IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DENNIS JAMES DAVIDSON, Defendant-Appellant, Petitioner on Review.	Marion County Circuit Court No. 11C43121 CA A150292 SC S063480

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the decision of the Court of Appeals
On appeal from a Judgment
of the Circuit Court for Marion County
Honorable DALE W. PENN, Judge

Opinion filed: June 17, 2015
Author of Opinion: Judge Sercombe
Concurring Judges: Presiding Judge Hadlock, Judge Tookey

Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION, QUESTIONS PRESENTED, AND PROPOSED RULES OF LAW

A jury convicted defendant of two counts of public indecency as defined by ORS 163.465(1)(c), which provides that "[a] person commits the crime of public indecency if while in, or in view of, a public place the person performs * * * [a]n act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person." (ER-10, Judgment; ER-1, Indictment). With respect to the first crime, the state presented evidence that a woman at River Road Park in Marion County, while seated at a picnic table, saw defendant "peeking out from behind [a] tree" and then—when she stood—observed his erect penis and saw him masturbating. (Tr 36-38, 41-42). With respect to the second crime, the state presented evidence that, later that day, police officers saw defendant masturbating in a back yard that faced "directly towards the park"; an officer saw that defendant's "pants were open," and that defendant's erect penis was "in his hand." (Tr 53-54, 65).

Defendant argues that ORS 163.465(1)(c) required the state to prove: (1) that he knew, when he uncovered his genitals, that others could see them; and (2) that he intended that the act of exposing his genitals would, by itself, arouse his own sexual desire or another's; that is, he argues that the state had to prove not merely that he possessed the intent to arouse someone at the time that he

exposed his genitals, but that he intended the mere act of exposure, without more, to cause arousal. Based on those premises, he argues that the trial court erred by refusing to instruct the jury on the lesser-included offense of attempted public indecency, and by prohibiting him from making certain arguments to the jury.

This case thus presents the following questions, to which the state proposes the following rules of law:

> **First question presented**: If a defendant uncovered his genitals in a public place or in view of a public place, must the state—to prove that the defendant "expose[d]" his genitals for ORS 163.465(1)(c)'s purposes—prove that he knew that others were present who could see his genitals?
>
> **First proposed rule of law:** Proof that a defendant uncovered his genitals in a public place or in view of a public place, such that others might see the genitals if they visited that place, proves that the defendant "expos[ed]" his genitals for ORS 163.465(1)(c)'s purposes. The provision does not require proof that the defendant, when uncovering his genitals or leaving them uncovered, knew that others were present who could see them.
>
> **Second question presented:** Did defendant preserve his argument that ORS 163.465(1)(c) required proof that he intended the exposure of his genitals, by itself, to arouse someone's sexual desire?
>
> **Second proposed rule of law:** Defendant never alerted the trial court, or tried to argue to the jury, that ORS 163.465(1)(c) required proof that he intended that the act of exposing his genitals would, by itself, arouse someone. As a result, he did not preserve his argument that—in light of that construction—the trial court was required to give a jury instruction on attempted public

indecency, and was required to let defendant present his "intent" argument to the jury.

Third question presented: Does ORS 163.465(1)(c) require the state to prove that a defendant, in exposing his genitals, intended that the act of exposure, by itself, would arouse someone's sexual desire?

Third proposed rule of law: To prove a violation of ORS 163.465(1)(c), the state must prove that the defendant, in exposing his genitals in or in view of a public place, was motivated by a desire to sexually arouse himself or another; for example, the state may do so by presenting evidence that a defendant exposed his genitals to make it easier for him to then masturbate. ORS 163.465(1)(c) does not require proof that the defendant intended that the act of exposure, by itself, would arouse someone.

SUMMARY OF ARGUMENT

This court should affirm defendant's two convictions for committing public indecency as defined by ORS 163.465(1)(c). Although defendant makes two distinct statutory-construction arguments in challenging his convictions, neither provides a basis for reversal.

First, this court should reject defendant's suggestion that the provision required proof that, when uncovering his genitals, he knew that others were present who could see them. Instead, the state can prove that a defendant "expos[ed]" his genitals, for ORS 163.465(1)(c)'s purposes, by proving that he uncovered them in a public place, such that others could see them if they visited the place. That result is consistent with one

of the most common understandings of the word "expose"—that it connotes the act of "laying bare."

If defendant's construction were correct, the state essentially would have had to prove that he showed or displayed his genitals "to" another person, even though no such express requirement appears in ORS 163.465(1)(c). And if defendant were correct, a man who disrobes and begins to masturbate, while standing directly behind a woman who is seated in an otherwise empty park, would not necessarily be committing public indecency. That result is at odds with the legislature's evident focus, in ORS 163.465, on flatly prohibiting certain kinds of behavior in public places. The trial court correctly rejected the legal premise behind defendant's request for an attempted public indecency instruction, and behind defendant's attempt to argue in closing that a defendant violates ORS 163.465(1)(c) only when he exposes his genitals "to" another person.

Second, defendant argues that ORS 163.465(1)(c) required the state to prove that he intended that the act of exposing his genitals would, by itself, arouse someone. Yet defendant never alerted the trial court to that proposed construction of the provision. As a result, he did not preserve his arguments that—in light of that construction—the trial court was required to give a jury instruction on attempted public indecency,

and to let defendant make a closing argument based on that construction. This court should not review those arguments.

In any event, ORS 163.465(1)(c) does not require proof that a defendant intended the act of exposure, alone, to arouse someone. If defendant's proposed construction were correct, a person who disrobes and then masturbates on a crowded public playground would not necessarily be committing public indecency—the state would have to prove that he intended that the mere act of disrobing, *by itself*, would arouse someone. That result cannot be squared with the legislature's attempt, in ORS 163.465, to shield children, families, and others who use public places from encountering certain sexual behaviors. ORS 163.465(1)(c) merely requires the state to prove that, if a defendant exposed his genitals in a public place or in view of such a place, his ultimate motivation was sexual arousal; the state may prove the requisite intent through evidence that the defendant publicly uncovered his genitals to masturbate.

ARGUMENT

A. To prove that a defendant violated ORS 163.465(1)(c), the state need not prove that he knew, when he exposed his genitals in a public place, that others were present who could see them.

Defendant argues that when a person uncovers his genitals in a public place, he violates ORS 163.465(1)(c) only if he knows that others are present

who can see his genitals: The state must prove that the defendant was "consciously presenting his genitals to public view." (Pet Br 16).

From that premise, defendant argues that the trial court should have granted his request to instruct the jury on the lesser-included offense of attempted public indecency. (Pet Br 34-37). He notes that the evidence of his first crime showed that he stood behind a tree in River Road Park, and that the victim—who had been seated at a table—saw his erect penis only "when *she* stood and presented herself such that she could see defendant's genitals." (Pet Br 37; emphasis in original). With respect to the second crime, he notes that nothing suggests that, when he uncovered his genitals and began masturbating, he was "consciously aware" that others "could see him." (Pet Br 37). He thus claims that, had an attempt instruction been given, he could have plausibly argued that he committed mere *attempted* public indecency; although uncovering his genitals may have been a substantial step toward "exposing" his genitals, "exposure" would not have been complete until he was under circumstances in which he *knew* that others could see his genitals. (*See* Pet Br 35-36, asserting that he wished to argue that he was not guilty of public indecency because "he did not know that his genitals were exposed to public view"); ORS 161.405(1) ("[a] person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime"). And based on the same

statutory-construction premise, defendant also argues that the trial court erred by sustaining the state's objection to his assertion, during closing argument, that the public indecency statute "is for people who go around exposing themselves *to* other people." (Tr 92; emphasis added).

In fact, the legal premise behind defendant's request for an attempt instruction, and behind the assertion that he made to the jury, is a faulty one. The state—to prove that defendant "exposed" his genitals while in or in view of a public place—had to prove merely that he uncovered them (or kept them uncovered) such that they were capable of being seen by those who might use the public place. The state did not need to prove that defendant, when he uncovered his genitals, *knew* that others were present who could see them. As a result, the trial court correctly chose not to give an attempt instruction and correctly sustained the state's objection to defendant's closing argument.

1. Text and context show that the state does not need to prove that a defendant, when uncovering his genitals or leaving them uncovered, knew that others were present who could see them.

a. Statutory text supports that conclusion.

To construe a statute's meaning, this court "begin[s] with the text and context of the statute, which are the best indications of the legislature's intent." *State v. Walker*, 356 Or 4, 13, 333 P3d 316 (2014). ORS 163.465(1) provides:

> A person commits the crime of public indecency if while in, or in view of, a public place the person performs:

> (a) An act of sexual intercourse;
>
> (b) An act of deviate sexual intercourse; or
>
> (c) An act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person.

By requiring proof, in ORS 163.465(1)(c), that a defendant performed an "act of exposing [his] genitals," the legislature used a form of the word "expose." One of the word's common meanings is the act of laying something bare, or the act of uncovering something and making it "visible." *See Webster's Third New International Dictionary* (unabridged ed 1993) at 802 (defining "expose," in part, as "**2:** to lay open to view: lay bare: make known: set forth: EXHIBIT, DISPLAY < *exposing* a sun-tanned back >"); www.meriam-webster.com, *Merriam-Webster Online Dictionary* (defining "expose," in part, as "3: to cause to be visible or open to view"); *Webster's Third New International Dictionary* (unabridged ed 1993) at 2557 (listing definition **1a** of "visible" as "capable of being seen: perceptible by vision").

Understood in that manner, "exposing" an object means making it *possible* for it to be seen; but the act can be accomplished whether or not anyone is present to see the object. When erosion removes dirt from the base of a tree, it "exposes" a tree root even if no one is present to see the root. A cook who cracks an egg into a bowl "exposes" the yolk, whether or not a third party is present to observe the yolk. Similarly, a clothed person who removes all his

garments "exposes" his genitals. He has exposed them whether or not anyone else is present, and whether or not anyone else can now see them.

Some meanings ascribed to "expose"— "exhibit" or "display"— contemplate that the person doing the exposing intends that others ultimately will observe the object being exposed. Yet even those meanings do not require anyone else to be present at the moment the object is exposed, and do not require that the person doing the exposing *know* that others are present who can now see the object. Instead, one can "exhibit" or "display" an object in the *hope* that others might come by and notice it. *See Webster's Third New International Dictionary* (unabridged ed 1993) at 796, defining "exhibit," in part, as to "put on display *in order to attract notice*" (definition **1d**); emphasis added); *id.* at 654 (defining "display," in part, as to "exhibit to the sight or mind" and "to put on exhibition" (definition **2a**)).

Even if some of the common meanings of "expose" contemplate that exposure occurs only when someone other than the "exposer" observes the uncovered item, nothing suggests that the legislature intended "exposing" to encompasses *only* those more limited meanings. Absent evidence that the legislature intended "exposing" to encompass only a subset of the meanings that logically can be given effect in ORS 163.465(1)(c), this court should conclude that the legislature's use of "exposing" was designed to encompass all of those meanings—including the act of uncovering something or laying it bare, such

that the uncovered object is *capable* of being seen in the event that someone else happens by.

Construing ORS 163.465(1)(c) in that manner is consistent with the intent evident in ORS 163.465(1)(a) and (b), which prohibit a person from performing an "act of sexual intercourse" or "deviate sexual intercourse" in a public place or in view of such a place. Nothing in those subsections suggests that the state must prove that a person who engaged in such an act was aware that anyone else was present. "[E]xposing," as used in subsection (1)(c), should be similarly construed. Subsections (1)(a) and (b) reflect a legislative desire to (among other things) shield citizens seeking a quiet picnic spot in a public park from encountering a couple engaged in sexual intercourse; (1)(c) reflects a desire to shield such citizens from encountering someone who has exposed his genitals for the purpose of masturbating. The legislature flatly prohibited certain acts in public places, whether or not the actors were aware that others were present.

Ultimately, defendant's construction of ORS 163.465(1)(c) would require proof that he knowingly exposed his genitals "to" another person who was present at the time. (*See* Tr 92, containing defendant's attempt during closing argument to argue that "[t]his statute is for people who go around exposing themselves *to* other people"). Yet nothing in ORS 163.465(1)(c)'s text contains the word "to" or otherwise signals that the offender must have displayed his

genitals to another person who was present. Defendant's argument asks this court to insert text that the legislature omitted. This court may not do so. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) (noting statutory enjoinder in ORS 174.10 "not to insert what has been omitted," and describing it as a rule of construction "that bear[s] directly on how to read the text").

b. Statutory context supports the same conclusion.

ORS 163.465(1)(c) was adopted by the 1971 Legislature as part of the 1971 Criminal Code. Or Laws 1971, ch 743, § 120. As a result, pertinent context includes ORS 167.060(2), which was also adopted by the 1971 Legislature as part of the 1971 Criminal Code. As is true of ORS 163.465, ORS 167.060(2) uses the word "exposing," although it does so while defining the phrase "displays publicly" as used in ORS 167.060-167.095, which include provisions prohibiting displays of obscene materials to minors (ORS 167.080) and prohibiting displays of nudity or sex for advertising purposes (ORS 167.090). ORS 167.060(2)'s use of "exposing," as discussed below, helps show that the 1971 Legislature believed that an item or object can qualify as "exposed" even when no one is present to observe it. It helps show that, in the 1971 Legislature's view, proof that a person "exposed" something does not require proof that the person—at the moment the act occurred—knew that others could see it.

ORS 167.060(2) defines "displays publicly" as the "exposing" of an item that may be "readily" seen:

> "Displays publicly" means the *exposing*, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, *an item in such a manner that it may be readily seen* and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot or vehicle.

(Emphasis added.) That the 1971 Legislature discerned a need to qualify the word "exposing," by clarifying that it was referring only to exposing an item "in such manner that it may be readily seen," reflects an understanding that "exposing" normally can occur even when it does not result in the item being either seen or readily seen. ORS 167.060(2) suggests that the 1971 Legislature generally understood that an act of "exposing" occurs even if no one else is present when the act occurs.

Other pertinent context shows that when the 1971 Legislature intended to require proof that a defendant knowingly showed something *to* another person, it did so explicitly. The 1971 Legislature also adopted ORS 167.075(1), which criminalizes "exhibiting" an obscene performance "*to*" a minor. Or Laws 1971, ch 743, § 258 (emphasis added). That ORS 163.465(1)(c) does not similarly require proof that a defendant expose his genitals "to" someone else is significant.

Pertinent context further shows that the state, to prove public indecency under ORS 163.465(1)(c), need not prove that a defendant, when he uncovered

his genitals in or in view of a public place, knew that others were present who could see them.

2. Nothing in legislative history suggests that the legislature intended a narrow construction of "exposing," or intended to require proof that a defendant knew that others were present who could see his genitals.

Courts may consult legislative history to "resolve ambiguity or demonstrate that superficially plain text is not so clear." *Walker*, 356 Or at 17, citing *State v. Gaines*, 346 Or 160, 172-73, 206 P3d 1042 (2009). ORS 163.465 was adopted as part of the 1971 Criminal Code, Or Laws 1971, ch 743, § 120, and this court has described the Criminal Law Revision Commission's Commentary to the 1971 Oregon Criminal Code as "part of the legislative history of the Code." *State v. Chakerian*, 325 Or 370, 379, 938 P2d 756 (1997). Here, nothing in the commentary, or in any other pertinent history, supports defendant's argument about the meaning of "exposing."

The commentary does not explicitly discuss the intended meaning of "exposing," or explicitly address whether the state would have to prove, under ORS 163.465(1)(c), that a defendant knew, when uncovering his genitals, that others were able to see them.[1] Nothing in the commentary suggests that the

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[1] The complete commentary, with respect to ORS 163.465, is as follows:

A. Summary

Footnote continued…

legislature intended to criminalize the uncovering of genitals in a public place *only* when the defendant knows that others are present who can see his genitals.

Defendant nonetheless asserts that the following passage in the commentary supports his construction of ORS 163.465(1)(c):

> Paragraphs (a) and (b) of subsection (1) prohibit the performance of certain sexual activity in a public place. There is

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(…continued)

> Indecent or lewd exposure of the person to the public view is a common law misdemeanor and it has been made a specific offense under many state statutes.
>
> Paragraphs (a) and (b) of subsection (1) prohibit the performance of certain sexual activity in a public place. There is no *mens rea* requirement here; the commission of the act in public for whatever reason constitutes the offense.
>
> Paragraph (c) requires an intent to arouse the sexual desire of the actor or another. An exposure that is not sexually motivated would not violate this section, but might be "disorderly conduct."
>
> **B. Derivation**
>
> The section is taken from Connecticut Revised Penal Code § 196 (1969).
>
> **C. Relationship to Existing Law**
>
> ORS 167.145, indecent exposure, 1 year, $500 fine; ORS 161.310, offenses against public peace, health or morals, 6 months, $200 fine. Both statutes would be repealed by the proposed code.

Proposed Oregon Criminal Code, Final Draft and Report of Criminal Law Revision Commission (July 1970) at p 129 (Article 13, § 120).

> no *mens rea* requirement here; the commission of the act in public for whatever reason constitutes the offense.
>
> Paragraph (c) requires an intent to arouse the sexual desire of the actor or another. An exposure that is not sexually motivated would not violate this section, but might be "disorderly conduct."

(Pet Br 2, quoting *Proposed Oregon Criminal Code, Final Draft and Report* of Criminal Law Revision Commission (July 1970) at p 129 (Article 13, § 120); emphasis added). Defendant asserts that the commentary, in noting that an exposure of genitals must be "sexually motivated," "refer[s] to a requirement that the solitary actor be 'sexually motivated' in bringing his conduct—'exposing'—into the *public* sphere" (Pet Br 23; emphasis in original). He suggests that the commentary therefore supports the conclusion that the state, to prove an act of "exposing," must prove that he knew that others were present who could see his genitals. (Pet Br 35-36, asserting that he wished to argue that he was not guilty of public indecency because "he did not know that his genitals were exposed to public view"). Yet nothing in the quoted passage makes any effort to define the phrase "act of exposing." The passage instead describes the portion of ORS 163.465 requiring "an intent to arouse the sexual desire of the actor or another." The commentary contains no support for defendant's proposed construction of "exposing."

3. General maxims show that the state did not have to prove that defendant, when he uncovered his genitals, knew that others were present who could see them.

"If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction." *PGE*, 317 Or at 612. Pertinent maxims include "the maxim that, where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue." *Id*. Here, had the legislature directly addressed the issue, it would have concluded that ORS 163.465(1)(c) does not require proof that a defendant, in uncovering his genitals in a public place, knew that others were present who could see them.

It is significant that the 1971 Legislature's focus, in prohibiting the exposing of genitals for a sexual purpose, was on acts occurring in or in view of a "public place," which includes places commonly frequented by children and families:

> "*Public place*" means a place to which the general public has access and *includes*, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, *schools, places of amusement, parks, playgrounds* and premises used in connection with public passenger transportation.

ORS 161.015(10) (defining the term "[a]s used in chapter 743, Oregon Laws 1971"; emphasis added). It also is significant that

ORS 163.465(1)(a) and (b) reflect a legislative intent to flatly prohibit particular forms of conduct, to reduce the risk that children, families, and other citizens using public places will encounter such conduct. ORS 163.465's focus on "public places" reflects a likely legislative intent to prohibit people from baring their genitals for sexual purposes in such places, whether or not the offender knows that his genitals can be seen.

Under defendant's approach, a man who strips naked and masturbates, while standing behind a woman who occupies a bench in an otherwise deserted park, would not necessarily be guilty of public indecency. Indeed, under defendant's view, that would be true even if a third person approached and saw the man's erect penis (at least so long as the defendant remained unaware that another could now see his genitals). Such a result conflicts with the legislature's evident focus, in adopting ORS 163.465(1), on locations commonly frequented by children and families, and with the statute's attempt to shield citizens from the risk of encountering certain activities.

4. As a result, the trial court correctly refused to give an attempt instruction and correctly sustained the state's objection to defendant's closing argument.

To prove that defendant committed "[a]n act of exposing the genitals" under ORS 163.465(1)(c), the state had to prove merely that defendant uncovered his genitals (or kept them uncovered) in or in view

of a public place, such that others might see them if they used that place. The state did not need to prove that defendant, when he uncovered his genitals or kept them uncovered, *knew* that others were present who could see them. Consequently, defendant's request for a jury instruction on attempted public indecency was based on a mistaken understanding of the crime's elements. (*See* Tr 80-82, containing defendant's argument to the trial court that (1) because the victim in River Road Park "had to get up and adjust her viewpoint to see what was going on," defendant was free to argue that he had not "exposed" his genitals; (2) containing defense counsel's assertion to trial court that, with respect to the later offense, because "no one else was around to see him" when he opened his pants and began masturbating, "[i]t could be seen as attempt"; and (3) that "an attempt instruction would still be allowable under that definition of the term 'expose'"). As a result, the trial court correctly refused to give that instruction.

For the same reason, the trial court correctly sustained the state's objection when defendant told the jury during closing argument that "[t]his statute is for people who go around exposing themselves *to* other people." (Tr 92, emphasis added; *see id.*, containing state's objection that "[t]his is a misstatement of the law"). Here, too, defendant's premise is that the state needed to prove that, when he uncovered his genitals, he knew that others were

present who could see them. (*See* Pet Br 43, arguing that defendant "predicated his theory on a correct interpretation of the public indecency statute," and that the court's ruling prevented him from arguing that "'exposing' means consciously presenting for public view). Because that premise conflicts with the legislature's intended meaning of "exposing," the trial court correctly sustained the state's objection.

B. Defendant—by arguing that the state had to prove that he intended the act of exposure, by itself, to arouse someone—identifies no basis for review or reversal.

ORS 163.465(1)(c) prohibits a person who is in, or in view of, a public place from "exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person." Defendant argues that the provision required the state to prove that he intended that "the exposing" of his genitals would, *by itself*, arouse either his or another's desire; that is, the state had to prove not merely that he intended to arouse someone at the time that he exposed his genitals, but that he specifically intended the very act of exposure, without more, to cause someone's arousal. (Pet Br 2). Under that view, a defendant who disrobes in a public park in order to masturbate, and who then masturbates, does not necessarily commit public indecency; he commits the crime only if he intended that the disrobing itself would arouse someone. (*See* Pet Br 33, arguing that ORS 163.465 does not prohibit exposing one's genitals in a public place with the intent "to masturbate," and instead prohibits only

exposing one's genitals while "intending *the exposure to arouse*"; emphasis in original).

From that premise, defendant asserts that the trial court erred (1) by not giving a jury instruction on attempted public indecency, as a lesser-included offense of public indecency,[2] and (2) by purportedly preventing defendant from arguing that the jury, to return a public indecency conviction, had to find that he intended the exposure alone to arouse. (Pet Br 43-44). Defendant identifies no basis for review or reversal.

1. Because defendant did not preserve his argument, this court should not review it.

Although defendant asked the trial court to instruct the jury on the definition of attempted public indecency, he never argued that the *reason* for the instruction was that ORS 163.465 required proof that he intended the act of exposure, alone, to arouse someone. Instead, defendant's argument about the

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[2] Defendant does not explain how, if his view of ORS 163.465(1)(c)'s intent requirement is correct, it follows that the trial court was required to give an attempt instruction. (Pet Br 43-44). An attempt instruction is appropriate only if the evidence entitles a factfinder to find that the defendant "engage[d] in conduct which constitutes a substantial step toward commission of the crime," while finding that the defendant's conduct did not complete that crime. ORS 161.405(1). Defendant does not explain how, in light of that standard, his argument about the intent requirement supports the conclusion that an attempt instruction was required. For that reason also, defendant's intent argument identifies no basis for concluding that the trial court, by refusing to give an attempt instruction, committed reversible error.

need for an attempt instruction focused solely on the meaning of "exposing," and on whether he had known that others were present who could see his genitals. (Tr 80-82).

Similarly, defendant never tried to argue to the jury that, to convict, it needed to find that he intended the act of exposure, by itself, to arouse someone, and the trial court did nothing to prevent him from making any such argument. (*See* Tr 92, reflecting that court merely sustained an objection to defendant's argument that ORS 163.465(1)(c) prohibits exposing one's genitals "to" someone).

As a result, defendant did not preserve his "intent" argument, either when requesting an attempt instruction or when presenting closing argument. Because defendant did not preserve his argument, this court should not review it. *See* ORAP 5.45(1) (generally, "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court").

2. Evidence that a defendant exposed his genitals to make it easier to masturbate proves that the exposure was accompanied by the requisite intent.

In any event, ORS 163.465(1)(c) required the state to prove merely that defendant, in uncovering and thereby exposing his genitals, was motivated by the desire to arouse himself or another; the provision did not require the state to prove that defendant intended the exposure, by itself, to arouse someone. For

example, if the state proves that a defendant uncovered his genitals in a public place to make it easier to arouse himself by masturbating, it proves that he violated ORS 163.465(1)(c). Text, context, and legislative history are consistent with that conclusion, and third-level maxims confirm its correctness.

a. Text and context support that conclusion.

Text and context do not definitively resolve the question, but they are consistent with the state's position. ORS 163.465(1)(c)'s text requires proof that a defendant exposed his genitals "with the intent of arousing the sexual desire of the person or another person." One common meaning of "intent" is "purpose." *See Webster's Third New International Dictionary* (unabridged ed 1993) at 1176 (defining "intent" as connoting, in part, "PURPOSE, DESIGN" (definition **1a**) or "an end or object proposed: AIM" (definition **1b**)). An act can correspond to a particular intent, or purpose, even if the actor does not expect the act to accomplish that purpose by itself. If a man reacts to a fire in his kitchen by grabbing a fire extinguisher and removing its pin, his purpose in taking those actions can be described as extinguishing the fire, even though he would not expect those actions—by themselves—to fully achieve that purpose.

Similarly, one who uncovers his genitals to make it easier to masturbate can be said to expose his genitals "with the intent of arousing the sexual desire of the person." That is, at the very least, one plausible way of construing ORS 163.465(1)(c)'s intent requirement, read in light of the common meanings

associated with the words in question. Nothing in text and context dictates a contrary conclusion.

b. Legislative history also is consistent with that conclusion.

Legislative history also is consistent with the conclusion that the state can prove the requisite intent by showing that a defendant uncovered his genitals to make it easier to masturbate.

In part, the 1971 Criminal Code commentary states:

> Paragraphs (a) and (b) of subsection (1) prohibit the performance of certain sexual activity in a public place. There is no *mens rea* requirement here; the commission of the act in public for whatever reason constitutes the offense.
>
> *Paragraph (c) requires an intent to arouse the sexual desire of the actor or another. An exposure that is not sexually motivated would not violate this section*, but might be "disorderly conduct."

Proposed Oregon Criminal Code, Final Draft and Report of Criminal Law Revision Commission (July 1970) at p 129 (Article 13, § 120) (emphasis added). The italicized portion shows that ORS 163.465(1)(c)'s "intent" requirement was designed to criminalize "[a]n exposure that is * * * sexually motivated." One's "motive" in committing a particular act can be understood as the thing inciting or prompting or causing the act. *See Webster's Third New International Dictionary* (unabridged ed 1993) at 1475 (defining "motive," in part, as "something * * * that incites [a person] to action" and as the "consideration or object influencing a choice or prompting an action"

(definition **1a**), and as "a prompting force or incitement working on a person to influence volition or action: * * * CAUSE" (definition **2**)). In turn, a particular goal can be said to incite or prompt or cause someone to act—and to thereby "motivate" the act—even if the actor does not expect the act, by itself, to accomplish that goal. A person's desire to extinguish a fire can be said to motivate his conduct in grabbing a fire extinguisher and removing its pin, even if the person does not expect those actions, by themselves, to affect the fire. Similarly, if a person takes off his clothes to make it easier to masturbate, his conduct in disrobing can be described as "sexually motivated," even if he does not expect the act of disrobing, by itself, to arouse anyone.

Legislative history is consistent with the conclusion that, if the state proves that a defendant exposed his genitals to make it easier to masturbate, it proves the intent required by ORS 163.465(1)(c).

c. Third-level maxims confirm the correctness of that conclusion.

Pertinent "third-level" maxims include "the maxim that, where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue." *PGE*, 317 Or at 612. Had the legislature directly addressed the issue, it would have concluded that ORS 163.465(1)(c) does not require proof that a defendant,

in exposing his genitals in a public place, intended the exposure alone to arouse someone's sexual desire.

Under defendant's view, a man who intentionally disrobes in the middle of a crowded school playground for the purpose of masturbating, and who then masturbates in full view of those on the playground, has not necessarily committed public indecency. Instead, he has committed public indecency only if he intended that the act of disrobing would, by itself, arouse his (or another's) desire. Under that approach, that a person is observed masturbating in amidst children on a playground might only *strengthen* his defense at trial: He can argue that his evident need to stimulate himself manually reflects that merely being naked in public is not, by itself, something that arouses him.

Had the 1971 Legislature been confronted with defendant's proposed reading of the public indecency statute, it would have rejected it. ORS 163.465(1)(a) and (b) reflect that the legislature meant to shield citizens, while using public places—including parks, playgrounds, and schools—from encountering people engaged in sexual behavior. The legislature most likely intended that ORS 163.465 would also shield citizens who use public places from encountering masturbating individuals.

The state was not required to prove that defendant intended the exposing of his genitals, by itself, to arouse someone's sexual desire. This court should reject defendant's argument that the trial court erred by refusing to give an

attempted public indecency instruction or to let defendant make additional closing arguments.

CONCLUSION

This court should affirm the trial court judgment convicting defendant of two counts of public indecency.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 4, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet, attorney for respondent on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,109 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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