November 18, 2022

Oregon Court of Appeals Opinions Issued September 2022

State v. Wallace - 321 Or App 704 (2022)

Victim, J, has an intellectual disability, fetal alcohol syndrome, and an IQ of 62. J manages her personal care but can't handle her own transportation, manage her own finances, shop for herself and needs assistance with daily tasks. J can't live alone and has lived with her grandmother (her full-time caregiver) since she was 6 months old. J requires support to socialize. J's intellectual deficits are "obvious." J met the defendant at the church they both attended. Defendant said he was 30 years old but was really 50. At the time of trial, J was 28 years old. J's grandmother told defendant that J had been diagnosed as "retarded" and defendant promised he would not touch J unless they were married. Defendant was controlling of J during their relationship. Defendant told J she could not tell anyone at church they were dating. J was "curious" about sex but only had a basic understanding that babies are made when a man puts his penis in a woman's vagina. At one point the defendant had J strip naked and took pictures of her which she thought was strange and made her uncomfortable, but she trusted the defendant. The defendant then forcibly raped her. Defendant was charged with multiple counts of rape I, sodomy I, and sex abuse I. One count of Rape I was based on forcible compulsion, the rest were under the theory that J was unable to consent to sexual activity by reason of being "mentally defective" (in 2021 legislature changed the term "mentally defective" to "incapable of appraising the nature of the victim's conduct"). Defendant argued the evidence did not show that J was unable to consent as a result of her mental disability.

Court of Appeals held that the evidence was insufficient to prove J was unable to consent to sexual conduct as a result of her mental disability. A person's ability to consent to sexual activity, "consists of two related concepts: (1) understanding the nature of sexual conduct and (2) exercising judgment and making choices based on that understanding." The state had to prove that because of her mental disability, J lacked the specific ability to understand that the conduct defendant initiated was sexual in nature, or to exercise judgment to make the choice to consent to the conduct. Even though defendant took advantage of J's curiosity, her vulnerability, and lack of understanding, it was not sufficient to prove that J's mental disability prevented her from understanding that the conduct the defendant initiated was sexual in nature. The evidence was also not sufficient to prove that, because of her mental disability, J did not have the ability to consent to the sexual activity.

State v. N. J. D. A. - 322 Or App 26 (2022)

14 year old youth lived with his adoptive parents. In the middle of the night he took $10,000 from his parents' safe and set the house on fire. Youth's dad died in the fire, mom escaped. Initially mom did not

know if the youth escaped the fire. The next day mom learned the youth was at a good friend's house and went to the house with one police officer. The officer was in uniform with his firearm holstered. They knocked on the door and asked if the youth was there. The youth came outside without any verbal directives from the officer. At the officer's request, the youth and the officer stepped to the side of the house to speak since there were a lot of people in the house. The officer did not think the youth was a suspect at this time. The officer was a couple of feet from the youth during their conversation, the youth was never directed to do anything, and the officer never touched the youth. The officer didn't notice any signs the youth didn't want to speak with him or that the youth was unable to understand the conversation. Mom was present within earshot during the entire conversation. The officer asked the youth about what happened since, in his experience, people usually stay at the scene of a fire. Youth said he woke up and saw the fire so ran away. The officer also asked about an injury on the youth's forehead. After about 10 minutes the officer asked why the youth did not wake his parents up when he saw the fire. Mom then told the officer to stop asking the youth questions. The officer ended the conversation. Youth was later charged with Arson I and Murder. Youth moved to suppress the statements he made to the officer and argued he was in compelling circumstances that required *Miranda* warnings. Youth's expert testified that he is "an uncommonly intelligent child who learns quickly" but is "unusually underdeveloped with respect to his emotional and interpersonal maturation." That expert opined that he is "on the autism spectrum" and suffers from PTSD.

Court of Appeals held that the youth was not in compelling circumstances during his conversation with the officer. The encounter was in a place the youth was familiar with, the youth's mom was present, the conversation was short, and that the officer was not aggressive or accusatory. The officer did not confront the youth with evidence he was involved in the fire or ask questions that assumed or suggested he had started the fire. The Court acknowledged that youth was 14 years old at the time of the encounter, was unusually naïve for his age, and had some social deficits, but none of those things made the encounter rise to the level of compelling circumstances.

Oregon Court of Appeals Opinions Issued October 2022

State v. Giron-Cortez - 322 Or App 274 (2022)

Defendant was in a bar seated with two other men at a high-top table. There were about 20 other people in the bar. During a conversation with the people around his table defendant motioned the rapid firing of a gun with his hands. Defendant then pulled a firearm from his waistband and held the gun parallel to the floor. The gun was pointed at the victim while defendant showed it to a person standing next to him. As the defendant brought the gun back towards his waistband, he had both hands on the gun. The gun then discharged. A bullet hit the defendant's leg, ricocheted off of his thigh bone, and went through the victim's foot. Among other crimes, the defendant was charged with assault III (ORS 163.165 (1)(c) – recklessly causing physical injury to another by means of a deadly weapon under circumstances manifesting extreme indifference to the value of human life). Defendant argued that the evidence was insufficient for the "extreme indifference" element of assault III.

Court of Appeals held that the evidence was sufficient to prove extreme indifference. "Extreme indifference" is not defined by statute, but "refers to a state of mind where an individual cares little about the risk of death of a human being. A defendant's extreme indifference may be inferred from his conduct at the time of the event." The evidence showed that, "defendant's fingers were near the trigger of a loaded gun as he brought the gun above the table and moved the gun around so that it pointed at multiple people. That is legally sufficient to establish extreme indifference to the value of human life."

State v. Lugo - 322 Or App 477 (2022)

The victim was staying with her boyfriend. Her boyfriend's step-brother (defendant) also lived in the house. Victim worked an 11-hour shift and went to bed around 3:30 a.m. Victim's boyfriend left for work around 5:00 a.m. Victim remained in bed because she was exhausted from working. Victim was naked in the bed and "woke up to a hand running down from her shoulder to her butt." Victim testified she was just waking up and was confused when she felt something touching her shoulder since her boyfriend was supposed to be at work. The touching then went "down to her bottom area," and then touched, "an intimate area where you don't want people to touch." Victim was still in the process of waking up and unaware of what was going on. Victim rolled over and saw that it was defendant who touched her. Defendant was charged with Sex Abuse III and Sex Abuse I (ORS 163.427 (1)(a)(C) – subjects another to sexual contact when the victim is incapable of consent by reason of being physically helpless). Defendant argued the evidence was insufficient to prove the victim was "physically helpless" at the time of the sexual contact.

Court of Appeals held that the evidence was sufficient to prove the victim was physically helpless. The term physically helpless includes a victim who is sleeping when the sexual contact occurs. Even though the victim was in the process of waking up when the sexual contact occurred, she was not "fully possessed of [her] mental faculties" and "not in a state wherein all ones' mental powers have returned" when defendant subjected her to the sexual contact. Therefore, victim was incapable of consent by reason of being physically helpless.

State v. Elbinger - 322 Or App 498 (2022)

Officer arrested a shoplifter outside a Fred Meyer and the shoplifter admitted that he was stealing for his girlfriend. The shoplifter initially gave a false name and was not identified until later during transport to the jail. After being arrested, shoplifter pointed to a Subaru in the Fred Meyer parking lot and asked the officer to tell the occupants he had been arrested. A male (defendant) was sitting in the driver's seat, and a female was in the passenger seat. The officer parked next to the Subaru but did not block it in. The officer got out and spoke with the defendant. Defendant got out of the car without being directed to do so and voluntarily provided his ID. The officer told the defendant that "the person in his car" asked the officer to let the defendant know he was in custody. The officer asked if defendant was shopping at the store with someone and defendant said he was "just the driver." The officer told defendant the person in his car had stolen "a whole bunch of stuff." The officer asked if the passenger was shoplifter's girlfriend and said he needed to talk to her "real quick." She denied being the shoplifter's girlfriend. The officer wrote down her name and DOB and gave that information to dispatch. The officer asked the female and

the defendant questions about their connection to the shoplifter and asked for contact info. The officer's demeanor during the interaction was professional and non-confrontational. The conversation lasted about 10 minutes. During the encounter the officer was communicating on his radio. Eventually the officer said into his radio "affirm. Occupied twice. One black male. One white female." The officer testified that was in response to a question asking if there was a tall black male with dreadlocks present. Then the officer asked if either of them had been in the store that day. The defendant said he went into the store briefly to use the bathroom. As the defendant was answering that question the officer learned someone fitting the defendant's description was also a shoplifting suspect. They both were read their *Miranda* rights. The female admitted that stolen stuff was in the vehicle. Drugs were found during a search of the defendant. Defendant was charged with PCS meth. Defendant filed a motion to suppress arguing he was unlawfully stopped and the search was a result of the unlawful stop. During the motion the officer testified that he did not have reasonable suspicion that defendant was involved with the shoplifting until *after* he received information that the defendant matched the description of a suspected shoplifter.

Court of Appeals held that the defendant was stopped at the point that the officer radioed a description of the defendant to another officer. The officer's initial exchange with defendant was not a stop, but when he radioed the defendant's description to another officer it would have been reasonable for defendant to believe that he was no longer free to leave. At that point the encounter had evolved into a stop. The officer did not have reasonable suspicion of a crime until *after* the defendant was stopped, so the stop and resulting search were unlawful.

State v. Miller - 322 Or App 431 (2022) (NP)

Trooper saw defendant's vehicle cross the fog line multiple times and almost hit the guardrail. During a traffic stop he smelled a strong order of alcohol and saw the defendant appeared to be intoxicated. The trooper told the defendant he was concerned about his driving and asked, "do you want to step out and perform some voluntary field sobriety tests." When defendant asked if it was voluntary, and the trooper told him it was. Defendant asked what would happen if he didn't volunteer. The trooper said then they would "go down a different road." The defendant asked, "what road is that?" and the trooper said, "either you go the one way or the other first, before we get to that point." The defendant then said, "I will volunteer." Defendant did the FSTs and then was arrested for DUII. Defendant moved to suppress the evidence from the FSTs arguing that he did not voluntarily consent.

Court of Appeals held that the defendant voluntarily submitted to FSTs. Under the totality of the circumstances, the Court found that the defendant's consent to perform FSTs was freely and voluntarily given. When the trooper asked if the defendant wanted to "step out and perform some voluntary field sobriety tests," that question invited yes or no response. The trooper again told the defendant it was up to him and it was voluntary – this communicated to the defendant it was his choice to perform the tests or not. The trooper's statement about "different roads" was potentially confusing, but nothing about the trooper's words to defendant or the circumstances of the interaction were coercive.

State v. Soto - 322 Or App 449 (2022) (NP)

Defendant was previously in a relationship with the victim. One night he forced his way inside the victim's apartment, carried her from the entrance into the primary bedroom, threw her onto the bed, took her cellphone, searched the apartment for other people, closed her children's bedroom door, shut the window in the bedroom, and turned up the volume of the music that was playing in that room. Defendant then dragged her into the bathroom by her hair, closed the door, and then proceeded to assault and sexually assault her. During the assault he told the victim to "shut up" and "be quiet" any time she made noise. He told the victim to "sit back down" when she tried to get up and pushed her back into the bedroom when she tried to escape. He was charged with multiple crimes including Sodomy I, Burglary I, and Kidnapping I (ORS 163.235(1)(c) (taking the victim from one place to another). For the kidnapping charge the defendant argued the evidence was insufficient to prove that he took the victim from once place to another and that he intended to substantially interfere with the victim's liberty.

Court of Appeals held there was sufficient evidence for kidnapping. Even though the movement of the victim all occurred in the same residence, the defendant increased the victim's isolation by moving her from the front door of her apartment (an area where another person or her children might have seen her) to the bathroom (a more isolated part of the apartment that could only be accessed through the primary bedroom) before assaulting her – the starting and ending places were qualitatively different. The evidence was also sufficient to prove that the defendant intended to interfere substantially with the victim's personal liberty and that the abduction was not merely incidental to or to further the commission of the defendant's other crimes.

Oregon Supreme Court Opinions Issued October 2022

State v. Thompson - 370 Or 273 (2022)

Police seized defendant's cell phone under exigency while he was in the hospital based on PC that he'd been involved in an armed robbery and that evidence would be found on the phone. 5 days later officers applied for and were granted a search warrant for the phone. Defendant was arrested a few days later, he was interviewed about the robbery, and he made some incriminating statements. Defendant was charged with multiple crimes including robbery and unlawful use of a weapon. He moved to suppress the evidence that was found on his cellphone and argued the seizure of the phone was unlawful. He also argued statements he made during his interview related to the information found on the cell phone should be suppressed. At the motion hearing the officer testified that he could have obtained a warrant within 6 to 10 hours after seizing the phone. The officer testified that during the 5 day delay he was working on other aspects of the investigation.

The Supreme Court held that even if the initial seizure of the phone was justified under exigency, the continued seizure for 5 days before obtaining warrant was unlawful. A warrant would have taken 6 to 10 hours, but the delay was 5 days. Even though the officer was diligently working on the investigation during that time, as soon as the warrantless seizure was made obtaining a warrant needed to be a

priority. Police cannot create exigency by their own inaction so the continued seizure of the phone without a warrant for 5 days was not justified by exigent circumstances. The Court rejected the argument that once items were lawfully in police custody they could be retained indefinitely The Court noted that unlike contraband, stolen property, etc. that a defendant cannot lawfully possess, in this case the item was the defendant's own phone that he was lawfully in possession of.

NOTE: In their opinion the Court clarified they were not holding that there is a specific time limit in which a warrant must be obtained in every case, or what the exact deadline in this case would have been. The Court's decision was that the continued seizure of the phone was justified only for the amount time that was reasonably necessary to obtain a warrant – and under these facts and circumstances the 5-day delay was not reasonable. Officers should consult their local DA's office for guidance on seeking warrants immediately after an exigent seizure.

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