IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
RICHARD EUGENE IPSEN,
Defendant-Appellant.

Washington County Circuit Court
D132437M; A157082

Eric Butterfield, Judge.

Argued and submitted March 1, 2016.

Stephen A. Houze argued the cause and filed the brief for appellant.

Andrew M. Lavin, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before DeVore, Presiding Judge, and Tookey, Judge, and Garrett, Judge.*

TOOKEY, J.

Affirmed.

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* Tookey, J., *vice* Duncan, J. pro tempore; Garrett, J., *vice* Flynn, J. pro tempore.

TOOKEY, J.

Defendant appeals a judgment of conviction for eight counts of second-degree invasion of personal privacy and two counts of attempted second-degree invasion of personal privacy, ORS 163.700. Defendant assigns error to the trial court's denial of his motion to suppress evidence obtained as a result of a purported unlawful search. For the reasons that follow, we affirm.

We recite the facts consistently with the trial court's findings. On May 1, 2013, a Starbucks employee found what appeared to be an AC adapter in the Starbucks public bathroom; the device appeared similar to a cell phone or camera charger. The device was in plain view, plugged into an outlet near the sink, facing the toilet. Upon closer inspection, the employee noticed that the device had a small rainbow-colored lens and that the device did not have a cord, as would be expected for a cell phone or camera charger. The employee showed the device to his shift supervisor, who agreed that the device did not look like a charger; rather, they agreed that the device looked like a camera. Believing the device to be a camera, the Starbucks employee called the Sherwood Police Department. The employee later testified that, although Starbucks has a procedure for lost and found items, because he was concerned that the device was a camera, the employee decided to turn the device over to the police.

Officer Miller responded to the call at the Starbucks location. Miller explained that the Starbucks employee was "adamant that he thought [the device] was a camera." The employee showed Miller a pinhole on the front of the device where the employee believed the camera was located. After examining the device and being unable to determine whether it was a camera, Miller gave the Starbucks employee a property receipt, treating the device as he would "any found property." Before leaving the store, Miller instructed the Starbucks employees that if someone came looking for the device, the employees should notify that person that the device had been turned over to the police department and that the person could retrieve the device from the department. When he returned to the police department, Miller

placed the device "into evidence as found property." Miller also searched the Internet for AC adapters, but was unable to find an image that was identical to the device found. As a result, Miller was unable to confirm that the device was just an AC adapter, but was similarly unsure that the device was a camera.

A week later, on May 8, 2013, Captain Hanlon was reviewing the Sherwood Police Department's calls for service from the week prior. The call concerning the device found at Starbucks "piqued [Hanlon's] curiosity" because it reminded him of a similar, unrelated case involving a hidden device. At the time, Hanlon was not aware that anyone had attempted to retrieve the device from Starbucks. Sergeant Powell retrieved the device from evidence and Hanlon inspected it. Hanlon noticed the pinhole on the front of the device and, based on his training and experience, Hanlon knew that the pinhole could either be "a camera or an LED light that would indicate" whether the device was charging. Hanlon also noticed that, unlike a normal AC adapter, the device's backing could slide off. Hanlon slid the backing off of the device, exposing a storage device (SD) card. The contents of the SD card revealed images of Starbucks patrons using the bathroom.

Subsequently, Hanlon reported his findings to Detective Smith. On May 12, 2013, Smith contacted the Starbucks employees. At that time, Starbucks employees informed Smith that on May 5, 2013, a man had come to the store and attempted to retrieve a charger. One of the employees told the man that they had recently "turned one over to the police." The man looked very surprised and exited the store. The man did not leave his contact information. The Starbucks employees described the man to Smith. No one attempted to retrieve the device from the Sherwood Police Department.

As part of her investigation, Smith reviewed surveillance footage from Starbucks; using that footage, she matched the same man visiting the store on May 1 and May 5. Smith conducted another search of the SD card, discovering additional evidence of defendant adjusting the positioning of the camera and people using a residential bathroom.

Thereafter, after identifying defendant, Smith obtained a search warrant to search his homes in Tualatin and Bend.

Relying on Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution, defendant moved to suppress the evidence seized during the warrantless searches of the device and the subsequent searches of his homes. The trial court denied defendant's motion to suppress, stating, "Clearly, it was a search. Clearly it was warrantless. I don't believe, however, that [defendant] had any privacy rights to the camera once he left it where he did, so the motion's going to be denied."

Defendant subsequently waived his right to a jury trial, and, following a trial on stipulated facts, he was convicted of eight counts of invasion of personal privacy and two counts of attempted invasion of personal privacy.

On appeal, defendant argues that the trial court erred in denying his motion to suppress, in that the state failed to prove that defendant abandoned his privacy interest in the contents of the device. Defendant contends that, because law enforcement did not manifest a subjective belief that the device had been abandoned and because such a belief would not have been objectively reasonable, the search was not justified on the theory that the device had been abandoned. In response, the state argues that the trial court did not err in denying defendant's motion to suppress. According to the state, by placing the device in a bathroom available to the general public and leaving it, defendant abandoned his constitutionally protected privacy interest in the device.

We review a trial court's ruling on a motion to suppress evidence for errors of law. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). In reviewing a trial court's suppression order,

> "we are bound by the trial court's findings of historical fact if they are supported by evidence in the record. Where a trial court does not make findings on a particular issue, we presume that it decided the facts in a manner consistent with its ultimate conclusion relating to the lawfulness of the seizure and search."

State v. Dickson, 173 Or App 567, 571, 24 P3d 909, *rev den*, 332 Or 559 (2001) (citation omitted).

Article I, section 9, of the Oregon Constitution provides, in pertinent 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[.]" A search occurs for purposes of Article I, section 9, when the government "invades a protected privacy interest." *State v. Brown*, 348 Or 293, 297, 232 P3d 962 (2010). "A protected privacy interest 'is not the privacy that one reasonably *expects* but the privacy to which one has a *right*.'" *Id.* at 298 (quoting *State v. Campbell*, 306 Or 157, 164, 759 P2d 1040 (1988) (emphasis in *Campbell*)). Moreover, "a defendant's subjective expectation of privacy does not necessarily determine whether a privacy interest has been violated." *Id.*

We begin by considering whether, at the time the device was searched, defendant held a privacy interest in the device. In a case of actual abandonment, and in determining whether a defendant has abandoned his constitutionally protected interest in an article of property, we consider "whether the defendant's statements and conduct demonstrated that [he] relinquished all constitutionally protected interests" in the property. *Brown*, 348 Or at 302. A defendant need not demonstrate "an intent to *permanently* relinquish all constitutionally protected interests." *Id.* (emphasis in original).[1]

In determining whether defendant manifested an intent to relinquish his constitutionally protected interests in the device, we turn to case law. Factors relevant to that determination include: (1) whether the defendant separated himself from the property as a result of police instruction or illegal police conduct, *State v. Bernabo*, 224 Or App 379,

[1] Because we conclude that defendant actually abandoned his privacy interest in the device, we need not address whether he apparently abandoned his privacy interest in the property. *See State v. Brown*, 273 Or App 347, 352 n 4, 359 P3d 413 (2015) (explaining that under the "actual abandonment" construct, the test is whether the defendant's statements and conduct demonstrated that he relinquished all constitutionally protected interests in the property searched by police, whereas the "apparent abandonment" test asks whether the "defendant's statements and conduct made it reasonable for officers to conclude that the defendant had relinquished all constitutionally protected interests in the property (emphasis in original omitted)).

387, 197 P3d 610 (2008); (2) whether the defendant left the property on public or private property, *id.*; (3) whether the defendant "made any attempt to hide the property or in any other way manifest an intention to the police that he *** was attempting to maintain control over it," *id.* at 388; (4) whether the defendant "has left his property under circumstances which objectively make it likely that others will inspect it," *State v. Belcher*, 89 Or App 401, 404, 749 P2d 591 (1988); (5) whether the defendant has placed the item in plain view, *Brown*, 348 Or at 300; and (6) whether the defendant gave up his rights to control the disposition of the property, *id*. at 304.

In this case, defendant purposefully—not in response to any police instruction or illegal police conduct—placed the device in a bathroom available to the general public, in plain view where any person visiting that bathroom could have seen the device and inspected it. Indeed, that is exactly what happened; a Starbucks employee noticed the device in the bathroom, inspected its surface, and immediately concluded that it appeared to be a camera. By purposefully plugging the device into the bathroom's outlet, leaving it there, and failing to return for several days, defendant gave up his rights to control the disposition of the property; defendant could no longer control whether the device remained plugged into the outlet or whether the device was inspected or removed by a member of the public or, as it happened, a Starbucks employee. *See State v. Stafford*, 184 Or App 674, 679-80, 57 P3d 598 (2002), *rev den*, 335 Or 181 (2003) (holding that defendant abandoned his constitutionally protected interest in a bag that he left "in a place that was visible and accessible to any member of the public" where defendant's relinquishment of possession was not "in response to any instruction from, or illegal conduct on the part of, the police"). Although defendant contends that the nature of the device—a hidden camera—demonstrates his intent to retrieve it, as we have noted, defendant's intent to relinquish his constitutionally protected rights need not have been permanent; here, it was legally sufficient that he purposefully left the device in plain view, in a bathroom available to the general public, for an extended period of time, and where it was accessible to anyone who entered

the bathroom. Accordingly, defendant did not manifest an intention to maintain control over the device. *Cf. State v. Brown*, 273 Or App at 353-54 (holding that the defendant had not abandoned a McDonald's bag when he left the bag in a parking lot and moved across the street from the bag for only 10 to 20 minutes). Based on the foregoing, we conclude that defendant abandoned his privacy interest in the device under Article I, section 9; as a result, defendant was not entitled to challenge the subsequent searches of the device by the police.

Defendant alternatively contends that the search violated the Fourth Amendment to the United States Constitution. *See Campbell*, 306 Or at 163 (explaining that the United States Supreme Court defines "a Fourth Amendment search as a government action that infringes upon a reasonable expectation of privacy" (internal quotation marks omitted)); *Dickson*, 173 Or App at 573 ("[U]nder the Fourth Amendment, the question is whether a defendant *** has relinquished a reasonable expectation of privacy so that the seizure and search are reasonable.") (omission in *Dickson*; internal quotation marks and brackets omitted). We conclude that defendant's Fourth Amendment rights have not been violated for the same reasons that we have articulated above with respect to his Article I, section 9, challenge. Defendant left the device in a bathroom available to the general public on his own volition, where the device was accessible to any member of the public to retrieve or inspect the device. In doing so, defendant abandoned his privacy interest in it, and no longer retained a reasonable expectation of privacy in the device at the time of the search.

Based on the foregoing, we conclude that the trial court did not err in denying defendant's motion to suppress because defendant had abandoned any constitutionally protected interest in the device at the time of the warrantless search.

Affirmed.