IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. STEPHEN WAYNE ZISKA, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court No. C092432CR CA A145162 SC S060946 (Control)
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. MARGARITO GARZA, Defendant-Appellant, Petitioner on Review	Washington County Circuit Court No. C092075CR CA A146764 SC S060995

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Washington County
Honorable STEVEN L. PRICE, Judge, and MARCO A. HERNANDEZ, Judge

---

_____

A145162:
Affirmed with Opinion Filed: October 24, 2012
Before: Armstrong, Presiding Judge, Haselton, Chief Judge, and Duncan, Judge

A146764:
Affirmed with Per Curiam Opinion Filed: November 15, 2012
Before: Ortega, Presiding Judge, Haselton, Chief Judge, and Sercombe, Judge

_____

PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
ERNEST G. LANNET #013248
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
ernest.g.lannet@opds.state.or.us

Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
MATTHEW J. LYSNE #025422
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
Matthew.J.Lysne@doj.state.or.us

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

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

INTRODUCTION

ORS 166.220(1)(a) provides that a person commits the crime of unlawful use of a weapon if that person "carries or possesses" a dangerous or deadly weapon "with intent to use [it] unlawfully against another." This case presents the question whether a person commits that crime if he has the intent to use a weapon to threaten or menace another person, or whether the legislature intended that ORS 166.220(1)(a) be more narrowly applied to only those circumstances in which the person intended to use the weapon to actually strike, assault, or injure another person. As explained below, the plain text of the statute, when considered in its context, demonstrates that the state need prove only that a person has the intent to use a dangerous or deadly weapon against another person for *any* unlawful purpose, including unlawfully threatening or injuring another.

QUESTION PRESENTED

Question Presented

ORS 166.220(1)(a) provides that a person commits the crime of unlawful use of a weapon if the person carries or possesses a dangerous or deadly weapon with the "with intent to use [it] unlawfully against another." Does a person who carries or possesses a dangerous or deadly weapon with the intent to use it to

unlawfully place another person in fear of imminent serious physical injury (*i.e.* to commit the crime of menacing) commit the crime of unlawful use of a weapon?

Proposed Rule of Law

Yes. ORS 166.220(1)(a)'s text, context and legislative history shows that its scope reaches to any person who carries or possesses a dangerous or deadly weapon with the intent to use it against another person for any unlawful purpose, including the unlawful purpose of threatening another person.

SUMMARY OF ARGUMENT

A person commits the crime of unlawful use of a weapon under ORS 166.220(1)(a) when a person possesses a dangerous or deadly weapon with the intent to use it for *any* unlawful purpose (including for the purpose of unlawfully threatening another person). The ordinary meaning of ORS 166.220(1)(a)'s text—"with intent to use unlawfully against another"—demonstrates that the state must prove that the person who possessed the weapon had the intent to employ that weapon for *any* unlawful purpose, including to kill, injure, coerce, or to merely scare another person. Therefore, proof that a person possessed a dangerous weapon and intended to use that weapon to commit the crime of menacing, *i.e.*, to place another person in fear of imminent serious physical injury, would sufficiently establish the proof of intent necessary to sustain a conviction under ORS 166.220(1)(a).

Context reinforces that ORS 166.220(1)(a) should be interpreted consistently with its plain meaning. Contrary to defendants' argument that the terms "to use" or "to use unlawfully against another" means that the state must prove an intent to assault, no contextual source suggests that those terms should have such a specific meanings. To the contrary, the many statutes that regulate or proscribe the use of dangerous or deadly weapons rarely do so by express reference to the use of weapons but focus instead on the undesirable results that weapons produce, and which typically include death, injury, and fear of injury. With that context, "with intent to use unlawfully against another" refers to the legislature's collective statutory measures that regulate how weapons are "used"—and not specifically to those statutory measures that prohibit assault crimes. That is, contextual provisions demonstrate that this court should construe ORS 166.220(1)(a) in accordance with its plain and ordinary meaning, which would require only that the state prove that a person who possessed a dangerous or deadly weapon did so with the intent to use it against another person for any unlawful purpose, including threatening or placing another in fear of injury.

That understanding of ORS 166.220(1)(a) also comports with the prior versions of that statutory provision, including its initial enactment in 1917 and its substantial amendment in 1985. In 1917, when the legislature first enacted what later became ORS 166.220(1)(a), that provision included an evidentiary presumption of an unlawful intent to use. That presumption applied if a person

committed or threatened to commit *any* kind of felony, or, if a person merely threatened to commit a breach of the peace, an unlawful, but non-criminal act. Given that the evidentiary presumption applied to circumstances that did not necessitate or include the commission of the crime of assault, it is likely that the legislature intended that provision to broadly include circumstances in which the person intended to use a prohibited weapon against another for any unlawful purpose. The 1985 legislature reinforces that construction.

In sum, the text of ORS 166.220(1)(a) and relevant contextual provisions lead to the same conclusion: the state may prove that defendants possessed a dangerous or deadly weapon with the intent to employ it against another person for any unlawful purpose, including to kill, to injure, or to merely threaten or scare another person. In both cases, the state proved that defendants possessed dangerous weapons with the intent to use them to commit the crime of menacing. Therefore, the trial court in each case correctly concluded that the state provided sufficient evidence to show that defendants had the intent necessary to be convicted of violating ORS 166.220(1)(a).

FACTS MATERIAL TO REVIEW

This case arises from two cases in which defendants separately were convicted of one count of menacing and one count of unlawful use of a weapon based on unrelated incidents. *State v. Ziska*, 253 Or App 82, 288 P3d 1012 (2012); *State v. Garza*, 253 Or App 551, 291 P3d 774 (2012). On appeal, each defendant

argued that he should have been acquitted on the unlawful-use charge on the ground that the state had failed to offer sufficient evidence to prove that he intended to unlawfully use a weapon to physically strike or assault another person.

A. Defendant Ziska

During the evening of October 27, 2009, Ziska and several roommates were drinking in the living room of their house when Ziska and got into an argument. (2/10/10 Tr 15-17). Ziska and called each other names, and eventually, Ziska stood up from his chair and challenged to a fight. (2/10/10 Tr 18). At that point, a roommate stepped in to "break up" the fight and escorted out to the backyard while Ziska went to his bedroom. (2/10/10 Tr 18-19). Ziska soon returned to the living room with a crowbar and sat down in a chair. (2/10/10 Tr 21-22).

Approximately five minutes later, returned inside and saw Ziska holding up the crowbar. (2/10/10 Tr 21). Ziska waved the crowbar at said "I'm going to level you," and stood up from the chair. (2/10/10 Tr 22, 26). At that point, other roommates intervened and restrained Ziska in order to take the crowbar from him—and then called police. (2/10/10 Tr 22-23). During an interview with police, Ziska admitted that he had "had enough abuse" by name-calling, and that he had carried the crowbar to show and others that he "meant business." (2/10/10 Tr 38, 41).

Ziska was arrested and charged with one count of menacing, and one count of unlawful use of a weapon based on the theory that he carried or possessed a dangerous weapon (a crowbar) with the intent to use it unlawfully against another. (App Br, A145162, ER 1). After a bench trial, the court convicted Ziska on both counts. While announcing the court's verdict, the trial court explained that it interpreted the phrase "with intent to use unlawfully against another" "to include threatening to use in a menacing manner as use," and found Ziska guilty under that theory. (2/10/10 Tr 66).

On appeal, Ziska characterized the trial court's oral remarks during the verdict as a denial of a motion for judgment of acquittal, and contended that the trial court erred because the evidence showed only that he intended to "threaten" the victim and that such a threat was not a "use" of a weapon that ORS 166.220 prohibits. *Ziska*, 253 Or App at 83. The Court of Appeals rejected Ziska's argument that the legislature intended the term "use" to equate to "the legal definition of assault instead of that term's ordinary meaning." *Ziska*, 253 Or App at 88. Instead, the court held that "'use' in ORS 166.220(1)(a) describes both the actual use of physical force and the threat of immediate use of physical force," and affirmed the trial court's judgment. *Id*. at 88-89.

B. Defendant Garza

In August 2009, Garza moved into a group home for offenders in Hillsboro, Oregon. (8/18/10 Tr 6, 8). On September 17, 2009, the group home held a yard

sale and as a part of that sale, had a table on the front porch that displayed several knives and other items. (8/18/10 Tr 9).

During the yard sale, Garza, who was intoxicated, walked onto the porch. (*Id*.). asked defendant to leave the porch area. (*Id*.). Garza took a folding knife off the knife table and began walking off the porch. (8/18/10 Tr 9-10). called out "Hey, put the knife back. Garza, put the knife back." (8/18/10 Tr 9). Garza continued off the porch and followed, and told him to "put the knife down." (*Id*.). At that point, when was three to four feet away, defendant turned around and "flashed" the opened knife at (8/18/10 Tr 9-10). backed up and called out to another roommate, for help, and then went and called 9-1-1. (8/18/10 Tr 10). came over and told Garza to give him the knife. (8/18/10 Tr 27). repeated his instructions and after about one minute, Garza gave the knife to (*Id*.). Garza was arrested by police shortly thereafter.

The state indicted defendant with one count of menacing and one count of unlawful use of a weapon that, like defendant Ziska, was based on the theory that he carried or possessed a dangerous weapon (a knife) with the intent to use it unlawfully against another. (App Br, A146764, ER 1). Garza proceeded to a bench trial and moved for a judgment of acquittal on the ground that the term "use" in ORS 166.220 meant "to stab or to slash or something of that nature" and that merely "threatening to use is not use" within the meaning of ORS 166.220.

(8/18/10 Tr 50-51). The trial court denied Garza's motion and concluded that "he was using the knife in a threatening manner in order to retain the knife" and that "he was using it in order to place another individual in fear of serious physical injury." (8/18/10 Tr 55-56).

On appeal, defendant renewed his argument that he should have been acquitted on the ground that he did not "use" the knife by merely threatening to harm another person. (App Br, Case No. A146764, 4). In a per curiam opinion, the Court of Appeals affirmed, citing to its decision in *Ziska*. *State v. Garza*, 253 Or App 551, 291 P3d 774 (2012), *rev allowed*, 353 Or 428 (2013).

ARGUMENT

The case presents a question of statutory construction: whether, under ORS 166.220(1)(a), the state must prove that a person possessed a dangerous weapon with the intent to cause actual physical harm, or whether, instead, it is enough that the state proves that the person possessed the weapon with the intent to use it for some other unlawful purpose, such as menacing.[1] Stated perhaps even more plainly, the question presented is whether a person violates

[1] At the outset, the state will note that ORS 166.220(1)(a) includes a second theory of liability for persons who "attempt[] to use" dangerous or deadly weapon, which also contains an intent requirement. However, because the cases against defendants were charged and tried under the theory that they carried or possessed a weapon with intent to use it unlawfully against another, and because the state understands the intent requirement to be the same under either theory, the state will focus its analysis on the "carries or possesses with intent to use" theory of liability.

ORS 166.220(1)(a) when he uses a dangerous weapon to *threaten* a person with harm rather than with the intent to *cause* harm. The text, context, and legislative history demonstrate that the statute requires only proof that a person possessed the intent to use the weapon for any unlawful purpose, including—as particularly pertinent to this case—to commit the crime of menacing (*i.e.*, placing another in fear of imminent serious injury).

A. The plain text requires the state to prove that a person intended to employ a dangerous or deadly weapon against another for any unlawful purpose.

Because the parties' dispute over intent centers on the phrase "to use unlawfully against another"—the type of intent expressly required by the legislature—the state starts with that text. The statute provides, in full:

> (1) A person commits the crime of unlawful use of a weapon if the person:
>
> > (a) Attempts to use unlawfully against another, or carries or possesses with intent to use unlawfully against another, any dangerous or deadly weapon as defined in ORS 161.015[.]

ORS 166.220. As this court is amply aware, each term must be given its plain and ordinary meaning. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) ("words of common usage typically should be given their plain, natural, and ordinary meaning"). The transitive verb "to use," in this context, ordinarily means "[t]o make use of; to convert to one's service; to avail one's self of; to employ; to put a purpose as, to *use* a plow, a chair, a book * * *[.]"

Webster's Revised New Int'l Dictionary 2258 (1910)[2]. The three terms that modify "to use" (and their ordinary meanings) are:

- "unlawful," which means "contrary to law[,]" *Webster's* at 2245;
- "against," which means "[i]n opposition to, whether the opposition is of sentiment or of action; on the other side; counter to; as in competition; hence, adverse to * * * to set off one item *against* another * * *" *Webster's* at 41; and
- "another," which means "any different person, indefinitely; any one else * * * [.]" *Webster's* at 92.

Considering those definitions together, the phrase "to use unlawfully against another" means to employ a dangerous or deadly weapon in some manner that is both unlawful and adverse to another person.

In sum, ORS 166.220(1)(a) has a plain meaning that requires the state to prove only that the person had the intent to use the weapon against another person for *any* unlawful purpose, and not just for the specific purpose of committing the crime of assault. The text thus confirms that if a person possesses a dangerous or deadly weapon with the intent to use it to commit the crime of menacing, that person also commits the crime of unlawful use of a weapon.

---

[2] The state refers to the definitions available in 1917, when legislature first enacted ORS 166.220(1), only as a starting point for ascertaining the meaning of ORS 166.220(1). *See State v. Cloutier*, 351 Or 68, 96, 261 P3d 1234 (2011) (this court will not "simply consult dictionaries and interpret words in a vacuum" but instead consider dictionary definitions as what words "*can* mean, depending on their context and the particular manner in which they are used"). Ultimately, however, the meanings of those terms have not changed much.

B. Context confirms that a person violates ORS 166.220(1)(a) when he possesses a dangerous or deadly weapon with the intent to use it for any unlawful purpose, including to threaten another person.

Context confirms that the legislature intended that ORS 166.220(1)(a) should be interpreted according to is plain and ordinary meaning. In particular, previous versions of ORS 166.220(1)(a) demonstrate that the statute requires proof that the person have the intent to use a dangerous or deadly weapon for any unlawful purpose, including to use the weapon to commit the crime of menacing.

Earlier incarnations of ORS 166.220(1)(a) show that that provision always prohibited using dangerous weapons to unlawfully threaten others. *See Harris and Harris*, 349 Or 393, 402, 244 P3d 801 (2010) ("[T]he context of a statutory provision, including its prior versions, is helpful in determining [the statute's] reach."). Contrary to defendants' arguments, a review of the 1917 and 1985 legislation shows that ORS 166.220(1)(a) has always applied to persons who possessed prohibited weapons with the intent to use it to commit unlawful threatening acts against others and have never—as defendants suppose—required proof of intent to commit actual physical harm.

1. The earliest predecessor to ORS 166.220(1)(a) applied to persons who possessed weapons with the intent to use them for many unlawful purposes, and not just to commit an assault.

In 1917, the Oregon Legislature passed House Bill (HB) 402, a bill that concerned the manufacture, sale, and possession of certain dangerous weapons. That legislation established a hierarchy of escalating criminal offenses set within

three categories. First, Section 2 of that legislation made it a misdemeanor to manufacture or sell certain dangerous weapons known as "a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles." Oregon Laws 1917, ch 377, § 2. Second, Section 3 of that legislation made it a misdemeanor to carry or possess those specific items or to carry "a dirk or a dagger, or stiletto." Oregon Laws 1917, ch 377, § 3. Third, Section 7 of that legislation, the earliest predecessor to ORS 166.220(1)(a), made it a felony offense to "attempt to use" a dangerous weapon, or to possess one with the intent to use it. Oregon Laws 1917, ch 377, § 7 (codified as Oregon Laws, title L, ch III, § 9687 (1920)). Oregon Laws § 9687 provided:

> Any person who attempts to use, or who with intent to use the same unlawfully against another, carries or possesses a dagger, dirk, dangerous knife, razor, stiletto, or any loaded pistol, revolver or other firearm, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, bomb or bombshell, or any other dangerous or deadly weapon or instrument, is guilty of a felony. The carrying or possession of any of the weapons specified in this section by any person while committing, or attempting or threatening to commit a felony, or a breach of the peace, or any act of violence against the person or property of another, shall be presumptive evidence of carrying or possessing such weapon with intent to use the same in violation of this section.
>
> * * * * *.

The contextual significance of § 9687 comes from the phrase it employs, "to use * * * unlawfully against another," which is similar to the modern statute. As with the modern version, that phrase is not specifically defined. However, Oregon

Laws § 9687 had one additional provision that clarified how that provision operated, a second sentence created the following evidentiary presumption for certain persons found in possession of prohibited items:

> The carrying or possession of any of the weapons specified in this section by any person while committing, or attempting or threatening to commit a felony, or a breach of the peace, or any act of violence against the person or property of another, shall be presumptive evidence of carrying or possessing such weapon with intent to use the same in violation of this section.

Oregon Laws, title L, ch III, § 9687.[3]

That evidentiary presumption clarified that the earliest version of ORS 166.220(1)(a) applied broadly, in that a person would be presumed to have the intent to unlawfully use a weapon, even if the person was engaged in a wide range of unlawful conduct that not require an assaultive purpose or intent. Again, that presumption applied whenever a person possessed a listed weapon while "committing, attempting to commit, or threatening to commit" either "a felony," "a breach of the peace," or "any act of violence against the person or property of another." At that time, like the felony itself, "attempting to commit" a felony and "threatening to commit" a felony were both unlawful acts—the latter of which did not require an actual intent to assault or injure. *See* Lord's Oregon Laws, Title

[3] In 1985, the legislature eliminated this presumption, which was then found in ORS 166.220(2), out of concern that it could be construed as a mandatory (as opposed to a permissible) inference or presumption. Minutes, Senate Judiciary Committee, May 30, 1985, 4 (statement of Rep. Paul Phillips).

XIX, ch XI, § 2376 (1910) (defining and prohibiting criminal attempts); Oregon Laws 1913, ch 66, § 1 (codified as Oregon Laws, Title XIX, ch XI, § 2377-1 (1920)) ("[i]f any person shall threaten or advocate by speech * * * the commission of a felony, such person shall be guilty of a crime * * *"). Similarly, "threatening to commit" a "breach of the peace" was an unlawful act (albeit one that gave rise to only a *civil* remedy) that also did not require proof of an actual intent to assault. *See* Lord's Oregon Laws, Title XVIII, ch XXII, § 1819 (1910) (providing that if there is "good reason to fear the commission of the [threatened] crime, the person completed of must be required to enter into an undertaking in such sum, not exceeding $2,000[.]"); *see also State v. Hamre*, 247 Or 359, 429 P2d 804 (1967) (recognizing common-law authority to order "threateners" "to post bond not to breach the peace by committing the offense threatened").

Given the fact that the statutory presumption in the 1917 enactment of ORS 166.220(1)(a) applied to persons committing a broad array of unlawful acts, including some non-criminal acts, it is highly unlikely that that earliest version applied only to those situations where the person possessed a weapon with the intent to assault another person with it.

a. Like today, many statutes in 1917 regularly prohibited persons from who intended to use and did use dangerous weapons to threaten others.

The 1917 legislature's intent to apply ORS 166.220(1)(a) to include threats is reinforced by the fact that when it included the phrase "to use unlawfully against

another," other statutes existed that made it a crime to use weapons to threaten others for many different reasons. One salient example is that it was a crime in 1917 to intimidate voters by "menace, threat, or violence, whether armed or unarmed"—a crime that clearly and unambiguously contemplated a threat to use force or to cause injury with some sort of weapon. *See* Lord's Oregon Laws, Title XIX, ch III, § 2059 (1910) ("[i]f any person or persons shall by menace, threat, or violence, whether armed or unarmed, intimidate or prevent, or attempt to intimidate or prevent any person from voting, such person * * * shall [be subject to imprisonment for up to one year.])"[4] In addition, statutes prohibited persons from making threats to kill or injure others, including provisions concerning the crimes of riot, extortion, and coercion. *See* Lord's Oregon Laws, Title XIX, ch VI, § 2068 (1910) (defining the crime of "riot" as "[a]ny threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together * * *"); Lord's Oregon Laws, Title XIX, ch II, § 1929 (1910) (prohibiting a person from "threaten[ing] any injury to the person or property of another * * * with intent thereby to extort any pecuniary advantage * * * or with intent to compel such other to do any act against his will"). Oregon law prohibited a person from merely threatening to commit a felony, a crime in which a weapon could

[4] Oregon Laws § 2059 contradicts defendants' contention that "other criminal statutes governing combative or threatening uses of dangerous weapons in 1917 did not make threats to use them an unlawful use." (Pet Br 25).

readily be intended to be used to amplify the efficacy of some threats. *See* Or Laws 1913, ch 66, § 1 ("[i]f any person shall threaten or advocate by speech * * * the commission of a felony, such person shall be guilty of a crime * * *"). And Oregon laws also regulated the use of weaponry indirectly by targeting the undesirable results that they produce, and especially using a weapon to instill a fear of physical injury in order to compel a victim by force or threat to submit to some criminal act. *See, e.g.*, Lord's Oregon Laws, Title XIX, ch II, § 1926 (1910) (kidnaping); Lord's Oregon Laws, Title XIX, ch II, §1927 (1910) (child stealing).

In sum, the earliest version of ORS 166.220(1)(a) is the same as it is now: a person commits unlawful use of a weapon where the state proves that a person possessed a weapon with the intent to use it against another for any unlawful purpose. Defendants' contrary argument, that the 1917 version of ORS 166.220(1)(a) required a specific proof of intent to assault, is unsupported by the text or context of that earlier provision.

b. The 1985 amendment confirms that the intent requirement in ORS 166.220(1)(a) requires proof of an intent to use a dangerous or deadly weapon for any unlawful purpose.

The broad intent requirement in the earliest version of ORS 166.220(1)(a) survives and exists in the version at issue here as well. Since 1917, the statute that

became ORS 166.220 remained largely intact until 1985.[5] That amendment confirms that a person violates ORS 166.220(1)(a) if the person intends to use a dangerous or deadly weapon to unlawfully threaten another person.

In 1985, the Oregon Legislature passed House Bill (HB) 2384 (1985) in response to *State v. Delgado*, 298 Or 395, 403-04, 692 P2d 610 (1984), a case in which this court held that another statutory provision that prohibited the "mere possession" of switchblade knives violated the state constitutional right to bear arms protected by Article I, section 27, of the Oregon Constitution. *See* Minutes, House Committee on Judiciary, Judiciary Subcommittee 1, House Bill 2384, Apr 8, 1985, 4 (statement of Rep. Paul Phillips) (explaining the purpose of the bill). That legislation included two significant changes. First, to resolve the constitutional problem presented by *Delgado*, and to make ORS 166.220(1) "all inclusive" for when "a new dangerous or deadly weapon comes on the market," the legislature deleted the list of specific weapons and instead included the defined terms "dangerous weapon" and "deadly weapon" in ORS 161.015. Minutes, House Committee on Judiciary, Judiciary Subcommittee 1, House Bill 2384, Apr 8, 1985, 4 (statement of Rep. Paul Phillips) (explaining the purpose of the bill).

---

[5] As defendants note, the legislature also amended ORS 166.220(1) in 1975 (to include "nunchaku sticks" to the list of prohibited weapons), in 1991 (to include "drive-by shootings" as a prohibited use of a firearm), and in 2009 (to regulate wildlife takings). (Pet Br 28, 28 n 12). Neither amendment appears to be significant with respect to interpreting what ORS 166.220(1)(a) means.

Second, the legislature codified this court's holding in *State v. Linthwaite*, 295 Or 162, 665 P2d 863 (1983), the case in which this court construed the phrase "attempts to use" to necessarily mean "attempts to use unlawfully against another."[6] Both legislative changes support the conclusion ORS 166.220(1)(a) should be construed to include those instances that a person possesses a dangerous weapon for any unlawful purpose, including to threaten another person.

The latter change, the approval of this court's interpretation of ORS 166.220(1)(a) in *Linthwaite*, bolsters the conclusion that ORS 166.220(1)(a) has a broad intent requirement that would include the intent to use a weapon to commit the crime of menacing. Significantly, *Linthwaite* was a menacing case: the defendant, like defendants in this case, was convicted of four counts of menacing and four counts of unlawful use of a weapon[7] as a result of an incident in which he allegedly "attempted to use" a knife by "brandishing" it at four people. 295 Or at 164. The defendant, seizing on the fact that the 1917 version of ORS 166.220(1)(a) included the "attempts to use" language *without* the modifier

---

[6] This court explained that the phrase "attempts to use," if it stood alone, could produce absurd results like prohibiting potentially benign uses of a knife, *e.g.*, as a paperweight or "to cut a roast." *Id.* at 167. The court also noted that it could preclude the *lawful* use of a weapon, *e.g.* to perform emergency field surgery on a hunting trip. *Id*. at 169 n 7.

[7] The Court of Appeals reversed two of defendant's menacing convictions because they were not charged in the indictment. *State v. Linthwaite*, 52 Or App 511, 529, 628 P2d 1250 (1981), *rev'd on other grounds*, 295 Or 162 (1983).

"unlawfully against another," argued that that crime could be committed only once, *i.e.* there was only one act of "brandishing" that occurred, rather than one act against each victim. Ultimately, this court rejected that argument, construing ORS 166.220(1) "to describe two criminals: (1) Any person who attempts to use a dangerous knife unlawfully against another. (2) Any person who carries or possesses a dangerous knife with intent to use the same unlawfully against another." *Id*. at 170-71. In doing so, this court apparently assumed (or it was not in dispute) that ORS 166.220(1)(a) applied to the act of brandishing, and that no proof of intent to actually assault or physically harm any victim was necessary. Thus, the question here becomes whether the legislature's codification of *Linthwaite* and its interpretation of ORS 166.220(1)(a) would also include an approval of this court's assumption about the intent requirement in ORS 166.220(1)(a).

The answer is yes. It is well understood that in the construction of statutes this court will presume that the legislature enacts legislation "in light of existing judicial decisions that have a direct bearing upon those statutes." *In Re Weber*, 337 Or 55, 67, 91 P3d 706 (2004). *Linthwaite* was a case that concerned how to properly construe the operation of ORS 166.220(1)(a) in a menacing case. In 1985, the legislature substantially amended ORS 166.220(1)(a) to include expand its breadth to include new and future weaponry, and to update the precise operation of that provision in light of *Linthwaite*'s critique of the existing provision. Given

that the 1985 legislature was substantively modifying the scope and application of ORS 166.220(1)(a), had that legislature believed that *Linthwaite* made an improper assumption about the breadth of application of ORS 166.220(1)(a)—or to clarify that persons like the defendant in *Linthwaite* should no longer be charged with unlawful use of a weapon, the legislature certainly could have done so by adopting different language in ORS 166.220(1)(a). But it did not do so. This court should thus presume that the legislature approved of the *Linthwaite* decision, that the legislature also approved of this court's assumption about the intent requirement in ORS 166.220(1)(a). That approval is the legislature's "last word" about the intent requirement in ORS 166.220(1)(a), that resolve any question about what the legislature intended with respect to the intent requirement in ORS 166.220(1)(a). *See generally, State v. Ofodrinwa*, 353 Or 507, 530, 300 P3d 154 (2013) (when the legislative amendment gives the "last word" on the meaning of a phrase, that amendment "controls the meaning of the phrase").

In sum, the text, context, and contextual legislative history of ORS 166.220(1) shows that that the intent requirement has always has been satisfied if the state proves that the person intended to use specified weapons for any unlawful purpose against another— even if that unlawful purpose was only to induce injury or fear in the victim.

C. Defendants' contrary interpretation of ORS 166.220(1)(a) conflicts with the text, context, and history of that provision.

In contending otherwise, defendants do not appear to discredit the plausibility of the state's interpretation of ORS 166.220(1)(a). Instead, they suggest that there is a second plausible interpretation of ORS 166.220(1)(a), that the phrase "to use unlawfully against another" *really means* something like "attempts to assault" or "carries or possesses with the intent to assault." As contextual support, defendants contend that the 1917 and 1985 legislatures both intended that ORS 166.220(1)(a) would apply only to situations in which a person intended to physically assault another person. (*See* Pet Br 22, arguing that the 1985 Legislature intended that that provision would apply only when a person "intend[ed] to actually use [a dangerous or deadly weapon] to assault another"; Pet Br 32, arguing that the 1985 Legislature "would have understood that 'to use a weapon' meant its employment to attempt to inflict injury or harm rather than conduct constituting a threat to use it").

However, defendants' interpretation conflicts with the mandatory rules of statutory construction that prohibit the insertion of omitted terms as well as the omission of inserted terms. ORS 174.010 provides that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such

construction is, if possible, to be adopted as will give effect to all." Here, although defendants appear to concede that a person uses a weapon "unlawfully against another" if the person uses that weapon to commit the crime of menacing, defendants urge this court to ignore that understanding and to instead construe the phrase "with intent to use unlawfully against another" to mean "with intent to assault." Defendants have not and cannot show any textual or contextual support to support that interpretation. Moreover, defendants' interpretation ignores the fact that the legislature repeatedly uses specific legal or descriptive terms like "assaults" or "strikes" or "beats" to signal its intention to specifically prohibit assaultive actions.[8] Because defendants' construction ultimately requires this court to ignore the plain text and instead substitute or add new terms, ORS 174.010 precludes this court from endorsing such a construction.

Ultimately, defendants fail to provide any substantial textual or contextual evidence that shows that the legislature ever intended the intent requirement in ORS 166.220(1)(a) to include proof of an intent to assault. Rather than include specific and legal terms like "assault," the legislature instead chose "to use unlawfully against another," a phrase that all persons would know and understand

[8] As the Court of Appeals noted, the Legislature commonly used descriptive words such as "cuts" "strikes" "beats," or "assaults" when the legislature had the design to prohibit a particular form of assault. *Zisk*a, 253 Or App at 88 (citing Lord's Oregon Laws, title XIX, ch II, §§ 1918, 1923, 2047 (1910)).

to prohibit a person from employing a dangerous or deadly weapon against another person for *any* unlawful purpose, including to injure or simply place another in fear of injury. To conclude otherwise requires this court to change the terms in ORS 166.220(1)(a), and to ignore all of the other textual and contextual clues that plainly show that ORS 166.220(1)(a) applies when a person uses a dangerous weapon to commit the crime of menacing. Because defendants' construction conflicts with the text and context of ORS 166.220(1)(a), this court should affirm the decisions of the Court of Appeals and the judgments of the trial court.

CONCLUSION

For the reasons explained above, the text, context, and history of ORS 166.220 demonstrate that that provision prohibits a person from possessing a dangerous or deadly weapon with the intent to use it to commit the crime of menacing. Accordingly, this court should affirm the decisions of the Court of Appeals and the judgments of the trial court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Matthew J. Lysne
MATTHEW J. LYSNE #025422
Assistant Attorney General
Matthew.J.Lysne@doj.state.or.us
Attorneys for Plaintiff-Respondent
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 18, 2013, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Ernest G. Lannet, attorneys for appellant, 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 5,896 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).

/s/ Matthew J. Lysne
MATTHEW J. LYSNE #025422
Assistant Attorney General
Matthew.J.Lysne@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

MJL:slc/4435905-v1