

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JULIO CESAR SEPULVEDA,
Defendant-Appellant.

Washington County Circuit Court
C141818CR; A159019

Rick Knapp, Judge.

Argued and submitted December 19, 2016.

John Evans, Deputy Public Defender, argued the cause for appellant. With him on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Leigh A. Salmon, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

TOOKEY, J.

Reversed and remanded.

TOOKEY, J.

Defendant appeals a judgment of conviction for unlawful delivery of methamphetamine, ORS 475.890, and unlawful possession of methamphetamine, ORS 475.894. Defendant assigns error to the trial court's denial of his motion to suppress evidence discovered as a result of a purported unlawful arrest. For the reasons that follow, we reverse and remand.

We review a trial court's denial of a defendant's motion to suppress for legal error and are bound by the trial court's express and implied findings of fact, if there is sufficient evidence in the record to support them. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). We recite the facts in accordance with that standard.

Just before midnight in August 2014, Deputies Dunn and Wood were responding to reports of a gang-related disturbance. One report indicated that there were possible shots fired in the area, and another report indicated that there was a possible gang fight "and someone was chasing another person down the street with a baseball bat." Dunn and Wood, who were both on bike patrol, rode toward the vicinity of the reported location.

Dunn and Wood encountered defendant walking briskly parallel to, and four blocks west of, the location of the reported disturbance. Defendant was talking on his cell phone and looking around; according to Dunn, defendant "just seemed very suspicious. He was kind of sweaty *** and it looked like he had been running or attempting to hide from police *** [b]ecause *** there was a lot of police activity in the area."

As the deputies approached defendant, Dunn announced, "Sheriff's Office," in a loud, commanding voice and pointed his flashlight at defendant. In response, defendant "quickly bladed up his stance, [and] moved his right foot to the rear. [Defendant] also took his right hand [which was holding his cell phone] and reached near the area of his back right pocket." Believing defendant's bladed stance to be a fight or flight movement and that defendant may have been reaching for a weapon, the deputies drew their

firearms. Dunn commanded defendant to raise his hands in the air and get on his knees. Defendant complied with Dunn's commands, and Wood handcuffed defendant. Wood frisked defendant for weapons and did not find any. Following the frisk, defendant remained handcuffed.

Dunn advised defendant of his *Miranda* rights, which defendant said he understood. Wood then requested and obtained defendant's consent to search his pockets. Evidence obtained from that search resulted in defendant being charged with unlawful delivery of methamphetamine and unlawful possession of methamphetamine.

Before trial, defendant moved to suppress the evidence discovered as a result of Dunn and Wood's search. Defendant filed a one-page written motion to suppress, which argued, in its entirety:

"The defendant was subject to a search and seizure without a warrant. Warrantless searches and seizures are per se unreasonable and the state has the burden of proving otherwise. *State v. Miller*, 269 Or 328, 334, [524 P2d 1399] (1974). Defendant is not required to allege any additional facts in a motion to suppress. *Id.* at 335. This Motion is, in the opinion of counsel, well-founded in law and not made nor filed for the purpose of delay."

The motion was not otherwise filed with an accompanying brief or memorandum.¹

At the suppression hearing, defense counsel argued that he believed that the motion to suppress was "constitutionally sufficient under the Uniform Trial [Court] Rules in that it does allege a fact that there was a warrantless search," and that the motion cited legal authority. The trial court stated that, because defendant's motion failed to conform to the Uniform Trial Court Rules, the court would not "proceed with [the] case until [defense counsel] had an opportunity to file his brief to apprise the Court and the

¹ The state did not move to strike defendant's motion to suppress; accordingly, the question of whether the motion complied with the Uniform Trial Court Rules is not before us. Cf. *State v. Jacinto-Leiva*, 287 Or App 574, 578, ___ P3d ___ (2017) (concluding that the trial court did not err in striking defendant's motion to suppress where the "defendant failed to cite the authority upon which his motion to suppress was based as required by UTCR 4.060(1)(a)").

district attorney's office of his legal arguments." As a result, the court set over the motion to suppress hearing to allow defense counsel time to file additional briefing.

Defense counsel subsequently filed a supplemental brief in support of his motion to suppress. The supplemental brief expanded on the one-page motion that defendant had previously submitted; the brief argued that, pursuant to *Miller*, because defendant asserted that he "was subject to a search and seizure without a warrant," defendant "need not assert more than that in order to place the burden on the state to prove there is an exception to [defendant's] constitutionally protected rights against unreasonable search and seizure." Other than that theory, the supplemental brief lacked any specific arguments pertaining to the legality of the search and seizure.

At the subsequent suppression hearing, the state and defendant waived opening argument, and the state called Dunn and Wood to testify regarding the events leading up to defendant's charges. In the state's closing argument on the motion to suppress, the state argued that defendant was stopped when defendant "bladed his stance off, reached behind his back *** [and] the Sheriff deputies pulled their guns and took him into custody. So *** it really went from encounter to custody, not encounter to stop to custody." Despite contending that defendant was not stopped, the state argued that the deputies had reasonable suspicion to stop defendant because defendant bladed his body and reached towards his back pocket, so "if there was any illegality, that illegality [did not] produce any derivative evidence." Then, according to the state, "[o]nce *** defendant [was] in custody, he voluntarily consented to the search of *** his pockets."

In response, in his closing argument, defendant argued that the deputies lacked reasonable suspicion to stop defendant. Additionally, defendant argued that, assuming that the deputies had reasonable suspicion to stop him, the deputies arrested defendant without probable cause. Defense counsel argued:

"The [deputies'] decision to immediately handcuff [defendant] constitutes a seizure.

“And that’s what we have here. [Defendant] was clearly under arrest. He was ordered to turn around, put his hands in the air, [and] drop to his knees. [Deputy] Wood handcuffed him. [Deputy] Dunn read him his rights. And he immediately complied with all these orders. There [were] no longer any issues with regard to [officer] safety at all. There [were] no weapons found. They didn’t release him. He was clearly under arrest. And at that point, there was no probable cause that a crime [was] actually committed.

“Neither officer in this case makes any mention about their basis for a probable cause for arresting [defendant], until they’re already going into his pockets and getting consent for—for drugs. They arrest him only on an officer safety basis.”

Following defendant’s argument, the trial court made its findings and rulings on defendant’s motion to suppress. The trial court found that defendant was stopped when the deputies drew their guns on him and that the stop was supported by reasonable suspicion. The trial court explained that, because defendant bladed his stance and reached towards his back pocket, the deputies had reasonable suspicion to frisk him to ensure that defendant was not reaching for a weapon. From that point, the trial court found that, even though he remained detained and handcuffed, defendant nonetheless consented to the deputies searching his person. As a result, the trial court denied defendant’s motion to suppress.

On appeal, defendant assigns error to the trial court’s denial of his motion to suppress. Defendant argues that the deputies arrested him “without probable cause when they detained him in handcuffs after officer-safety concerns had dissipated.” Alternatively, defendant contends that the deputies stopped defendant without reasonable suspicion.

In response, the state argues that defendant failed to preserve his argument that he was arrested without probable cause. Specifically, the state takes issue with defendant’s written motion to suppress because that motion did not set out defendant’s legal arguments. Additionally, although defendant, in “the middle of his [closing] argument[], ***

asserted that, by immediately handcuffing him, the officers arrested [defendant] without probable cause,” the state contends that that argument is “qualitatively different than the one that defendant now makes on appeal, and it is therefore unpreserved.” According to the state, because defendant failed to apprise the state or the trial court of his legal arguments in advance of the motion to suppress hearing, the state was deprived of “an opportunity to develop a factual record addressing the specific issues defendant ultimately raised.” Finally, the state asserts that defendant failed to “correct” the trial court’s understanding that the “sole issue” at the motion to suppress hearing “concerned the warrantless search.”

We begin with the state’s argument about preservation. “Generally, we will not consider an issue on appeal that was not preserved in the trial court.” *State v. Roth*, 235 Or App 441, 447, 234 P3d 1019 (2010). “To preserve his argument for appellate review, defendant was required to provide an explanation of his position ‘specific enough to ensure that the [trial] court [could] identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction [was] warranted.’” *State v. Kuschnick*, 269 Or App 198, 206-07, 344 P3d 480 (2015) (quoting *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000) (brackets in *Kuschnick*)). The rule of preservation “also ensures fairness to opposing parties, by requiring that the positions of the parties are presented clearly to the initial tribunal so that parties are not taken by surprise, misled, or denied opportunities to meet an argument.” *State v. Walker*, 350 Or 540, 548, 258 P3d 1228 (2011) (internal quotation marks omitted).

Here, in his written motion to suppress, defendant asserted that he had been subjected to a warrantless seizure and search.² Defendant continued by stating that, because “warrantless seizures are *per se* unreasonable,” the state had the burden of proving that the seizure was lawful. As set out above, the facts here did not support the

² Although defendant’s written motion to suppress challenges both the warrantless seizure and search, the parties’ arguments on appeal focus on the unlawful seizure.

possibility of numerous seizures arising from events separated in time or place. That is, defendant had one brief encounter with the deputies; his contention that he was seized would necessarily arise from those brief, straightforward events. Consequently, under these circumstances, defendant's motion put the state on notice that he was challenging the seizure that took place during his encounter with Dunn and Wood and that, as a result, the state should present all available evidence that the seizure was lawful. *See Walker*, 350 Or at 552 (focus of preservation analysis is "whether a party has given opponents and the trial court enough information to be able to understand the contention and to fairly respond to it"; furthermore, "[t]he necessity of fleshing out a contention with more developed or detailed analysis will depend on the circumstances and the nature of the issue that has been raised"); cf. *State v. Geyer*, 287 Or App 25, 34-35, 401 P3d 1259 (2017) (concluding that the defendant failed to preserve his argument that he was subject to an unlawful warrantless search when officers opened his car doors where, despite a written motion raising several bases for the suppression of evidence, the defendant failed to identify that he was challenging the opening of his car doors until his closing argument at the suppression hearing).

As noted, at the subsequent suppression hearing, the state focused its seizure-related argument on whether the deputies had reasonable suspicion to stop defendant. However, the state also argued that "it really went from encounter to custody, not encounter to stop to custody." That is, the state advanced two alternative views of the seizure that took place during the encounter. First, the state argued that any stop was supported by reasonable suspicion; second, the state argued that there was no intervening stop because, when defendant bladed his stance, it "went from encounter to custody." In response to the state's contention at the suppression hearing that the only seizure that took place during the encounter was an arrest, not a stop, defendant argued that the seizure was nevertheless unlawful because the arrest was not supported by probable cause—after the frisk, "there was no probable cause that a crime [was] actually committed." That is, defendant asserted, the deputies "arrest[ed]"

him only on an officer safety basis,” which could not support any seizure after a frisk that revealed no weapons. In summary, defendant’s original motion notified the state that the deputies’ warrantless seizure of defendant was at issue; the state presented evidence on that question and argued that the only seizure was an arrest; and, in response, defendant argued that the state had failed to show that the officers had probable cause to justify the seizure—the arrest.

The state contends that, because defendant did not apprise the state or the trial court of his precise legal arguments before the hearing, it was deprived of its ability to develop a factual record concerning the bases for the seizure. We disagree with the state. As explained above, in his written motion to suppress, defendant informed the state that he was challenging the warrantless seizure and that, as a result, the state was required to demonstrate that the seizure was lawful. The event at issue was not factually or legally complex such that the lack of detail in defendant’s motion would have affected the evidence that the state chose to present at the hearing. See *State v. Oxford*, 287 Or App 580, 586 n 3, ___ P3d ___ (2017) (concluding that the defendant’s motion sufficiently apprised the court and the state that defendant was challenging specific searches and seizures and that there was no ambiguity about “which seizure was being challenged” (emphasis omitted)).

Regarding the state’s argument that defendant did not “correct” the trial court’s understanding that the “sole issue” at the motion to suppress hearing “concerned the warrantless search,” looking at the context of issues set forth at the suppression hearing, it appears that, towards the beginning of the hearing, when the court referred to “the warrantless search” being the “sole issue” at the hearing, it used that phrasing as shorthand for the warrantless search *and seizure*. As noted, during the suppression hearing, the parties litigated at length the question of whether, and when, defendant was seized, and there is no indication in the record that the trial court did not understand the issue of whether defendant was seized was at issue. Moreover, a party is not required to reassert at the hearing each argument raised in writing before the hearing. In this

case, defendant's one-page written motion to suppress and his supplemental brief referred to a warrantless search and seizure; consequently, the trial court was aware that the seizure was at issue. See *State v. Mejia*, 287 Or App 17, 23-24, 401 P3d 1222 (2017) (where the defendant's written motion to suppress argued, among other things, that he was challenging the warrantless search of his person, the defendant adequately preserved that argument because his written motion "adequately frame[d] the issue of the lawfulness of the warrantless search of [his] person, even if defendant did not reiterate that argument at the suppression hearing or later point out the court's failure to address it"); *State v. Parnell*, 278 Or App 260, 266, 373 P3d 1252 (2016) ("[I]f a party makes an argument in a written motion, he or she need not necessarily reiterate that precise argument at the hearing in order for the issue to be preserved."). As explained above, in this case, defendant's motion informed the state that the seizure was at issue, and the parties litigated that issue at the hearing. Because defendant's motion and his closing argument gave his "opponents and the trial court enough information to be able to understand [his] contention and to fairly respond to it," defendant preserved the argument that he raises on appeal. *Walker*, 350 Or at 552.

We turn to the merits of defendant's assignment of error—whether the trial court erred in denying his motion to suppress. "A 'stop' is a temporary restraint of a person's liberty by a peace officer lawfully present in any place." ORS 131.605(7). A police officer may stop a person if the officer reasonably suspects that the person has committed or is about to commit a crime to make a reasonable inquiry. ORS 131.615(1). During a stop, an officer may "use the degree of force reasonably necessary to make the stop and ensure the safety of the peace officer, the person stopped or other persons who are present." ORS 131.615(5). "An officer confronted with safety concerns may handcuff a person without converting the stop into an arrest, but the stop is converted into an arrest if the officer continues to use force to restrain the person after the officer's safety concerns have dissipated." *State v. Hebrard*, 244 Or App 593, 598, 260 P3d 759 (2011).

Regardless of whether the deputies had reasonable suspicion to stop and frisk defendant, once the frisk of defendant revealed that defendant was not armed, the deputies needed lawful justification to continue their detention of defendant; one such justification is probable cause to believe that defendant had committed a crime.³ “A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed” a crime. ORS 133.310(1). “‘Probable cause’ means that there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it.” ORS 131.005(11). Probable cause has two components: “(1) the officer must subjectively believe that a crime has been committed, and (2) that belief must be objectively reasonable under the totality of the circumstances.” *State v. Gibson*, 268 Or App 428, 430, 342 P3d 168 (2015).

We conclude that the deputies lacked probable cause to arrest defendant after the frisk revealed that defendant was not armed, because the concern for officer safety had dissipated. The stop and frisk did not reveal any further information that would lead an objectively reasonable officer to conclude that it was more likely than not that defendant had committed a crime. Nor did the state present any evidence to demonstrate that probable cause existed to further detain defendant in handcuffs following the frisk. As a result, because the deputies lacked probable cause to arrest defendant, the arrest was unlawful and the trial court erred in denying defendant’s motion to suppress evidence found as a result of that unlawful arrest. Moreover, that error was not harmless; the evidence was central to the state’s case against defendant for unlawful delivery and possession of methamphetamine.

Reversed and remanded.

³ The record does not support the continued detention of defendant based on officer safety concerns.