IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review v. THOMAS ELDON EASTEP, Defendant-Appellant, Petitioner on Review.	Coos County Circuit Court Case No. 13CR0802 CA A155418 SC 064057

BRIEF ON THE MERITS OF PETITIONER ON REVIEW AND EXCERPT OF RECORD

Review of the Decision of the Court of Appeals on
Appeal from the Judgment of the Circuit Court for Coos County
Honorable Richard L. Barron, Judge

Opinion Filed: April 20, 2016
Author of Opinion: Flynn, J.
Before: Duncan, Presiding Judge, and Lagesen, Judge, and Flynn, Judge.

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PETITIONER ON REVIEW'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This case involves the meaning of the term "vehicle" in Oregon's statute defining the crime of unauthorized use of a vehicle (UUV), ORS 164.135. The specific issue is whether a "vehicle"—whatever the kind—must be capable of operation, or whether a wrecked truck salable as scrap qualifies as a vehicle. This court construed the term "vehicle" more than 40 years ago, in *State v. Macomber*, 269 Or 58, 61, 523 P2d 560 (1974), to exclude non-assembled automobile parts. Here, defendant was convicted of UUV after he had an assembled but inoperable pickup truck towed to a salvage yard without the truck owner's permission. Defendant moved for judgment of acquittal at trial, arguing that the state failed to prove that the pickup was operable. Defendant also requested a jury instruction that the state must prove that the vehicle in question was a "single operable unit." The Court of Appeals, relying on its prior decision that *Macomber* never interpreted "vehicle" to require an "operable vehicle," upheld defendant's conviction for unlawful use of a vehicle. *State v. Eastep*, 277 Or App 673, 677-78, __ P3d __ (2016) (citing *State v.*

Blair, 54 Or App 228, 231, 634 P2d 498 (1981). This court granted defendant's petition for review from that opinion.[1]

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Is an inoperable truck—specifically, one whose means of conveyance is ruined and is salable only as scrap—a "vehicle" under the statute defining unauthorized use of a vehicle?

Proposed Rule of Law

A vehicle is must be capable of operation. The term "vehicle" is defined not by its form but by its function—it is a means of transporting something. An automobile that is capable of operation in the normal course of use is a vehicle, because it functions as a means of transporting people or goods. But a wrecked, ruined, and irreparable—thus "inoperable"—automobile is not, and cannot be, a means of transporting something. An inoperable truck is not a vehicle for the purpose of the statute defining unauthorized use of a vehicle.

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[1] Defendant was also convicted of second-degree theft and false swearing but does not challenge those convictions.

STATEMENT OF FACTS

State's Case[2]

Denise owned a 1992 GMC pickup truck. Tr 13. The pickup's "clutch had gone out" near a crab shop, and had the pickup towed to the boat ramp next to her property in Myrtle Pont, where it sat for four or five months. Tr 13, 15-16. would check on the truck daily by looking out the windows of her house. Tr 16.

Defendant saw the pickup and called Shinglehouse Auto Wreckers to tow it. Tr 40-41. Defendant did not know who owned the pickup, but he represented that the pickup was not stolen and that he had complied with all of the legal requirements to claim a lien on it. Tr 27-35, 91. Shinglehouse towed the pickup and paid defendant $100 for it. Tr 35-36.

That evening, saw that the pickup was gone and called police to report it stolen. Tr 16-17. Shinglehouse returned the pickup to a few

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[2] Because the issues on review include a denial of a motion for judgment of acquittal and the refusal to give a jury instruction, this court must employ two standards of review—in the light most favorable to the state and in the light most favorable to the party seeking the jury instruction. *State v. Casey*, 346 Or 54, 56, 203 P3d 202 (2009) (this court views the evidence in the light most favorable to the state when reviewing the denial of a motion for judgment of acquittal); S*tate v. Oliphant*, 347 Or 175, 178, 218 P3d 1281 (2009) (this court views the evidence in the light most favorable to the defendant when reviewing a refusal to instruct the jury as requested by the defendant).

days later. Tr 17, 36. One or two months later, sold the pickup as scrap and was paid according to its weight. Tr 18-19, 21-22.

Defendant's case

sold the pickup for $321 to Steve who owns a scrap metal business. Tr 58. was able to get the engine to "run," but the pickup was not capable of moving on its own power. Tr 65-66. The engine "was seized up to the point where we got it loose, and it was rattling so bad that the engine was no good." Tr 60. The "clutch pedal was seized" and the clutch was also "no good." Tr 60. A dog had torn up the truck's interior. Tr 60. concluded that the truck was "not operable" and was "strictly just scrap." *Id.*

SUMMARY OF ARGUMENT

Oregon's UUV statute, ORS 164.135, makes it a crime to exercise control over a "vehicle" without authorization. Defendant was convicted of UUV after he had a wrecked, inoperable truck that was salable only as scrap towed to a salvage yard. But the truck did not constitute a vehicle for the purpose of ORS 164.135. The text, context, and legislative history make it clear that a "vehicle" must be capable of operation and does not include wrecked former vehicles.

First, the ordinary definition of "vehicle" hinges on how a thing functions, not what it looks like or is made of. An "inoperable vehicle" in the

context of UUV is an oxymoron. Second, when the legislature enacted ORS 164.135, it clearly intended to protect the public from the kinds of harm that generally result from joyriding. Those harms—owners temporarily losing the use of their modes of transport and people creating a hazard by commandeering vehicles—do not result from exercising control over inoperable, wrecked former vehicles. A "vehicle" for the purpose of ORS 164.135 means something that is capable of operation. That is, it must be fit, possible, or desirable to use as a means of conveyance.

The evidence in this case failed to establish that the pickup was operable. The state presented evidence that the pickup's clutch had "gone out," that the pickup had sat for months after being towed to its owner's house, and that the owner ultimately sold the pickup as scrap. But even if the evidence was sufficient to survive a motion for judgment of acquittal, the trial court should have instructed the jury that the vehicle in question must be a "single operable unit" for the purpose of UUV. Defendant was entitled to that instruction because it is a correct statement of the law and the record contained evidence to support it. Before it could render a valid verdict, the jury needed to know that a "vehicle" for the purpose of UUV must be operable.

ARGUMENT

I. Oregon's UUV statute criminalizes temporarily using vehicles that are capable of operation, but does not criminalize the temporary use of a wrecked or completely inoperable automobile.

ORS 164.135, the statute that defines unauthorized use of a vehicle, provides:[3]

> "(1) A person commits the crime of unauthorized use of a vehicle when:
>
> "(a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner;
>
> "(b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between the person or another and the owner thereof whereby the person or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, the person intentionally uses or operates it, without consent of the owner, for the person's own purpose in a manner constituting a gross deviation from the agreed purpose; or
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> "(c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time, the person knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.
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> "(2) Unauthorized use of a vehicle, boat or aircraft is a Class C felony.

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[3] Since its enactment, ORS 164.135 has not substantively changed for the purpose of construing "vehicle." It was amended in 2001 to add subsection (3) (clarifying that a person does not commit the crime by using a public transit vehicle), Or Laws 2001, ch 851, § 1, and in 2007 with a technical amendment (removing a superfluous conjunction), Or Laws 2007, Ch 71, § 50.

> "(3) Subsection (1)(a) of this section does not apply to a person who rides in or otherwise uses a public transit vehicle, as defined in ORS 166.116, if the vehicle is being operated by an authorized operator within the scope of the operator's employment."

The statute does not define "vehicle," nor does it refer to any other statutory definition of "vehicle."[4] This court has interpreted the term to mean, at the least, something that is assembled as opposed to unassembled parts of an automobile. *Macomber*, 269 Or at 61; *see also id.* at 61 n 2 (observing that the transcript contained "at most an admission that the defendant obtained possession of a wrecked truck, which would not constitute a vehicle capable of operation"). But, at least as the Court of Appeals understands *Macomber*, this court has not decided whether an inoperable but not disassembled automobile constitutes a "vehicle" under ORS 164.135. *Eastep*, 277 Or App at 677. Nor has this court construed the term using its current methodology for statutory construction.

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[4] Oregon's vehicle code contains a definition of "vehicle," but that statute was enacted after ORS 164.135:

> "'Vehicle' means any device in, upon or by which any person or property is or may be transported or drawn upon a public highway and includes vehicles that are propelled or powered by any means. 'Vehicle' does not include a manufactured structure."

ORS 801.590. When ORS 164.135 was enacted, the contemporary vehicle code defined "motor vehicle" as "every vehicle which is self-propelled." *Former* ORS 483.014(4) (*repealed by* Or Laws 1983, ch 338, ss 978). As discussed below, neither definition controls the meaning of the term in ORS 164.135 or precisely matches the legislature's intended meaning of the term.

The overall objective when construing a statute is to determine what the legislature intended, if possible. ORS 174.020(1). To do that, this court uses the methodology set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009): it examines the statute's text in context, as well as any pertinent legislative history, to determine what the legislature intended the term to mean. *Gaines*, 346 Or at 171-72. If this court cannot glean the legislature's intent from those sources, it may draw upon "general maxims of statutory construction" to resolve any remaining ambiguity. *Id.* at 172.

A. The text and context of ORS 164.135 clearly show that a "vehicle" is something capable of operating as a carrier of people or goods.

1. The ordinary meaning of "vehicle" assumes operability, because the term is defined by function.

When the legislature does not supply a definition for a word, this court looks to the word's plain and ordinary meaning. *Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 295, 337 P3d 768 (2014). The usual authority on a word's ordinary meaning is the dictionary. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense."). The aim in consulting a dictionary is not to prescribe what a word is supposed to mean, but to find out what the word most likely does mean when people use it. That is because courts assume "that legislatures

use words in their ordinary senses." *Kohring v. Ballard*, 355 Or 297, 304 n 2, 325 P3d 722 (2014) (explaining why a descriptive approach (describing actual usage) is more useful than a prescriptive approach (defining "correct" usage) when it comes to statutory construction).

The descriptive dictionary that was current in 1971, *Webster's Third New International Dictionary* , defines "vehicle" as

> "**5 :** a means of carrying or transporting something : CONVEYANCE: as **a :** a carrier of goods or passengers * * * *specif* : MOTOR VEHICLE * * * **b :** a container in which something is conveyed * * * **c :** a piece of mechanized equipment **d :** a propulsive device * * * **syn** see MEAN[.]"

Webster's Third New Int'l Dictionary 2538 (unabridged ed 1961).[5]

A second dictionary in use, *Webster's New International Dictionary of the English Language* 2824 (2nd ed unabridged 1950), defines "vehicle" as

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[5] The meaning of "vehicle" according to *Webster's Third* has not changed since the legislature enacted ORS 164.135; the 1971 and 2002 versions of *Webster's* contain the same entry verbatim. *Webster's Third New Int'l Dictionary* 2538 (unabridged ed 1971); *Webster's Third New Int'l Dictionary* 2538 (unabridged ed 2002).

Finally, *Webster's Encyclopedic Unabridged Dictionary of the English Language* 2109 (deluxe ed 2001), defines "vehicle" as

> "*n*. **1.** any means in or by which someone travels or something is carried or conveyed; a means of conveyance or transport: a motor vehicle; space vehicles. **2.** a conveyance moving on wheels, runners, tracks, or the like, as a cart, sled, automobile, or tractor."

> "**1.** That in or on which a person or thing is or may be carried from one place to another, esp. along the ground, also through air; any moving support or container fitted or used for the conveyance of bulky objects; a means of conveyance."

And a third contemporary dictionary, *Funk & Wagnalls New Standard Dictionary of the English Language* 2637 (1963), similarly defines "vehicle" as

> "**1.** That in or on which anything is or may be carried; especially, a contrivance with wheels or runners for carrying something; a conveyance, as a carriage, wagon, or car; specif., in law, any artificial contrivance used or capable of being used as a means of transportation on land."

All these definitions point to how a thing functions. A vehicle is a "means of carrying"; a "carrier" or "means" in or by which people or things are conveyed.[6] The definitions supply no further description of the object, its materials, or the mechanism by which it performs its task—it is a vehicle if it functions as one. If the function (conveying, carrying, transporting) is stripped away, it is difficult to salvage any meaningful definition of "vehicle" from any of the above dictionaries. To be a vehicle, something must at least be capable of operating as a means of conveyance or transportation.

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[6] The phrases "mechanized equipment" and "propulsive device" in *Webster's Third*'s definition serve as examples of the word "conveyance"—not as stand-alone definitions themselves. *See Webster's Third* at 17a, note 12.12.1 ("The lightface colon [*e.g.*, after the word "CONVEYANCE" in the above example] indicates that the definition immediately preceding it ["CONVEYANCE"] binds together or subsumes the coordinate subsenses that follow it ["carrier," "container," "mechanized equipment," "propulsive device."]").

Nor does vehicle, as that word is ordinarily used, mean something that once functioned as a vehicle but that can no longer be used—or used again—as a vehicle. The dictionary definitions all use the present tense in describing a vehicle—it is a "conveyance moving"; something by which someone "travels" or "is carried"; something that "is used" to carry people or goods. In ordinary usage, an automobile starts out as a vehicle and remains a vehicle for as long as it can be used to carry people. But at some point the automobile ceases to be capable of providing that use and becomes something else. For example, a partially or even fully-assembled, inoperable automobile can become a planter, a Volkswagen-Van desk, or a decoration atop a building. *See, e.g.*, Wikipedia: Carhenge https://en.wikipedia.org/wiki/Carhenge, (last visited October 11, 2016) (describing site in Alliance, NE, where vintage American automobiles are arranged to resemble Stonehenge). None of those objects would still be considered a "vehicle" in the ordinary sense of the word, because they no longer could be used for conveyance or transportation. Their inoperability renders them objects that once were—but no longer are—vehicles.

2. In context, "vehicle" in ORS 164.135 means an operable vehicle.

The clearest textual evidence for the meaning of "vehicle" is the evident aim of ORS 164.135. In each section, the statute criminalizes some kind of interfering with an owner's use of a "vehicle, boat or aircraft." A person is

guilty if the person, without the owner's consent, "takes, operates, exercises control over, rides in or otherwise uses" a vehicle. ORS 164.135(1)(a). Alternatively, a person is guilty of UUV even if the person did have the owner's consent to possess the vehicle if, in a manner that grossly deviates from the agreement with the owner, the person "intentionally uses or operates it * * * for the person's own use * * *" or keeps it for too long past the agreed-upon return date. ORS 164.135(1)(b)-(c).

In every version of the crime, the offender essentially deprives the owner of the exclusive use of his or her vehicle. And every kind of violation can apply to every kind of operable means of transport or conveyance—whether boat, aircraft, or vehicle. But only some of the acts can apply to inoperable vehicles: a person cannot "operate" or "rid[e] in" an inoperable truck. Moreover, the overall aim of the statute is to protect against using or taking vehicles, not items in general that people own. It is unlikely that the legislature, in drafting a statute that specifically protects owners' possessory interest in items that they use as vehicles, would embed a few scattered provisions that make it a crime to

take or exercise control over an inoperable and completely unusable car or truck.[7]

The legislature was also aware that "vehicle" typically did not refer to inoperable automobiles when defined by statute elsewhere. Even though it did not reference or incorporate any statutory definition of "vehicle," the legislature was aware of several then-current statutory definitions, none of which included inoperable vehicles, and listed those definitions in the commentary to the criminal code.[8] Clearly, the legislature expected that the ordinary definition of

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[7] The vehicles contemplated in subsection (1)(b), which are in the non-owner's possession so that they can be serviced or repaired, would still qualify as "vehicles" under defendant's definition. An automobile that is in the repair shop can be capable of operation, as can an automobile with a flat tire or an empty gas tank. In short, a vehicle need not be in use to be operable. Rather, it must be capable of use—whether that requires unlocking the door, releasing the emergency brake, charging the battery or changing the alternator.

[8] The Commentary to the Criminal Code Revision lists the following definitions:

> " * * * ORS 483.014(4) provides: '"motor vehicle" means every vehicle which is self-propelled.'
>
> "'Vehicle' is defined in ORS 482.030(4) as 'every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon stationary rails or tracks.' The term is defined in ORS 486.011(11) as meaning 'every trailer or semi-trailer, and every device which is self-propelled or propelled by electric power from overhead trolley wires but not operated upon rails.'"

Commentary to Criminal Law Revision, Proposed Oregon Criminal Code, Final Draft and Report 142-43, § 134 (1970).

"vehicle" would include something that was at least capable of operation, not a wrecked vehicle or an inoperable truck used for scrap. In using the term "vehicle," the legislature intended to criminalize exercising control over vehicles that could operate as modes of transport, not possessions in general.

Indeed, when the legislature did criminalize an unauthorized possession of personal property that falls short of theft, it did so separately and within limits. ORS 164.140, "Criminal possession of rented or leased property," provides that it is a crime to fail to return an item within 10 business days from a demand letter, but only if the person rented the item from a commercial renter with a written agreement specifying when and where the property would be returned. The value of the property determines whether the crime is a misdemeanor or felony. ORS 164.140(4). The legislature, then, did not create a general crime of unauthorized borrowing. It cabined the crime to acts that interfere with an owner's profitable use of his or her possession. But if "vehicle" can mean "inoperable vehicle" for the purpose of UUV, it would be a felony to take an object— no matter its value— without stealing it, just because it used to be able to function as a vehicle. That would create an arbitrary line between types of possession that are and are not protected from unauthorized borrowing. The UUV statute evinces no legislative intent to create that kind of arbitrary distinction.

3. When this court construed "vehicle" in *Macomber*, both the majority opinion and the concurrence expressed that it is the functionality of a vehicle that matters, rather than the component parts.

When this court construes a statute, it considers as context its own prior cases that construed the same statute. *State v. McAnulty*, 356 Or 432, 441, 338 P3d 653 (2014). This court construed the term "vehicle" once, almost forty years ago, in *Macomber*. There, the defendant was convicted of UUV after possessing several separate parts of a stolen truck. 269 Or at 60. The Court of Appeals decided that the record contained sufficient evidence that the defendant had exercised control over an operable vehicle which had been later disassembled. *State v. Macomber*, 16 Or App 54, 57-58, 517 P2d 344 (1973)). This court reversed the Court of Appeals decision. *Macomber*, 269 Or at 62.

This court determined that a careful search of the transcript did not turn up any evidence that the defendant had possessed an operable truck. *Id*. at 61. In a footnote, this court set out a part of the transcript and pointed out that "at most," the evidence showed that the defendant had obtained a "wrecked truck, which would not constitute a vehicle capable of operation." *Id.* at 62 n 2. After deciding that the evidence failed to establish that the defendant operated control over a "single operative unit" (or anything more than a "wrecked truck"), this court concluded that the defendant was not guilty of UUV under ORS 164.135. *Macomber*, 269 Or at 62.

The exegesis went no further than that. In whether the state failed to prove UUV in that case because a dismantled truck is not a vehicle, or whether the state failed to prove UUV because a "wrecked truck" is not a vehicle, *Macomber* is not a model of clarity. But the concurrence in *Macomber* took issue with the "apparent assumption by the majority" that a "vehicle" as used in ORS 164.135 must be "operable," as the concurring justice understood that term. *Macomber*, 269 Or at 62 (Tongue, J., concurring). The rub was that, if a vehicle must be operable, UUV "would have no application to a car without a battery or with a flat tire." *Id*. But that observation merely revealed a disagreement over terms: whether operable means *immediately* capable of use or means, instead, capable of use after some intermediate efforts.

Macomber is controlling for the proposition that an inoperable truck does not constitute a "vehicle" under ORS 164.135. The majority did not determine that the defendant possessed only disassembled parts of an automobile. Instead, it combed the transcript and found that, "at most," the defendant possessed a "wrecked truck, which would not constitute a vehicle capable of operation." *Macomber*, 269 or at 62 n 2. The court necessarily decided that whether the defendant took the truck while it was assembled but wrecked, or whether he only obtained disassembled parts, he could not be guilty of UUV because he did not exercise control over a "vehicle." This court would have had to uphold the defendant's conviction if it had held *only* that a truck must be an assembled,

identifiable (but not necessarily operable) vehicle, because the majority considered the evidence that showed that the defendant may have exercised control over an assembled but "wrecked" truck. *Macomber* therefore held—and did not merely state as *dictum*—that an inoperable truck does not constitute a "vehicle." *See State ex rel Huddleston v. Sawyer*, 324 Or 597, 621 n 19, 932 P2d 1145 (1997) (holding that a statement was *dictum* because it was "not necessary to the outcome of the case").

Even if this court determines that *Macomber* is not controlling, the opinion still context and it still helps to point out that "vehicle" means a vehicle that is operable. *See Halperin v. Pitts*, 352 Or 482, 491-92, 287 P3d 1069 (2012) (*dicta* in prior decisions construing a statute are part of the statute's context). This court clearly had operability in mind when it construed the term "vehicle" in *Macomber*. The concurrence complained only that a vehicle cannot be restricted to immediately operative machines, because if it is, then vehicles that are readily capable of operation in the normal course of use (like cars with flat tires or motorcycles with dead batteries) would not be covered. But that only begs the question of operability. Defendant does not disagree that a truck with a flat tire could still qualify as a vehicle under the statute. The definition that defendant suggests—a vehicle that is capable of operation in the normal course of use—is in line with the way this court has so far interpreted "vehicle."

B. The legislative history of ORS 164.135 confirms that the legislature aimed to protect owners from the inconvenience and cost of losing the use of one's mode of transportation and to protect the public from the dangers imposed by joyriding, not to criminalize unauthorized use of possessions that once were vehicles.

Oregon's UUV statute was born out of the need to stop people from joyriding.[9] "When the automobile began to appear and was limited to the possession of a few of the more fortunate members of the community, many persons who ordinarily respected the property rights of others, yielded to the temptation to drive one of these new contrivances without the consent of the owner." R. Perkins & R. Boyce, Criminal Law 333-34 (3rd ed 1982). That practice was so common that a new term sprang from it: "Joyriding." *Id.* "As the Automotive Age came into full bloom, joyriding emerged as a significant problem." *In Re Lakeysha P.*, 106 Md App 401, 415, 665 A 2d 264 (1995) (explaining that Maryland's UUV statute derived from an old anti-horse-theft statute while most states' UUV statutes, including Oregon's, derived from anti-joyriding statutes). Many states, including Oregon, enacted laws specifically to prohibit joyriding. *Id*. The Model Penal Code contains a section on joyriding:

> "Nearly all states have legislation penalizing unauthorized taking, use, or operation of motor vehicles. These laws are designed to reach temporary dispossession. The typical situation dealt with is the 'joyride,' *i.e.*, the taking of another's automobile

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[9] The laws in place when a statute is enacted can also be considered "context." Oregon's joyriding statute is informative on the issue at hand, no matter how it is classified.

> without his permission, not for the purpose of keeping it but merely to drive it briefly. The offense is typically committed by young people, and the car is generally recovered undamaged. Such behavior would not amount to larceny, which, as traditionally defined, requires proof that the actor intended to deprive the owner permanently."

Model Penal Code § 223.9 Comment, 270-71, "Unauthorized Use of Automobiles and Other Vehicles."

Oregon's first anti-joyriding statute, *former* ORS 164.670 (*repealed by* Or Laws 1971, ch 743, § 432), provided:

> 'Every person who takes or uses without authority any vehicle without intent to steal it, or is a party to such unauthorized taking or using, shall be punished upon conviction by imprisonment in the penitentiary for not more than two years, or by a fine of not more than $500."

In essence, the statute prohibited borrowing an automobile without authorization. *Former* ORS 164.670 did not refer to the term "joyriding," but it was commonly known as Oregon's "anti-joyriding" statute. *See State v. Eyle*, 236 Or 199, 201, 388 P2d 110 (1963) (stating that ORS 164.670 "describe[d] the offense commonly referred to as joyriding"); Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report §134 (July 1970) (describing *former* ORS 164.670 as the "'anti-joyriding' statute"). So before the current UUV statute existed, joyriding was enough of a problem in Oregon that the legislature targeted it with a statute criminalizing the act.

The current UUV statute, ORS 164.135, sprang from the former anti-joyriding statute. The legislature enacted ORS 164.135 when it revised the criminal code in 1971. Or Laws 1971, ch 743, § 34. The new UUV statute was meant to include the conduct covered by both the former anti-joyriding statute and that described in *former* ORS 164.650 and ORS164.660 (manipulating, starting or tampering with motor vehicles). Commentary to Criminal Law Revision Proposed Oregon Criminal Code, Final Draft and Report §134 (July 1970). It was introduced as part of a comprehensive theft bill, but UUV was categorized separately from theft. *Id*.

Members of the commission discussed the proposed draft during a subcommittee meeting on April 6, 1968. From that discussion emerges the drafters' overall purpose in enacting ORS 164.135: to protect owners from suffering the significant inconvenience of being even temporarily deprived from using their vehicles; to protect to pubic from the dangers of joyriders taking vehicles that can travel far and fast and cause damage; and to avoid criminalizing borrowing property, even "vehicles," unless there was a significant social reason to make the act a crime. Minutes, Criminal Law Revision Commission Subcommittee 1, April 6, 1968, Tape 11, Side 2.

For example, in discussing how to define "vehicle," the members overwhelmingly concerned themselves with what kinds of vehicles to include, *e.g*., boats, gliders, and other aircraft as well as automobiles. They did not

discuss whether to include inoperable or wrecked versions of any of those kinds of vehicles. Minutes, Criminal Law Revision Commission Subcommittee 1, April 6, 1968, Tape 11, Side 2. Committee member Robert Chandler repeatedly suggested removing "motor" from the current suggested term "motor vehicles" so that boats and gliders could be covered. *Id*. Members discussed whether to define "motor vehicle" by referencing the current definitions in the vehicle code; several members agreed that that would be problematic because the vehicle code could be revised separately from the criminal code. *Id*.

Senator John Burns warned that in removing "motor" from "motor vehicles," the legislature might be "getting into some pretty screwy-type cases" such as criminalizing the unauthorized borrowing of bicycles. *Id*. (statement of Chairman Burns). The members agreed that they did not intend such a result. *Id.*

Project Director Donald Paillette expressed his view that borrowing most possessions, including most kinds of vehicles, was not sufficiently serious to criminalize. *Id*. (statement of Donald Paillette). Mr. Spaulding agreed with that view. *Id.* Mr. Paillette stated that "the legislator looks upon unauthorized use of a motor vehicle to be sufficiently serious" to criminalize because motor vehicles are "highly mobile," and, "even without the intent to steal, can go great distances in a short time, and cause a lot of financial injury plus possible serious injury to people and loss of life and limb." *Id*. (statement of Donald Paillette).

Mr. Chandler suggested that it was important to protect automobiles from unauthorized use because "automobiles are in everybody's garage, [and] kids get them and indiscriminately use them and create a hazard on the streets." *Id.* (statement of Robert Chandler).

Members then discussed including boats in the definition of vehicles, because "the guy who loses the sailboat or even a rowboat" could be seriously inconvenienced by the temporary loss of use of that vehicle. *Id.* (statement of committee member Robert Chandler). Mr. Chandler posited that taking sailboats could be dangerous because a caregiver could borrow a boat while babysitting and drown the baby on the boat. *Id.* Chairman Burns mentioned Oregon's many beaches and lakes. Committee members discussed a hypothetical scenario where two "kids" take a sailboat without asking, and the family that owns the sailboat is unable to retrieve it from the other end of the lake before having to leave their vacation spot. *Id.* Mr. Chandler stated that he did not want "the whole yacht club to show up at the hearing" complaining that they were unprotected from unlawful use of their watercraft. *Id.* (statement of Robert Chandler). Members also discussed an instance in the past where two "kids" in Ontario got ahold of an airplane, flew it without permission, and could not figure out how to safely land it, risking great danger. *Id.*

The above discussion makes it clear that the legislature did not intend to criminalize any and all unauthorized borrowing or using of property, but wished

to single out functional vehicles for protection. And the reason for singling out vehicles was twofold: First, owners suffered inconvenience and financial loss when they were temporarily deprived of the use of their transportation. And second, taking vehicles and putting them in transit often caused a hazard.

Both those problems only attach to taking or using vehicles that can operate. One would not expect an inoperable automobile to be so useful that its owner would be seriously inconvenienced by someone borrowing it without asking. Nor can an inoperable automobile be driven far and fast in such a way that it creates a hazard. Instead, using or exercising control over an inoperable truck is more akin to borrowing objects (other than vehicles) in general: it is the kind of interference with a possessory interest that does not rise to the level of a felony.

Defining "vehicle" to include "inoperable vehicle" confounds both the ordinary definition of the word and the legislative intent behind ORS 164.135. A vehicle for the purpose of UUV must be operable— that is, "fit, possible, or desirable to use" as a vehicle. *Webster's Third Intern'l Dictionary* 1578 (unabridged ed 2002) (defining "operable"). This court does not have to look any further than the text, context, and legislative history of ORS 164.135 to recognize that defendant's definition of "vehicle" is correct.

C. Maxims of construction favor defendant's proposed interpretation of "vehicle."

If this court still believes that the intent of the legislature is ambiguous from the text, context, and history, it may resort to maxims of construction. *Gaines*, 346 Or at 172. One such maxim—the one that immediately suggests itself in this case—holds that the legislature would not have intended an unreasonable result. *See Schutz v. La Costita III, Inc.*, 256 Or App 573, 583, 302 P3d 460 (2013) (recognizing and applying the maxim).

To start with, a definition that encompasses inoperable vehicles would be unwieldy. The alternative to an operable vehicle is an "assembled, identifiable vehicle." *Blair*, 54 Or App 54 Or App at 231.[10] The problem with defining a vehicle that way is that it exalts form over function. By that definition, an automobile comprised entirely of nonworking parts but assembled to look like an automobile would constitute a vehicle. So would a compressed wrecked automobile, if it is still identifiable. So would an inoperable car for which a salvage title had already been acquired.

As a result, someone who tows an old truck that is missing its engine would not be guilty of UUV, while someone who tows an old truck with a completely broken, inoperable engine would be. Thus a kind of sanctity would

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[10] The phrase "assembled, identifiable vehicle" was *Blair*'s interpretation of how this court defined "vehicle" in *Macomber*. *Blair*, 54 Or App at 231.

attach to the mere form of a completely broken engine, even though no practical difference exists between a car with a broken engine and a car with no engine. A person who tampers with a rusted old car functioning as yard art would either be guilty of misdemeanor criminal mischief, or of the felony UUV—in which case the person is subjected to enhanced presumptive sentences for certain future property crimes—depending on whether the rusted car happened to have its broken transmission inside it or sitting on the lawn next to it. The legislature would not have intended any of those unreasonable results.[11]

II. The evidence in this case was insufficient to support a conviction for UUV.

Even in the light most favorable to the state, the evidence falls short of establishing that defendant committed UUV, because the pickup was inoperable. The state's witnesses described a broken-down pickup that showed no promise of being able to function again. The clutch had "gone out," the

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[11] The assembled-like-a-vehicle rule also invites problems of definition. First, it does not comport with the dictionary definition of "vehicle," which is one of function rather than form. Second, it shifts ambiguity onto the words "assembled" and "identifiable." An automobile might contain an engine, but the engine itself might not have all its proper parts in place. Courts would have to decide whether the engine and other parts of the vehicle must be assembled, and whether parts that have come loose or broken off are still assembled. At some point the line between assembled and unassembled must be drawn. And the line most logically comes down to function: Is the automobile sufficiently assembled so that it is readily or reasonably capable of operation? Defendant's proposed rule draws that line.

owner had had the pickup towed to her house, and there it sat for months before she ultimately sold it for scrap. That was the "vehicle" that defendant was accused of exercising control over when he had it towed to a salvage yard. The state offered no evidence that the pickup's mechanical problems could be fixed. The pickup was not fit, possible, or desirable to use as a means of transportation— it was not operable. The trial court should have granted defendant's motion for judgment of acquittal.

III. Alternatively, defendant was entitled to the requested jury instruction.

Even if the state presented enough evidence for the jury to weigh, the trial court should have instructed the jury on the meaning of "vehicle." A party is entitled to a requested jury instruction that correctly states the law if the evidence supports the instruction. *State v. Barnes*, 329 Or 327, 334, 986 P2d 1160 (1999). In making that determination, the reviewing court considers the evidence in the light most favorable to the party requesting the instruction. *Oliphant*, 347 Or at 178. Defendant requested the following jury instruction:

> "For the purposes of the crime of Unauthorized Use of a Vehicle, the state must prove that the vehicle in question was a 'single operable unit.'"

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Defendant presented evidence that the pickup was "not operable," that it was "strictly scrap" because its clutch and engine were "no good" and that it was unable to move on its own power. A juror could certainly infer from that

evidence that the truck was not fit, possible, or desirable to use as a means of conveyance— *i.e.*, that the pickup was not operable. But the trial court refused to instruct the jury that the vehicle in question must be a "single operable unit" for the purpose of UUV. Because defendant's requested instruction correctly stated the law and was supported by evidence that the pickup was inoperable, the trial court erred in refusing to give the instruction.

CONCLUSION

This court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in in ORAP 9.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,617 words.

Type size

I 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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 13, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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