to prove, as it argued in the trial court and on appeal, that the challenged evidence would have been discovered even if Mace had not extended his stop of defendant. Under *Unger*, it is presumed that evidence obtained following unlawful police conduct is tainted. 356 Or at 84; *State v. Jackson*, 268 Or App 139, 151, 342 P3d 119 (2014) ("Whenever the state has obtained evidence following the violation of a defendant's Article I, section 9 rights, it is presumed that the evidence was tainted and must be suppressed.") If evidence is obtained following unlawful police conduct, the state bears the burden of proving that the evidence is admissible, despite the unlawful police conduct. *State v. Jones*, 275 Or App 771, 773-74, 365 P3d 679 (2015) (state bears the burden of proving that evidence obtained after police illegally seized defendant was not tainted by the illegal seizure). To carry that burden, the state must show that (1) the police inevitably would have discovered the evidence through lawful procedures in the absence of the illegality; (2) the state obtained the evidence independently of the violation of the defendant's rights; or (3) the factual link between the violation and the evidence is so "tenuous" that the violation cannot be viewed as the source of the evidence. *Hall*, 339 Or at 25. The "inevitable discovery," "independent source," and "attenuation" exceptions to the exclusionary rule are separate exceptions, with different requirements. *See State v. Hensley*, 281 Or App 523, 540, 383 P3d 333 (2016) (inevitable discovery and attenuation are different bases for admitting evidence obtained after unlawful police conduct); *see also State v. Bailey*, 356 Or 486, 496, 338 P3d 702 (2014) ("There are three recognized exceptions to the Fourth Amendment exclusionary rule: (1) the inevitable discovery exception; (2) the independent source exception; and (3) the attenuation exception.").

In this case, in the trial court and on appeal, the state's argument that the challenged evidence was admissible despite any preceding unlawful conduct was that the evidence would have been discovered inevitably. As mentioned, in the trial court, the state argued that "the car was going to be searched regardless of [whether defendant] was there or not[.]" Correspondingly, in its brief on appeal, the state argued that Mace would have discovered the challenged

evidence regardless of whether defendant was unlawfully detained, and, as an example, asserted that, if Mace had told defendant that he was free to go, Mace "still would have extended the duration of the driver's stop by requesting consent to search in lieu of issuing the traffic citation, and the officer still would have discovered the drugs."

In order for the inevitable discovery exception to the warrant requirement to apply, the state must prove "(1) that certain proper and predictable investigatory procedures would have been utilized in the instant case, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question." *Hensley*, 281 Or App at 535 (internal quotation marks omitted). It is not sufficient for the state to merely show "that evidence might or could have been otherwise obtained." *Id.* (internal quotation marks omitted). Instead, "[a] conclusion that predictable investigatory procedures would have produced the evidence at issue must be substantiated by factual findings that are fairly supported by the record." *Id.* (internal quotation marks omitted). Here, as we previously held, the state failed to prove that the challenged evidence would have been inevitably discovered. For the inevitable discovery exception to apply, the state would have had to present evidence that, even if Mace had not unlawfully extended his traffic stop of defendant, and had instead proceeded with the stop as required, he inevitably would have discovered the evidence through proper and predictable investigatory procedures. That argument fails on several fronts. First, the state did not present any evidence to support factual findings about what Mace and Beardall would have done if Mace had proceeded with the traffic stop. It did not present evidence that Mace would have asked for consent, or that, if Mace had not detained defendant, but rather done what he was required to do, that Beardall would have consented. Second, even if there was evidence to show, as the state contends, that Mace "still would have extended the duration of the driver's stop by requesting consent to search in lieu of issuing the traffic citation," doing so would not establish that Mace would inevitably have discovered the challenged evidence through "proper and predictable investigatory procedures," because illegally detaining a driver in order to pursue a criminal

investigation without reasonable suspicion is not a proper investigatory procedure.

Our conclusions that defendant had a protected interest in the Jeep and its contents and that the state failed to prove that the challenged evidence would have been discovered inevitably were sufficient to resolve defendant's appeal. Although we addressed defendant's attenuation argument, we did not need to do so, because the state had not made an attenuation argument in the trial court or on appeal. *See* *State v. Garcia*, 276 Or App 838, 853-54, 370 P3d 512 (2016) (declining to address defendant's argument that third-party's consent to warrantless search was invalid, where the state had not argued consent as an exception to the warrant requirement or as a means to attenuate any prior illegality); *see also* *State v. Davis*, 286 Or App 528, 538, 400 P3d 994 (2017) (declining to address an attenuation argument the state had not made in the trial court and declining to remand for the parties to present evidence regarding attenuation).

Consequently, on remand, we limit our analysis to the two arguments that the state made, and we do not address defendant's argument that the connection between Mace's unlawful detention of defendant and the discovery of the challenged evidence is not attenuated because Mace intentionally violated defendant's rights in order to take "a 'shot in the dark' to check for criminal activity." We conclude that the trial court erred in denying defendant's motion to suppress, and we reverse and remand for further proceedings consistent with that conclusion.

Reversed and remanded.