IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. FERNANDO CLEMENTE-PEREZ, Defendant-Appellant Petitioner on Review.	Washington County Circuit Court Case No. D104733M CA A147753 SC S062407

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Washington County
Honorable Rick Knapp, Judge

Opinion Filed: February 20, 2014
Author of Opinion: Sercombe, Judge
Before: Ortega, Presiding Judge, and Sercombe, Judge, and De Muniz, Senior Judge

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INTRODUCTION

This case presents two issues of statutory interpretation involving the unlawful-possession-of-a-firearm statute. The first is whether the "place of residence" exception applied to the facts of this case as a matter of law. The second is whether defendant possessed a handgun that was concealed and readily accessible to him within a vehicle when he did not occupy the vehicle.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

A person may lawfully possess a concealed handgun within his "place of residence." Defendant stored a handgun in a truck parked under an awning structure in the driveway of his house. Is a car parked in a driveway within the resident's "place of residence?"

Proposed Rule of Law

A person's residence is where he or she lives. "Place of residence" means a person's real property that contains a domicile, including but not limited to the structures on the property and the curtilage.

Second Question Presented

A person violates the unlawful-possession-of-a-firearm statute if he or she "[p]ossesses a handgun that is concealed and readily accessible to the

person within any vehicle." A handgun is readily accessible to a person within a vehicle when that person occupies the vehicle. Defendant placed a handgun inside his truck, closed and locked the doors without sitting down, and left the area. Was the handgun accessible to defendant within the vehicle?

Proposed Rule of Law

A person does not possess a concealed handgun readily accessible to him or her in a vehicle unless the person is in the vehicle. The text, context, and legislative history of ORS 166.250(1)(b) establish that the legislature intended to bar possession of concealed handguns by occupants of vehicles. To violate the section, a person must simultaneously possess a concealed handgun and occupy a vehicle.

SUMMARY OF ARGUMENT

The trial court should have granted defendant's motion for judgment of acquittal on unlawful possession of a firearm for either of two reasons. First, defendant came within the "place of residence" exception to unlawful possession of a firearm as a matter of law. Second, even if he did not meet that exception, he never occupied a vehicle while possessing a concealed weapon within it. Both issues present independent grounds for reversal.

The "place of residence" issue involves a simple question: What is a residence? In 1925, the Oregon Legislature determined that a person may

possess a concealed weapon within his or her place of residence. Defendant stored a handgun in the back of his pickup truck, which at all times relevant to this case was parked under an awning structure at the side of his driveway. According to the text, context, and legislative history of the statute, a person's residence is the place where he or she actually lives. "Place of residence" covers the entire property containing a person's domicile. Or, at the very least, it includes those portions of where a person lives that he or she holds to be private. This definition serves the policies of protecting the public from concealed weapons while allowing people to defend their homes and property. Here, defendant's truck was parked well within the private portion of his property and he met the "place of residence" exception as a matter of law.

The "readily accessible" issue involves interpretation of the phrase "readily accessible to the person within any vehicle." The relevant portion of the unlawful possession of a firearm statute bars a person from possessing a concealed handgun that is readily accessible to a person who is in the vehicle. The phrase "within any vehicle" modifies the location of the *person* in the statute – that is, the statute bars possession of concealed handguns by people who are themselves in vehicles. This is made clear by the legislative history to the unlawful possession of a firearm statute. The purpose of the provision under which defendant was charged was to prevent possession of concealed weapons by occupants of vehicles, particularly those who would participate in drive-by

shootings. Defendant preserved that argument in the trial court, and he never occupied the vehicle in this case, therefore the court should have granted his motion for judgment of acquittal.

SUMMARY OF FACTS

The Court of Appeals summarized the historical facts:

> "Defendant retrieved a handgun from a truck that was parked on his property and used it to shoot his wife's cell phone. The truck was parked near defendant's house under a stand-alone awning structure. The awning was located a few feet from the garage, on the side of the driveway to the garage that was away from the house. After defendant shot his wife's cell phone, he wrapped the gun in a towel and put it into a storage compartment under the rear seat of the truck on the driver's side. Defendant's truck has a rear door on the driver's side. Although the storage compartment has a lock, defendant did not lock it when he returned the gun.

State v. Clemente-Perez, 261 Or App 146, 148, 322 P3d 1082, *rev allowed*, 356 Or 39 (2014).

The state charged defendant with unlawful possession of a firearm, alleging that he "did unlawfully and knowingly carry/possess a handgun concealed and readily accessible to the person within any vehicle." Misdemeanor Complaint, ER-1. Defendant moved for judgment of acquittal, making two arguments: (1) that the act of storing a gun in a parked vehicle did not violate the unlawful- possession-of-a-firearm statute because defendant was not in the vehicle with a gun readily accessible to him and that (2), even if it

did, he met the "place of residence" exception to that offense. Tr. 140-60. The trial court denied the motion. Tr. 162-63.

On appeal, defendant renewed his arguments regarding his motion for judgment of acquittal. App. Br. at 5. The Court of Appeals affirmed, holding that defendant's argument related to the "readily accessible" issue was unpreserved, and rejecting the "place of residence" argument on the merits. *Clemente-Perez*, 261 Or App at 146. This court allowed review. 356 Or 39.

ARGUMENT

This court should reverse defendant's conviction for unlawful possession of a firearm for either of two independent reasons. First, defendant fell within the "place of residence" exception. Second, defendant's conduct did not fall within the scope of the statute because the gun was not "readily accessible" to him within a vehicle because he was not himself in the vehicle. If this court accepts defendant's argument on the "place of residence" exception it need not consider the preservation issue or the "readily accessible within a vehicle" argument.

Because uncontroverted evidence at defendant's trial established that he met the "place of residence" exception, this court should reverse the Court of Appeals decision. In the alternative, if this court disagrees with defendant's argument as to that exception, it should reverse the Court of Appeals' erroneous

decision as to preservation and hold that defendant's conduct did not violate the statute because the gun was not "readily accessible" to him within a vehicle because he did not occupy the vehicle.

I. Defendant is not guilty of unlawful possession of a firearm because that statute does not bar a person from owning, possessing, or keeping a handgun within the person's place of residence.

This case presents an issue of statutory interpretation. The question is whether defendant's act of storing a gun in his parked truck next to his garage meets the "place of residence" statutory exception to the offense.

Defendant was charged and convicted under ORS 166.250(1)(b). The relevant portions of that statute provide:

> "(1) Except as otherwise provided * * * a person commits the crime of unlawful possession of a firearm if the person knowingly:
>
> "(a) Carries any firearm concealed upon the person;
>
> "(b) Possesses a handgun that is concealed and readily accessible to the person within any vehicle; * * *
>
> "* * * * *
>
> "(2) This section does not prohibit:
>
> "* * * * *
>
> "(b) Any citizen of the United States over the age of 18 years who resides in or is temporarily sojourning within this state, and who is not within the excepted classes prescribed by ORS 166.270 and subsection (1) of this section, from owning, possessing or *keeping within the person's place of residence* or place of business any handgun, and no permit or license to

> purchase, own, possess or keep any such firearm at the person's place of residence or place of business is required of any such citizen. As used in this subsection, 'residence; includes a recreational vessel or recreational vehicle while used, for whatever period of time, as residential quarters.
>
> "* * * * *
>
> "(4)(a) Except as provided in paragraph (b) of this subsection, a handgun is readily accessible within the meaning of this section if the handgun is within the passenger compartment of the vehicle.
>
> "(b) If a vehicle has no storage location that is outside the passenger compartment of the vehicle, a handgun is not readily accessible within the meaning of this section if:
>
> "(A) The handgun is stored in a closed and locked glove compartment, center console or other container; and
>
> "(B) The key is not inserted into the lock, if the glove compartment, center console or other container unlocks with a key."

Section (2)(b) contains the "place of residence" exception. The meaning and scope of that provision presents a question of statutory interpretation. The goal of statutory interpretation is to discern the legislature's intent. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). To that end, this court analyzes the text in context and does not insert or omit words from its interpretation. ORS 174.010; *PGE*, 317 Or at 610-12. This court may consider legislative history when offered by a party, and the court gives such history the weight it deems appropriate. ORS 174.020(1)(b); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). Here, the text,

context, and limited legislative history demonstrate that a person's residence includes the entirety of the property on which he lives or, at the very least, the curtilage.

A. Text, context, and the limited extant legislative history support defendant's interpretation of the term "place of residence."

A person's residence is the place where he or she lives. The legislature showed no intention to limit the bounds of a person's residence, so this court should hold that the entirety of a person's residential property is his or her residence. However, even if this court disagrees with that interpretation, at the very least the "place of residence" includes the portions of the premises that are distinct from the public sphere, such as houses, yards, sheds, decks, and outbuildings. The Court of Appeals decision focused at length on the distinction between "actual" and "legal" residence. However, that distinction is of little importance in this case, where defendant's actual residence was a typical home. This case involves the more fundamental question of "what is a residence?"

1. The text of the place-of-residence exception allows possession of handguns at people's homes.

The starting point for statutory interpretation is the text itself because the text "is the best evidence of the legislature's intent." *PGE*, 317 Or at 610. The text of the of exception demonstrates legislative intent to enact an exception that covered people's homes. The term "place of residence," as it was used in

1925, broadly refers to the location where a person lives and does not refer merely to a physical structure.

One dictionary quotes from early case law to describe a person's residence as "a matter of intention" Benjamin W. Pope, 2 *Legal Definitions: A Collection of Words and Phrases as Applied and Defined by the Courts, Lexicographers and Authors of Books on Legal Subjects* 1398 (1920). It is "where a man has a settled and fixed abode, with the intention to remain there permanently for a time, for business and other purposes * * *." *Id.*

Another dictionary provides that "residence" means:

> "Any place of abode or dwelling place, however temporary it may be. As a legal term, it is something more than the mere actual presence in a locality, even where it is not equivalent to 'domicil.' For example, a mere temporary absence of a few weeks will not constitute a person a nonresident, if at the time of departing there was an intention of returning at the expiration of that period."

Ballentine's Law Dictionary 1127 (1st ed 1930).

The first edition of Black's Law Dictionary describes "residence" as "living or dwelling in a certain place permanently or for a considerable length of time. The place where a man makes his home, or where he dwells permanently or for an extended period of time." *Black's Law Dictionary* 1127 (1st ed 1891).

The 1914 Third Edition of Bouvier's Law Dictionary defines "residence" as "Personal presence in a fixed and permanent abode." *Bouvier's Law*

Dictionary 2920 (3rd ed 1914). Although that definition may seem to suggest a reference to a structure through its use of "fixed," the word "abode" means merely "The place in which a person dwells." *Id.* at 88.

The term "place of residence" in 1925 meant the place where a person lives. The legislature did not bound the exception with a more limited term such as "dwelling," or "structure," or "house." A person's residence is where he or she lives. Indeed, shortly after the adoption of the exception, this court used "place of residence" to refer to the land on which a person lived. *Marvin & Co. v. Piazza*, 129 Or 128, 133, 276 P 680 (1929) ("[A] tenant in common may acquire a homestead exemption in lands of which he is a cotenant only if *the land* claimed as a homestead is occupied by him as his actual abode *and place of residence* * * * .") (emphasis added).

At the time of the adoption of the "place of residence" exception, Oregon Law recognized that people possessed broad authority to use force in defense of their property. In a 1920 case involving a fatal confrontation over sheep grazing in a place known as Dry Prairie, this court held that it was not error to instruct the jury regarding "the rule that homicide is justifiable when committed 'to prevent the commission of a felony on the property of such person, or upon property in his possession, or upon or in any dwelling house where such person may be.'" *State v. Holbrook*, 98 Or 43, 74, 188 P 947 (1920).

In *Holbrook*, this court quoted with approval a Texas case in which the court held that a father and son playing cards in a pasture did not violate a statute that barred "all character of gaming 'at any place except a private residence occupied by a family.'" *Hipp v. State*, 45 Tex Crim 200, 75 SW 28 (1903). The father testified that he and his son lived in a tent made from a wagon sheet. *Id.* at 201. The Texas court held that "the camp occupied by Scoggins and his son was their private residence." *Id.* at 201. The court further held that it was immaterial that father and son played cards outside, not under the tent, because,

> "[t]he statute uses the expressions "at the residence of a private family" and 'in the residence of a private family' interchangeably; and the fact that it was just outside the domicile, instead of on the inside, in our judgment would make no difference. It was at the residence, and, within contemplation of our statute, parties playing at that point were protected from punishment under this statute."

Id. at 202.

There is no indication that the legislature intended "place of residence" to mean less anything less than the property on which a person's domicile sits. However, even if it intended a more limited meaning, it would have understood the term to include, at the very least, the private areas surrounding the home. This court has recognized that a "residence" and its curtilage and appurtenances are inherently connected. It held that, under a statute covering liens on buildings, the term "building or other improvement" includes and embraces

"not only the dwelling house, but also the garage, driveway, walks, and retaining wall, since they were a part of the improvement against which the lien was claimed, and were all necessary for the convenient use and occupation of the house. *McCormack v. Bertschinger*, 115 Or 250, 260, 237 P 363 (1925). In *McCormack*, this court reasoned that requiring separate liens on the various portions of the residential property would lead to "absurdity" because "the court, in enforcing all of these liens, would be compelled to subdivide the lot so that there could be allotted to each of said structures sufficient space around the same for the convenient use and occupation of each." *Id.* at 262. A person's residence is a unified whole.

There is another reason why the legislature's use of the term "place of residence" suggests not just the physical structure in which a person lives but includes, at the very least, the curtilage. A person has historically had the right not to just *store* a weapon within his home and curtilage, but to "employ sufficient force to expel" an intruder from "the limits of the dwelling and the customary outbuildings," but not beyond. *State v. Bartmess*, 33 Or 110, 130, 54 P 167 (1898). *Bartmess* relied upon *Lee v. State*, 92 Ala 15, 19, 9 So 407 (1891), in which the Supreme Court of Alabama held that person has a duty to retreat rather than use deadly force "unless he is in his house, or within the curtilage or space usually occupied and used for the purposes of the house." The Supreme Court of South Carolina applied this court's *Bartmess* decision to

say, "There is much reason and authority for holding that one within the curtilage of his dwelling is in fact and law within his dwelling." *State v. Brooks*, 79 SC 144, 60 SE 518, 520 (1908). Although *Bartmess* does not use the term "residence," it stands for the proposition that a person's home extends beyond the four walls of his or her house. It would be incongruous if the legislature, without expressly saying so, intended to limit the location at which a person may carry or store a concealed weapon more strictly than where he or she may lawfully employ them in self-defense against another person.

2. Related statutes demonstrate that the legislature knows how to refer to physical structures and did not intend to do so here. This suggests a policy choice by the legislature to allow the protection of property, home, and family.

In construing the meaning of the "place of residence" exception, this court should examine related statutes. *See PGE*, 317 Or at 610-12 (Related statutes provide context to determine legislative intent.). The exception applies to the "place" of residence. Not the building, structure, or house of residence.

Had the legislature intended that the "place of residence" exception apply only to the physical structure of a home, it could have made that distinction because it has demonstrated the ability to make just such a distinction in other statutes, such as those prohibiting burglary. Burglary in the second degree can only take place "in a building." ORS 164.215. Burglary in the first degree is limited to one type of building, a "dwelling": "A person commits the crime of

burglary in the first degree if the person violates ORS 164.215 and the building is a dwelling * * * .” ORS 164.225 (emphasis added). Had the legislature wished to limit the scope of the exception in ORS 166.250(2)(b) to buildings, or to buildings which are dwellings, it could have done so as it did in those statutes.

It makes sense that the legislature did not do so. The purpose of the prohibition on carrying or possessing concealed firearms is to make the public safe by preventing them from encountering persons who are secretly armed with deadly weapons. However, that concern falls away when the armed person is in his house or on the land around it. Although the legislature has a strong policy interest in securing the public, it also would have recognized the competing policy interest of allowing a person to defend his or her home and land. *See State v. Hirsch/Friend*, 338 Or 622, 640, 114 P3d 1104 (2005), *overruled by State v. Christian*, 354 Or 22, 307 P3d 429 (2013) (recognizing right under Oregon Constitution “to bear arms to defend his or her person and home”). The legislature would not have had the same concern for a trespasser who enters a person’s yard or garage as for a person walking down a public street.

ORS 166.250 and its defined exceptions represent a balancing of policy choices by the legislature. While a person carrying a concealed gun in public represents a danger to innocent people who encounter them, the same person

concealing a weapon on his person while sitting in his yard or walking the boundary of his farm, or storing a gun on his private property, does not endanger the public in the same way. The legislature made the choice to criminalize the former while allowing the latter. This court should give effect to that policy determination.

3. The legislative history, which is limited due to the 1935 State Capitol Building fire, supports defendant's interpretation of the statute.

The legislative history of ORS 166.250(2**)**(b) is limited because the exception was enacted in 1925, 10 years before the 1935 State Capitol Building Fire. *State v. Perry*, 165 Or App 342, 350, 996 P2d 995 (2000), *aff'd*, 336 Or 49 (2003). This court summarized the extant history of the measure in *Perry*, a decision concerning the "place of business" exception in the same statute. 336 Or at 55. The legislature enacted the prohibition on carrying a concealed weapon in 1885. Or Laws, p. 33, § 1 (1885). The only exception to the general prohibition was that it did not apply to law-enforcement officers. *Perry*, 336 Or at 55. In 1917, the legislature enacted a similar law from which the modern ORS 166.250 derived. *Id.* That statute included an exception for people who possessed a license to carry a concealed weapon. *Id.*

In 1925, the legislature enacted the measure that included the "place of residence" exception. That measure provided

> "Except as otherwise provided in this act, it shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm, as hereinafter provided in section 8 hereof. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and if he has been convicted previously of any felony, or of any crime made punishable by this act, he is guilty of a felony. This section shall not be construed to prohibit any citizen of the United States, over the age of eighteen years, who resides or is temporarily sojourning within this state, and who is not within the excepted classes prescribed by section 2 hereof, from owning, possessing or keeping *within his place of residence* or place of business any pistol, revolver, or other firearm capable of being concealed upon the person, and no permit or license to purchase, own, possess or keep any such firearm at his place of residence or place of business shall be required of any such citizen. Firearms carried openly in belt holsters shall not be deemed to be concealed within the meaning of this section."

Or Laws 1925, ch. 260, § 5 (emphasis added).

Because the actual legislative discussions were lost in the fire, this court should consider the legislature's intent in light of the general purpose of both the unlawful possession of a firearm statute and the "place of residence" exception. The legislature chose to enact an exception that allows a person to keep a concealed handgun at a "place of residence." The fact that the legislature enacted an exception at all indicates a legislative intent to move away from the prior strict prohibition on carrying a concealed weapon in all places. Further, the legislature did not, but could have, employ a term tying the exception to a physical structure.

The unlawful-possession-of-a-firearm statute is about safeguarding people who are out in public from suddenly and unexpectedly facing danger from guns. The "place of residence" exception should be considered in light of the statute's purpose in safeguarding people *in public*. The purpose of a general prohibition on carrying a concealed weapon is "to prevent men in sudden quarrel * * * from drawing concealed weapons and using them without prior notice to their victims that they were armed." *People v. Clark*, 21 Mich App 712, 715-16, 176 NW 2d 427 (1970) (quoting *People v. Jones*, 12 Mich App 293, 295, 162 NW 2d 847 (1968)) (ellipses in *Clark*). Thus, the purpose of an exception allowing a person to possess a firearm within "his dwelling house or place of business or other lands possessed by him" is to allow "persons to defend those areas in which they have a possessory interest." *Clark*, 21 Mich App at 716. By barring the carrying of a concealed weapon in public, the legislature has limited the danger that a person may turn out to be surreptitiously armed with deadly force, and that an encounter may suddenly turn violent or fatal. On the other hand, a person may possess a concealed weapon on his or her own property without creating the danger that members to the public will be thrust unexpectedly into a dangerous situation.

The legislature chose not to criminalize the carrying of a concealed weapon at a person's "place of residence" or "place of business." ORS 166.250(2)(b). That exception broadly applies not only to Oregon Residents,

but even people who are "temporarily sojourning within this state." *Id.* In addition, the inclusion of the "place of business" exception indicates a legislative intent not just to allow people to protect their homes, but their property. Nothing in the text, context, or legislative history indicates that the legislature was concerned with possession of concealed weapons by people who are standing upon their own driveways, in their own sheds, or walking in their yards.

4. This case involves a traditional residence: defendant's home. Defendant's entire property, or at least the curtilage around his house, constitute his place of residence.

The Court of Appeals decision in this case placed significant weight on the fact that defendant did not assert that he ate or slept in his truck. It held that the driveway was not part of his place of residence and said that "defendant would have us focus on the characteristics of the place—its proximity to a residential structure—not the functional use of the place." 216 Or App at 157. However, the court's focus on the functional characteristics of a particular space is inapposite to a case in which the place of residence at issue is a traditional living space.

The Court of Appeals held that a person's actual residence could be identified by examining where he engaged "in particular activities of daily life—sleeping, eating, and drinking." *Clemente-Perez,* 261 Or App at 154. The

court stated that "place of residence" means "'the place where a person actually lives, *i.e.*, where he or she regularly eats, drinks, and sleeps," even if that place is not a building or other structure." *Id.* at 154 (quoting *State. v. Leslie*, 204 Or App 715, 723, 132 P3d 37, *rev den.*, 341 Or 245, 142 P3d 73 (2006)).

This court need not engage in a similar analysis where defendant makes the very different assertion that his driveway is part of his "place of residence." A person's residence is not limited to the space between the walls. As this court has explained in the context of search and seizure, "the words 'dwelling' or 'dwelling house' have been construed to include not only the main but all of the cluster of buildings convenient for the occupants of the premises, generally described as within the curtilage." *State v. Lee*, 120 Or 643, 648, 253 P 533 (1927). The curtilage of a home "includes the area adjoining the house and all outbuildings used in connection with it, such as garages, sheds and barns." *State v. Russo*, 68 Or App 760, 763, 683 P2d 163 (1984).

A person's home, place of residence, or dwelling includes the surrounding area and outbuildings. Defendant proposes a simple and more workable rule: once a court makes the determination of where a person lives, it need not parse out the various rooms, awnings, and outbuildings nor need it analyze each separately.

5. Defendant fell within the place-of-residence exception and the trial court should have granted his motion for judgment of acquittal because uncontroverted evidence established that defendant never possessed a concealed weapon outside of his place of residence.

The trial court should have granted defendant's motion for judgment of acquittal because he met the "place of residence" exception. The state presented no evidence that the truck containing the gun, or the gun itself, ever left defendant's property. Nor did it present evidence, or argue, that did not live on the property. Accordingly, the truck, and the gun within it, were at all times at defendant's place of residence as that phrase it used in ORS 166.250(2)(b) as a matter of law. Defendant was entitled to a judgment of acquittal under the "place of residence" exception.

II. Defendant preserved his challenge to the applicability of the unlawful-possession-of-a-firearm statute.

Because defendant's conduct falls within the "place of residence" exception, his motion for judgment of acquittal should have been granted. If this court agrees, it need go no further. However, even if this court does not accept defendant's interpretation of the "place of residence" exception, he is nevertheless entitled to reversal because he never occupied the truck that held the gun, thus he never possessed a gun that was readily accessible to him within a vehicle. But in order to reach that issue this court must first reverse the Court of Appeals' erroneous determination that that issue was unpreserved.

A. An issue is preserved when a trial court has the opportunity to consider and rule on the issue and potentially avoid error.

A reviewing court will generally not consider on appeal an issue not preserved in the trial court. *State v. Wyatt*, 331 Or 335, 341, 15 P3d 22, 26 (2000). The rule is a practical one, requiring that a party make an objection with enough clarity to allow the trial court an opportunity "to consider and correct the error immediately, if correction is warranted." *Id.* at 342. However, this court has noted that "problems * * * may arise if the preservation onion is sliced too thinly." *State v. Walker*, 350 Or 540, 548, 258 P3d 1228 (2011) (quoting *State v. Amaya*, 336 Or 616, 629, 89 P3d 1163 (2004) (ellipses in *Walker*). Thus, the ultimate requirement is that a reviewing court give "attention to the purposes of the rule and the practicalities it serves." *Id.*

This court has recognized a particular need for flexibility given the realities of criminal trial practice. As it said in *Walker*, "in criminal cases, in which there is a premium on considerations of cost and speed, the realities of trial practice may be such that fairly abbreviated short-hand references suffice to put all on notice about the nature of a party's arguments." 350 Or at 550. The purpose of the rule is to ensure "procedural fairness to the parties and the trial court, judicial economy, and full development of the record." *State v. Parkins*, 346 Or 333, 340, 211 P3d 262 (2009). But "the preservation rule also can come

at a cost. It may prevent a reviewing court from correcting prejudicial error * * * ." *Id.*

B. Defendant's argument in the trial preserved this issue because it alerted the trial court to his interpretation of the statute, allowing the trial court to specifically it.

Whether an issue is preserved "will turn on whether, given the particular record of a case, the court concludes that the policies underlying the rule have been sufficiently served." *Id.* at 341. Defendant preserved his argument that a person must be in a vehicle with possession of a handgun when he stated that the statute is "contemplating that somebody's in the car [*sic*] readily accessible, it's not just that somebody can approach the car and readily access this gun, because otherwise the trunk would be –" Tr. 146. The trial court ruled on and denied that argument, saying "You know I can tell you right now I'm going to deny your motion based on readily accessible because I think it's really a question of fact for the jury." Tr. 146.[1]

Defendant asked to be heard "on one more point," then argued that "the statute does say specifically say that must [*sic*] be readily accessible to a person within the vehicle. We have someone who's never driving the vehicle he just

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[1] Defendant acknowledges that, in the preservation section of his Court of Appeals brief, he misstated that the trial court "did not expressly address defendant's argument that the legislature did not intend to criminalize possessing a concealed weapon in a parked, unoccupied car when the weapon would not be accessible to the driver." App. Br. at 6. Defendant's characterization of the trial court record was incorrect. As set out above, the trial court expressly rejected defendant's "readily accessible" argument.

approaches it and leaves it, under this State's interpretation the trunk is readily accessible." Tr. 147.

The Court of Appeals held that, in context, defendant's arguments referenced above referred to the "place of residence" issue. *Clemente-Perez*, 261 Or App at 150. However, the context of the trial-court discussion makes clear that defendant brought up multiple challenges to the statute. That holding was incorrect.

At trial, defense counsel began her argument by stating, "First and this is kind of, I'm hoping to organize this in a fashion, first I believe this statute is being driven or that it is out on some kind of public highway or road open to the public, a public premises, not just somebody's car on their property – " Tr. 140.

While counsel may have been hoping to organize her argument in a particular way, at that point, in a manner familiar to anyone who has argued before this court, the judge took control of the discussion and engaged counsel on the topic of the "place of residence" exception. The trial court interjected, "Well, let's talk about that for a minute because I've been thinking about that and where is the authority for that?" Tr. 140. This sparked a discussion about the "place of residence" exception that continued for several transcript pages. Tr. 140-46.

Eventually, defense counsel returned to the "readily accessible" argument. In response to a hypothetical question involving a car parked in a

business parking lot, defense counsel explained her understanding of the reach of statute as follows, "it's contemplating that *somebody's in the car* readily accessible, it's not just that somebody can approach the car and readily access this gun, because otherwise the trunk would be –" Tr. 146 (emphasis added).

It was there that the trial court interrupted defendant's argument and, in so doing, made clear that it understood counsel to be addressing the issue of whether the weapon was readily accessible, "You know I can tell you right now I'm going to deny your motion based on readily accessible because I think it's really a question of fact for the jury." Tr. 146.

Shortly thereafter, the following exchange occurred:

> "DEFENSE: May I be heard on one more point?
>
> "COURT: Yeah.
>
> "DEFENSE: *Simply that the statute does specifically say that must* [sic] *be readily accessible to a person within the vehicle.* We have someone who's never driving the vehicle he just approaches it and leaves it, under this State's interpretation the trunk is readily accessible. Everything's readily accessible because you're just walking up to a stopped car on your personal property."

Tr. 147 (emphasis added).

The discussion continued. The trial court asked for the basis of defendant's position, and counsel stated that the statutory text demonstrated an "understanding that readily accessible within a vehicle to the person * * * that

they have to be able to access it while they're within the vehicle, not that they can just approach a vehicle." Tr. 148.

After several more pages of discussion on the issue of whether the handgun was "readily accessible," the parties expressly changed the topic to the place of residence issue. The trial court stated that it was denying the motion for judgment of acquittal and defense counsel asked if the court was finding that "it doesn't matter that it's on his property that it never left?" Tr. 152. The court responded, "We haven't dealt with that issue, I'm only talking about * * * * [r]eadily accessible, yeah we haven't dealt with that, I haven't gone there yet." Tr. 152.

The trial court was alerted that defendant's position that the statute only barred possession of a concealed handgun in a vehicle by a person who is simultaneously in that vehicle. In an ideal situation, counsel would delivered the argument as a monologue, marching in orderly fashion through each point. However, given the realities of a fast-moving criminal proceeding and an inquisitive judge, defendant did not have the opportunity to do so. Nevertheless, defendant articulated the precise argument that he advances on appeal.

III. The trial court should have granted defendant's motion for judgment of acquittal because the "readily accessible" in a vehicle portion of the unlawful-possession-of-a-firearm statute at issue only applies when a person is in the vehicle with a concealed firearm.

The state failed to prove that defendant was guilty of the offense because it did not present any evidence showing that defendant possessed "a handgun that [wa]s concealed and readily accessible to [defendant] within any vehicle" as required under ORS 166.250(1)(b).

In this case, this court must determine whether storing a concealed handgun in a parked truck constitutes possessing that gun in a readily accessible manner within a vehicle under ORS 166.250(1)(b). To answer that question, in turn, this court must determine whether the phrase "within any vehicle" in ORS 166.250(1)(b) was intended by the legislature to modify the conduct or status of "the person" or the handgun. The text, context, and legislative history make it clear that the legislature intended the statute to criminalize the possession of a concealed weapon *by a person who occupies a vehicle*, not the possession of a concealed weapon in a vehicle by a person who is not in that vehicle. In other words, the person's occupancy of the vehicle and possession of a concealed handgun must occur simultaneously.

ORS 166.250(1)(b) targets a specific form of conduct: the possession of a concealed handgun by a person who is in a vehicle. It does not bar the storage of a weapon in an unoccupied truck, just as it does not bar the possession of a

concealed long gun in a car, or an openly displayed handgun. Only when a person occupies a vehicle while simultaneously possessing a concealed handgun does he or she violate that provision.

A. The text and context of the "readily accessible" provision demonstrates that it applies only to people who are in vehicles.

The text of ORS 166.250(1)(b) applies when a person "Possesses a handgun that is concealed and readily accessible to the person within any vehicle." The statutory definition of "readily accessible" in ORS 166.250(4)(a) supports defendant's position that the statute targets only those people who occupy vehicles while possession concealed handguns. That definition provides that, other than an exception inapplicable here, "a handgun is readily accessible within the meaning of this section *if the handgun is within the passenger compartment of the vehicle*." (emphasis added). The definition makes sense only if the statute is targeting possession of concealed weapons by people who are themselves in vehicles – a handgun in a car is readily accessible to a person in that car.

The legislature was concerned with possession of readily accessible, concealed handguns by persons *in* vehicles. Defendant's interpretation of ORS 166.250(1)(b) squares with the definition of "readily accessible" in ORS 166.250(4)(a) because, for a weapon in the passenger compartment of a vehicle to be "readily accessible" to a person, that person will generally also be in the

vehicle. The legislature intended to punish a person who possesses concealed weapons while that person is in a vehicle, and reading ORS 166.250(1)(b) to require the defendant to be in the vehicle serves to harmonize the provisions of that statute. *See In re Holmlund's Estate*, 232 Or 49, 67, 374 P2d 393 (1962) ("Where there is a conflict between the various provisions of the statute, it is the court's duty to harmonize them if possible.").

B. The legislative history shows that the specific concern the legislature intended to address, at the time of the 1999 amendment of the statute, was people in cars with guns. In particular, the legislature wanted to address drive-by shootings.

The text demonstrates that the intent of ORS 166.250(1)(b) is to target people who are themselves in vehicles and possess concealed handguns. Therefore, this court need not consider legislative history in order to reverse defendant's conviction. However, the legislative history confirms defendant's interpretation because it demonstrates that the legislature was concerned with gun crimes by vehicle occupants, not the mere storage of guns in parked vehicles.

As discussed above, the statute that became ORS 166.250 was originally enacted in 1925. Like the current law, that statute also forbade the possession of a concealed weapon in a vehicle. It read, in relevant part, "it shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other

firearm capable of being concealed upon the person * * * [.]" Or Laws 1925, ch 260, § 5.[2] The vehicle portion of the 1925 statute remained largely unchanged until 1999, a which time it targeted a person who: "(b) [c]arries concealed and readily accessible to the person within any vehicle which is under the person's control or direction any handgun * * *." ORS 166.250 (1993).

The legislature modified that provision and created the current ORS 166.250(1)(b) in a 1999 amendment to the statute. Or Laws 1999, ch 1040 § 1. That amendment made several changes to the statute, including the removal the word "carries" and the phrase "which is under the person's control or direction * * * ." *Id.* Following the 1999 amendment, the section read as it does currently: a person violations the section if he or she "(b) [p]ossesses a handgun that is concealed and readily accessible to the person within any vehicle[.]" ORS 166.250(1)(b) (1999).

The amendment that became the current text of ORS 166.250(1)(b) was introduced in the Senate Committee on Judiciary on June 30, 1999. David Amesbury, a witness from the Department of Justice, explained that the amendment was drafted in response to The Court of Appeals' then weeks-old

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[2] As discussed above, there is no surviving legislative history from 1925. *Leslie*, 204 Or at 723.

decision in *State v. Williams,* 161 Or App 111, 984 P 2d 312 (1999). Senate Committee on Judiciary, HB 3374, Jun 30, 1999, Tape 261, Side A. In *Williams,* the Court of Appeals held that, under the 1993 version of the statute, "it is not a crime to be seated in a vehicle near where a handgun is concealed unless the vehicle is 'under the person's control or direction.'" 161 Or App at 118.

In response to *Williams,* the legislature sought to make clear that ORS 166.250(1)(b) applied not just to drivers, but also to passengers of vehicles. District attorneys were concerned that they would be "unable to prosecute passengers who are using the guns – shooting the guns – unless we catch them in the act of shooting." Testimony, Senate Committee on Judiciary, HB 3374, June 30, 1999, Tape 261, Side A (statement of Marion County District Attorney Dale Penn).

Both Penn and Amesbury noted that the amendment was inspired by a desire to prosecute the participants of drive-by shootings. In response to a question about who would be guilty under the amended statute, Amesbury stated, "It would be any *person in a vehicle* who possess[es] a handgun that is readily accessible and concealed." (emphasis added).

The legislative history is clear: the 1999 legislature broadened the scope of ORS 166.250(1)(b) to ensure that the statute punished both passengers and drivers of vehicles who possess concealed and readily accessible handguns

while in vehicles. The legislative history contains no indication that the legislature intended to punish a person's storage of a concealed handgun in a car.

C. Defendant's conduct did not violate the statute because he merely stored a firearm in his truck. He did not occupy a vehicle in which he possessed a concealed handgun.

Here, there is no evidence in the record that defendant occupied, a vehicle containing a concealed weapon. Because ORS 166.250(1)(b) is targeted only at persons who are in vehicles and possess concealed handguns inside of them, the trial court should have granted his motion for judgment of acquittal.

For the same reason, the fleeting moment in which defendant opened the truck and placed the gun in it does not constitute possessing a handgun in the vehicle. As set out above, the legislature was concerned with occupants of cars, drivers and passengers, having ready access to concealed weapons in public, not storing weapons in parked cars. Defendant was entitled to a judgment of acquittal.

CONCLUSION

Defendant did not violate the unlawful possession of a firearm statute because he did not possess a handgun that was readily accessible to him while he occupied a vehicle. Even if he did, the incident occurred entirely at his own home within his place of residence. Therefore, defendant respectfully requests that this court reverse the decision of the trial court and 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 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 7,693 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 Brief on the Merits of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on November 24, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of Petitioner on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, and Rebecca M. Auten, #083710, Assistant Attorney General, attorneys for Respondent on Review.

Respectfully submitted,

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