IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CURTIS DWAYNE MCCLURE, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court No. 090850307 CA A143705 SC S061434

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable LESLIE M. ROBERTS, Judge

Opinion Filed: April 17, 2013
Author of Opinion: Ortega, Presiding Judge
Before: Edmonds, Senior Judge, and Sercombe, Judge

Continued…

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

RESPONDENT'S BRIEF ON THE MERITS

INTRODUCTION

A jury convicted defendant of resisting arrest after he resisted being detained by two police officers on a warrant for a parole violation. Defendant contends that the trial court should have acquitted him because being detained on a parole violation does not constitute an "arrest" for purposes of resisting arrest. The trial court and Court of Appeals both rejected defendant's argument. This court should do the same.

The legislature made resisting arrest a crime to protect law enforcement and the public. The legislature intended that "arrest" have a broad meaning in the context of "resisting arrest." This court should clarify that the statute means what it says—that any actual or constructive restraint by law enforcement that does not amount to a mere stop is an arrest. And this court should affirm because when defendant resisted the officers detaining him on a warrant for a parole violation, he resisted arrest.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

ORS 162.315 defines the crime of resisting arrest and adopts the definition of "arrest" in ORS 133.005. ORS 133.005(1) defines "arrest" to mean "to place a person under actual or constructive restraint or to take a

person into custody for the purpose of charging that person with an offense." When law enforcement officers execute an arrest warrant for a parole or probation violation, is that detention an "arrest" as the legislature defined that term?

First Proposed Rule of Law

For purposes of the crime of resisting arrest, "arrest" includes any detention by law enforcement officers, provided the detention is longer than a mere stop. That includes officers detaining a person on a warrant for a parole or probation violation.

Second Question Presented

Under the facts of this case, where the two arresting officer's testified in compelling detail about defendant resisting arrest, was it harmless error for the trial court to admit evidence related to defendant's prior conviction for resisting arrest?

Second Proposed Rule of Law

It was harmless error in this case for the trial court to admit evidence related to defendant's prior conviction for resisting arrest. The trial court allowed the state to introduce evidence related to defendant's prior conviction to establish intent. However, the two arresting officers from this incident testified in detail about defendant's conduct. Their testimony established that defendant had intentionally resisted them. The jury very likely convicted

defendant based on the arresting officers' testimony. The evidence of defendant's prior resisting arrest conviction was unlikely to have affected the jurors' decision.

Summary of Argument

Defendant resisted police officers detaining him on a warrant for a parole violation. He contends that "arrest," as defined for purposes of resisting arrest statute, ORS 162.315, encompasses only situations where law enforcement detains a person for the purpose of charging that person with an offense and not for a parole violation. That is incorrect.

The plain text of the definition of "arrest" includes any actual or constructive restraint by law enforcement officers, unless the restraint is a mere stop. The resisting arrest statute incorporates the statutory definition of "arrest" in ORS 133.005, which provides:

> As used in ORS 133.005 to 133.400 and 133.410 to 133.450, unless the context requires otherwise:
>
> (1) "Arrest" means to place a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense. A "stop" as authorized under ORS 131.605 to 131.625 is not an arrest.

ORS 133.005. The qualifying phrase on which defendant relies—"for the purpose of charging that person with an offense"—applies only to taking a person into custody. If law enforcement officers restrain a person for a sufficient amount of time to exceed a mere stop, the restraint is an arrest

regardless of the purpose of the restraint. This court's case law supports that construction.

Legislative history also confirms that the legislature intended to criminalize the resisting of *any* type of arrest, including detaining a person for a parole or probation violation. When the legislature adopted the criminal code in 1970, it included the crime of resisting arrest because it was concerned about civil disorder and, specifically, the risks associated with violence during arrests. Moreover, the legislature has twice expanded the crime of resisting arrest. In 1997, it expanded the crime to include a person's conduct through the booking process. It expanded the statute again in 2005, to apply to a person resisting arrest by parole and probation officers in addition to arrest by peace officers. Nothing in the legislative history suggests that the legislature intended to limit the type of arrests that would be subject to resisting arrest. Rather, the legislative history of the initial law, and the statutory changes, indicate that the legislature intended to be inclusive and expansive with respect to the crime, with an eye to the safety of arresting officers and the public. Accordingly, an arrest for purposes of resisting arrest includes law enforcement detaining a person on a warrant for a parole violation, and the trial court properly denied defendant's motion for a judgment of acquittal.

Defendant also contends that the trial court erred in admitting evidence of defendant's prior conviction for resisting arrest. The state concedes that the

trial court erred in admitting that evidence because it was an "unremarkable single instance of prior conduct" that was inadmissible under *State v. Johns*, 301 Or 535, 548, 725 P2d 312 (1986), as applied by this court in *State v. Leistiko*, 352 Or 172, 282 P3d 857 (2012). However, the error was harmless because the state presented clear and compelling evidence from the two arresting officers to establish that defendant intentionally resisted arrest.[1]

Factual and Procedural Summary

A. Defendant resisted being detained by police officers for a parole violation.

As the Court of Appeals noted, the few relevant facts are undisputed. Portland Police Officers Shaw and Reister encountered defendant in downtown Portland. Tr 80-82. Officer Shaw spoke to defendant and asked him his name. Tr 81. Defendant gave his name and asked whether he was under arrest. Tr 81. Officer Shaw told defendant he was not under arrest and defendant walked off. Tr 81. Officer Shaw then conducted a warrant check that revealed an outstanding arrest warrant for defendant for a parole violation. Tr 81. The officers again approached defendant. Tr 82. Officer Shaw told defendant that he had an outstanding arrest warrant, and the two officers attempted to handcuff defendant. Tr 82. Defendant resisted being handcuffed by, among other things,

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[1] Even if the evidentiary error was not harmless, the court should decide the first issue. If defendant is correct about the construction of the statutes, then he is entitled to a judgment of acquittal, rather than a remand.

grabbing onto his head and locking his arm tight and then later grabbing onto a lamppost so that the officers could not get his arms together behind his back. Tr 82-84. The officers told defendant that he was "under arrest" and to "stop resisting." Tr 87, 136. Defendant did not comply their commands. Tr 91. The officers tried a number of maneuvers to get control of defendant and handcuff him. Tr 132-39. Defendant continued to resist until eventually, with the assistance of two private security officers, the police officers were able to handcuff defendant. Tr 84, 93, 141-42.

B. The trial court admitted evidence related to defendant's prior resisting arrest conviction and denied defendant's motion for a judgment of acquittal.

The state charged defendant with one count of resisting arrest. ER 1.[2] Before trial, the state moved to introduce evidence of defendant's prior conviction for resisting arrest. Tr 4-5. The state explained that the evidence would be offered to prove defendant's intent, not his character. Tr 5. At the pretrial hearing on the state's motion, the state called Officer Castaneda to testify about the circumstances of defendant's prior resisting arrest conviction. Tr 13. Officer Castaneda was one of the two officers involved in that arrest. Tr 13. He testified that he had arrested defendant in a similar area of downtown Portland. Tr 12-13, 162-63. Officer Castaneda testified that defendant had

[2] Citations to "ER" refer to the excerpt of record in defendant's brief to the Court of Appeals.

resisted being arrested, had come at the officers ready to fight, had punched the officers, and eventually engaged in a "drag-out" fight with the officers. Tr 11-19, 164-67. Over defendant's objection, the trial judge ruled that the state could introduce evidence related to defendant's prior resisting arrest conviction. Tr 55-56.

At trial, defendant moved for a judgment of acquittal at the close of the state's evidence. Tr 175. Defendant argued that the state failed to prove that defendant had resisted being "arrested" as that term is defined for purposes of resisting arrest because the police officers were arresting him on a parole violation and not to charge him with a new offense. Tr 175-78, 181. The trial court denied the motion, ruling that an arrest on warrant for a parole violation was an arrest for purposes of resisting arrest. Tr 178-81. A jury convicted defendant of resisting arrest.

C. The Court of Appeals affirmed.

On appeal, defendant raised two assignments of error. First, he assigned error to the trial court's denial of his motion for judgment of acquittal. He argued, as he had to the trial court, that taking a person into custody for a parole violation was not an "arrest" as the statute defines that term for purposes of resisting arrest. He argued that law enforcement taking a person into custody is an "arrest" only if the purpose is to charge the person with an offense, and that when the officers took him into custody for a parole violation, it was not to

charge him with an offense. The Court of Appeals affirmed, with Judge Sercombe dissenting. The majority agreed that taking a person into custody for a parole violation was not "for the purpose of charging the person with an offense." *State v. McClure*, 256 Or App 200, 204, 300 P3d 210 (2013). The majority, however, relied on the "unless context requires otherwise" provision of the definition of "arrest" and concluded that context required a broad definition of arrest that would include taking a person into custody for a parole violation. *Id.* at 205-09.

Defendant also assigned error to the trial court admitting evidence of defendant's prior resisting arrest conviction. After briefing in the Court of Appeals, but before the court's decision, this court decided *State v. Leistiko*, 352 Or 172, 186, 282 P3d 857 (2012), emphasizing that a single incident of prior conduct that does not involve a complex act cannot generally be admitted to show intent. Nevertheless, the Court of Appeals rejected defendant's first assignment of error without discussion. *McClure*, 256 Or App at 202.

ARGUMENT

A. An "arrest" for purposes of resisting arrest includes detention for any purpose, provided that the detention is not a mere stop.

This case turns on whether law enforcement officers detaining a person on a parole or probation violation is an "arrest" for purposes of the crime of

resisting arrest. ORS 162.315, the statute defining resisting arrest, provides, in part:

> (1) A person commits the crime of resisting arrest if the person intentionally resists a person known by that person to be a peace officer or parole or probation officer in making an arrest.
>
> (2) As used in this section:
>
> (a) "Arrest" has the meaning given that term in ORS 133.005 and includes, but is not limited to the booking process.

The statute referred to, ORS 133.005, provides, in part:

> As used in ORS 133.005 to 133.400 and 133.410 to 133.450, unless the context requires otherwise:
>
> (1) "Arrest" means to place a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense. A "stop" as authorized under ORS 131.605 to 131.625 is not an arrest.

Law enforcement officers detaining a person for a parole or probation violation is an "arrest" under that statute because the officers place the person under actual or constructive restraint. As explained below, that is all the statute requires for an arrest.

1. The statutory text and this court's prior cases applying that text indicate that a law enforcement officer "arrests" someone when the officer places the person under actual or constructive restraint, regardless of the purpose for the restraint.

"[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). Thus, the

text of the statutes provides the most important basis for analyzing the issue presented by this case. Here, the text supports a broad construction of the term "arrest" and this court has recognized as much, albeit in a different context.

ORS 162.315 expressly provides that "arrest" has the meaning given that term in ORS 133.005(1). That definition, in turn, provides that an arrest by a peace officer or a parole or probation officer may occur in two ways: (1) the officer may "place a person under actual or constructive restraint"; or (2) the officer may "take a person into custody for the purpose of charging that person with an offense." ORS 133.005(1). The definition excludes a "stop" authorized by ORS 131.605 to 131.625. "Restraint," in the first part of the definition, is not further defined, and nothing suggests the legislature intended that the word have anything other than its ordinary meaning—"an act of restraining, hindering, checking, or holding back from some activity * * * ." *Webster's Third New International Dictionary* 1937 (unabridged ed 2006).

Again, the statute defines "arrest" to include "actual or constructive restraint" by law enforcement. Here, there is no question that the police officers restrained defendant when they detained him on a warrant for a parole violation.[3] The question is whether the qualifying phrase "for the purpose of

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[3] The state charged defendant by information with "unlawfully and intentionally resist[ing] Officer Shaw." ER 1. The state did not limit the charge against defendant to resisting being taken into "custody."

charging that person with an offense" in the statutory definition of arrest modifies the phrase "place the person under actual or constructive restraint." It does not. The qualifying phrase modifies only the second part of the definition—taking a person into custody—and not the first. The last antecedent rule and general grammar principles support that construction of the statute, as do this court's prior decisions.[4]

The last antecedent rule "is a long-recognized grammatical principle used in interpreting the text of statutes." *State v. Webb*, 324 Or 380, 386, 927 P2d 79 (1996). The doctrine of the last antecedent is that: "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.'" *Id.* (quoting Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.33, at 270 (5th ed 1992)). In other words, a qualification in a statute usually applies

[4] In the Court of Appeals, the state did not argue that the phrase "for the purpose of charging that person with an offense" modified only taking a person into custody and did not modify "actual or constructive restraint." Rather, the state argued that "context required" a broad definition of arrest that would include resisting being taken into custody for a parole violation. Ans Br 13-20. However, the proper construction of the statute defining arrest was the broad legal issue before the trial court and Court of Appeals. *See Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) (explaining that a party's argument regarding an alternative construction of a statute was sufficiently preserved where the issue on appeal was the proper construction of the statute). Moreover, this court must identify the correct interpretation of the statute, regardless of the parties' arguments. *Id.*

only to the clause immediately preceding it. *Id.* The last antecedent rule dictates that in the statute defining arrest, the qualifying phrase "for the purpose of charging that person with an offense" modifies only the immediately preceding clause, "take a person into custody," and does not modify "place a person under actual or constructive restraint."

The presence or absence of a comma is important in applying the last antecedent rule. "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma." *Id.* at 387 (quoting 2A *Sutherland Statutory Construction* § 47.33, at 270). The significance of the comma in the last antecedent rule is consistent with general grammatical principles. *Id.* at 389. Where a phrase is set off from the rest of a sentence by commas, the phrase is "nonrestrictive," meaning that it is intended to modify more than the immediately preceding provision in the sentence. *Liberty Nw Ins. Corp. v. Watkins*, 347 Or 687, 693, 227 P3d 1134 (2010). The absence of a comma before a modifying clause, on the other hand, indicates that the clause is an essential or restrictive clause that modifies only the immediately preceding provision. *Webb*, 324 Or at 386.

Here, the Oregon legislature did not separate the qualification of "for the purpose of charging that person with an offense" from "take a person into custody" with a comma. Accordingly, as a matter of grammar, as well as the

last antecedent rule, the phrase "for the purpose of charging that person with an offense" modifies only "take a person into custody." The court would have to insert a comma into ORS 133.005(1) in order for the statute to have the meaning defendant suggests, which it may not do. *See* ORS 174.010 (court is "not to insert what has been omitted, or to omit what has been inserted").

This court's previous decisions support the state's construction of the definition of "arrest" in ORS 133.005(1). In analyzing a statute, this court considers prior judicial construction of the statute. *See*, *e.g., Halperin v. Pitts*, 352 Or 482, 491, 287 P3d 1069 (2012) ("court's prior construction of a statute is an important consideration"); *State v. Cloutier*, 351 Or 68, 100, 261 P3d 1234 (2011) (the court's "analysis of [the statute] is also informed by this court's prior construction of that statute or its predecessors"); *State v. Murray*, 343 Or 48, 52, 162 P3d 255 (2007) ("At the first level of analysis of a statute, this court also considers case law interpreting that statute."). In three cases decided close together, this court construed an "actual or constructive restraint" by police officers to be an "arrest," as ORS 133.005(1) defines that term, even though the officers did not restrain the person in order to charge the person with an offense.

First, in *State v. Groda*, 285 Or 321, 591 P2d 1354 (1979), this court held that, when the police detain a person for any substantial amount of time, they arrest that person as that term is defined in ORS 133.005(1). In *Groda*, prior to formally arresting the defendant, the police took him into a room in a house,

advised him of his *Miranda* rights, patted him down, and took money and car keys from his pocket. The police then searched his car, which was parked outside the house, and discovered drugs. The issue on appeal was whether the searches of defendant and the car were lawful. This court concluded that when the police searched defendant in the house, they had done more than "stop and frisk" him. *Id.* at 325. The court held that police had "arrested" the defendant as that word is defined in ORS 133.005(1) because they placed him "under actual * * * restraint." *Id.* (omission in original). The court concluded that the subsequent search of defendant was valid as a search incident to arrest.[5] *Id.* at 326.

The court did not consider, and the parties apparently did not argue, that it was significant whether the officers detained defendant in the house to charge him with a crime. The case is nonetheless pertinent. If the court in *Groda* had understood the arrest statute to mean what defendant in this case says it does, then the court would necessarily have had to consider whether the officers planned to charge the defendant with an offense *at the time they detained him*. That the court did not consider the purpose of the detention supports the state's

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[5] This court ultimately concluded that the warrantless search of a briefcase that the police officers found in defendant's car trunk was unlawful even though the search of defendant and his car were lawful. *Groda*, 285 Or at 327-29.

position that the purpose is not pertinent to determining *whether* an arrest occurred. The restraint itself was sufficient to make it an arrest.

The second case, *State v. Heintz*, 286 Or 239, 594 P2d 385 (1979), is similar. This court again treated the "actual and constructive restraint" part of the definition of arrest in ORS 133.005(1), as independent from the clause "for purpose of charging the person with an offense." In *Heintz*, the defendant was in the hospital after he caused a fatal car collision. *Id.* at 241-42. The police took a sample of the defendant's blood to test its alcohol content. *Id.* at 242-43. Citing *Groda*, this court held that the law enforcement had "arrested" defendant at the time of the search because, although officers had not formally arrested the defendant, they had actually or constructively restrained him. *Id.* at 248. The court held that the search was a lawful search incident to arrest. *Id.* at 251. As in *Groda*, the court did not discuss, and the parties apparently did not argue about whether the actual or constructive restraint of defendant was "for the purpose of charging" him with a crime. *Id.* Again, that suggests that the purpose of the restraint did not matter in deciding whether the officers had arrested the defendant.

In the third case, *State v. Mendacino*, 288 Or 231, 603 P2d 1376 (1979), the question was whether the defendant's confession that he had murdered the victim was admissible. *Id.* at 233. This court concluded that, when a police detective treated defendant as a murder suspect, requested his clothing for

testing, and "would not have allowed defendant to leave," the defendant was under arrest as that term is defined in the ORS 133.005(1). *Id.* at 234 n 3. This court held that when the defendant then requested a lawyer, and police detectives ignored the request, they violated his constitutional rights. *Id.* at 238. As in *Groda* and *Heintz*, the court concluded that the defendant was "arrested" even though the officers did not initially detain him for the purpose of charging him with a crime, but rather to further investigate. Accordingly, all three cases support what the plain text of ORS 133.005(1) indicates—any detention by law enforcement, that is not a mere stop, is an arrest.

Defendant's arguments that the text of the definition of arrest leads to a different construction are unpersuasive. He acknowledges that applying the last antecedent rule to the definition of arrest results in the construction urged by the state. Pet BOM 19-20. He argues, however, that the last antecedent rule does not apply where a "contrary intention" appears in the statute, and that here such a contrary intention appears. Pet BOM 19-20. He maintains that because the legislature excluded "stop"—which is a temporary restraint by law enforcement officers—from the definition of "arrest," it could not have intended for every restraint by law enforcement officers to be an arrest. Pet BOM 21. And he contends that considering every restraint to be an arrest would render the exemption for "stops" meaningless. Pet BOM 21.

But the fact that the statute carves out a "stop" from an "arrest" actually supports the state's position. There would be no need for such a carve-out unless every actual or constructive restraint fit the definition of arrest. It makes more sense that the legislature intended *any* actual or constructive restraint by law enforcement to be an arrest, unless the restraint fits the statutory definition for a stop—that is, unless it is a merely a "temporary" restraint. *See* ORS 131.605(7) (defining "stop" as a "temporary restraint").

Defendant also recognizes that in *Groda* and *Heintz*, this court construed "actual or constructive restraint" in the statutory definition of arrest, to be independent from the clause "for the purpose of charging the person with an offense." Pet BOM 21. Defendant asserts, however, that the court's statements in *Groda* and *Heintz* are *dicta*. Pet BOM 21-24. That is incorrect. The court's statements were essential to its decisions in those cases and so were not *dicta*. *See Halperin*, 352 Or at 492 (*dictum* is a statement in a judicial opinion that is not necessary to the decision). In both *Groda* and *Heintz*, the issue was whether the police search was a valid search incident to arrest. The court held that the respective officers in each case "arrested" the defendant by placing him "under actual * * * restraint." In neither case did the court find that the restraint was for the purpose of charging the defendant with an offense.

Defendant argues, however, that because the officers in each case had probable cause at the time they detained the defendant, the officers *could have*

detained him "for the purpose of" charging him with an offense. Pet BOM 22. But those were not the facts in either case. In both cases, the officers detained the defendant to investigate further, not to charge him with a crime. The timing of the arrests was crucial to whether the ensuing search was lawful. Therefore, the court's construction of the "arrest" statute was necessary to its analysis of the searches and was not *dicta*.

Further, even if the court's construction of the definition of "arrest" in those earlier cases was *dicta*, it is still relevant and persuasive. *See Halperin*, 352 Or at 494 (even if prior construction is *dictum*, it "could have persuasive force"). For all of the reasons previously explained, this court's application of the definition of "arrest" in *Groda*, *Heintz*, and *Mendacino*, correctly recognizes that when law enforcement officers restrain a person for longer than a mere stop, the restraint constitutes an arrest even if the purpose is something other than to charge the person with an offense.

2. Legislative history confirms that the legislature intended a broad construction of "arrest" for purposes of resisting arrest.

Legislative history confirms that the legislature intended that the crime of resisting arrest would apply to any arrest by law enforcement, including detention for a parole or probation violation. The statute criminalizing resisting arrest was part of the Criminal Code drafted by the Oregon Law Commission. The Commission's purpose for including that crime was to reduce "civil

disorder and disrespect for the law." Proposed Oregon Criminal Code 204, Commentary (A) § 206 (1970). The Commission was concerned with "violence directed at the arresting officers" and "the threat to society posed by violent street confrontations between private citizens and the police." *Id.* It addressed that threat by criminalizing resisting arrest without regard to the authority for the arrest. *Id*. That purpose is served if the resisting arrest statute applies to *all* detention by law enforcement, not only when the detention is to charge the person with a new offense.

The original resisting arrest statute did not define "arrest." Or Laws 1971, ch 743, § 206. The Commission provided no indication that it intended to limit "arrest" to only those situations where law enforcement detained an individual in order to charge the person with an offense. When the Commission adopted the definition of "arrest," a person could be "arrested" for a parole or probation violation. ORS 144.350 (1969) (providing that the Director of Parole and Probation could issue an order for "arrest" for a parole or probation violation). Research counsel for the Commission stated that an arrest occurred "the moment the officer verbally and physically made it known that the individual was under arrest." Criminal Law Revision Commission, Minutes, January 23, 1970, 20 (statement of Robert D. Wallingford). Thus, the Commission appears to have intended to make it a crime to resist *any* arrest, without limitation.

The legislature amended the resisting arrest statute in 1997 to incorporate the definition of "arrest" in ORS 133.005(1). Or Laws 1997, ch 749, § 3. At the time, in addition to including the reference to the definition of arrest in ORS 133.005(1), the legislature added that an arrest "includes, but is not limited to the booking process." *Id*. The legislative history reveals that including the booking process was the legislature's focus. *See e.g.* Tape Recording, House Committee on Judiciary, HB 2992, Mar 27, 1997, Tape 18 A (statement of Rep. Floyd Prozanski). The legislative staff summary stated that the amendment to the resisting arrest statute "would eliminate any possible judicial interpretation of the statute that would exclude behavior, during the booking process, from the crime." Staff Measure Summary Conference Committee on SB 35.[6] Nothing in the legislative history suggests that the legislature intended to narrow the scope of arrests for purposes of the crime of resisting arrest. To the contrary, the legislature intended to expand the conduct that constituted resisting arrest. Tape Recording, House Committee on Judiciary, HB 2992, Mar 27, 1997, Tape 18 A (statement of Rep. Floyd Prozanski).

The legislature amended the resisting arrest statute again in 2005. Prior to 2005, the statute defining the crime of resisting arrest did not mention parole

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[6] The amendment started as part of House Bill 2992 (1997) and was then added as an amendment to Senate Bill 35 (1997). House Amendment A5, Committee on the Judiciary, June 13, 1997.

and probation officers—it referred only to peace officers. In 2005, groups acting on behalf of parole and probation officers introduced House Bill 3379 (2005). The bill's proponents wanted to address two issues. First, they wanted to clarify that the crimes of resisting arrest, ORS 162.315, and interfering with a peace officer, ORS 162.247, applied to parole and probation officers when they arrest an individual under their supervision for parole or probation violations. Testimony, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, June 10, 2005, Ex C (statement of Mary Botkin). Second, they wanted to clarify and possibly expand the general arrest authority of parole and probation officers to include criminal arrest warrants and criminal conduct in addition to arrests for parole or probation violations. *Id.*

HB 3379, as introduced, proposed to address those concerns by amending the definition of "peace officer" in ORS 161.015(4) to include parole and probation officers. That proposal was opposed, in part, because of concerns about expanding the parole and probation officers' authority to arrest people who were not under the Parole Board's supervision. The parties agreed to a compromise bill that established a task force to explore broader arrest authority for parole and probation officers. *See* Tape Recording, Senate Committee on Rules, HB 3379, June 27, 2005, Tape 129 A (statement of Brian DeLashmutt); Or Laws 2005, ch 668, § 7. The compromise bill also added "parole and probation officer" to ORS 162.315. Or Laws 2005, ch 668, § 2. Further, the

bill amended ORS 133.220 to recognize explicitly a parole and probation officer's authority to arrest under a warrant, or to arrest without a warrant for a parole or probation violation. Or Laws 2005, ch 668, § 4. Those changes clarified that the legislature intended that parole and probation officers are authorized to arrest people for parole or probation violations, with or without a warrant, and that resisting such arrests is a crime. *See* Tape Recording, Senate Committee on Rules, HB 3379, July 1, 2005, Tape 145 A and 146 A (statement of Sen. Charlie Ringo) (confirming that parole and probation officers may arrest a person on a warrant for a parole or probation violation and that arrests by parole and probation officers are subject to resisting arrest).

That was consistent with testimony presented on the bill. Proponents of the bill indicated that one of the reasons for the statutory amendments was to clarify that a person can be charged with resisting arrest if the person resists being detained for a parole or probation violation. A parole officer, testifying on behalf of one of the organizations that introduced the bill, described a situation in which he arrested one of his parolees on a parole violation, and the parolee resisted, causing significant risk of harm to the officer and five other parole officers. Tape Recording, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Tape 59 A (statement of Brennan Mitchell). The parole officer explained that it was not clear in that situation whether the state could charge the parolee with resisting arrest. *Id.* At a later

hearing, another parole officer emphasized the importance of parole officer safety when executing warrants for parole violations. Tape Recording, Senate Rules Committee, HB 3379, June 27, 2005, Tape 129 A (statement of Lucinda Carroll). Another proponent highlighted the importance of parole and probation officers being able to arrest offenders safely "on all lawful warrants." Testimony, Senate Rules Committee, HB 3379, June 27, 2005, Ex Z (testimony of Jennifer Cameron).

Although the legislative changes pertained to parole and probation officers, it would make no sense for the legislature to make arrests by parole and probation officers for parole or probation violations subject to resisting arrest, but to exclude arrests by peace officers for those same violations. The legislature apparently presumed that the statutes already made it a crime to resist a *peace officer* arresting a person on a warrant for a parole violation. A common theme expressed by proponents of the bill was that the law should protect parole and probation officers *to the same extent* the laws protect other law enforcement officers—and members of the subcommittee agreed. Tape Recording, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Tape 59 A (statement of Mary Botkin); Tape Recording, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Tape 130 A (statement of Chair Jeff Barker). The legislative history of the statutes—like the text, in context—supports the state's position

that law enforcement detaining a person for a parole or probation violation is an arrest for purposes of resisting arrest.

3. Alternatively, "context requires" that "arrest" for purposes of resisting arrest include law enforcement detaining a person for a parole or probation violation.

If the court does not agree with the state that "arrest," as defined in ORS 133.005(1), includes actual or constructive restraint, regardless of whether that restraint is for the purpose of charging the person with an offense, the court should still conclude that the resisting arrest statute applies to detention by law enforcement for a parole or probation violation. The statute defining "arrest" includes the phrase, "unless the context requires otherwise." ORS 133.005(1). If "arrest" as defined is limited to restraining a person for purposes of charging the person with an offense, then "context"—that is, the statutory scheme governing arrests for parole or probation violations—requires a broader definition be used with respect to the resisting arrest statute.

The legislature's inclusion of the phrase "unless the context requires otherwise" in a definition indicates that, "in some cases, the circumstances of a case may require the application of a modified definition of the pertinent statutory terms to carry out the legislature's intent." *Necanicum Inv. Co. v. Employment Dep't*, 345 Or 138, 142-43, 190 P3d 368 (2008). Accordingly, as part of the textual analysis of the statute, this court should "consider whether, in light of the factual context and the entire statutory scheme, the use of a

particular statutory definition would be inappropriate because the result would conflict with one or more aspects of the legislature's intent." *Id.* As explained below, context requires a broad definition of arrest.[7]

Context requires that arrest for purposes of resisting arrest include detaining a person on a warrant for a parole violation. As briefly explained above, the Parole Board has authority to issue arrest warrants for parole and probation violations. ORS 144.331(1). In addition to authorizing such arrest warrants, the legislature made it mandatory for a peace officer to detain an individual when the officer determines that there is an outstanding warrant for a parole or probation violation. ORS 144.331 (peace officer "shall execute" arrest warrant for a parole or probation violation); *see Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 346 Or 415, 426-27, 212 P3d 1243 (2009) ("shall" in a statute creates a mandatory duty). As explained above, the purpose of criminalizing resisting arrest was to encourage orderly arrests and protect officers and the public from violence. *See* Proposed Oregon Criminal

[7] As described, the statute defining arrest states, "[a]s used in ORS 133.005 to 133.400 and 133.410 to 133.450, unless the context requires otherwise." ORS 133.005(1). Defendant argues that because the resisting arrest statute, ORS 162.315, is not one of the identified statutes, the "context requires otherwise" provision does not apply. Pet BOM 25. He is wrong. The resisting arrest statute specifically relies on the definition in ORS 133.005(1). That statute, in turn, *is included* in the list of statutes for which the definition of arrest may differ if context so requires. Accordingly, the "context requires otherwise" provision may apply to construing "arrest" for resisting arrest statute.

Code 204, Commentary (A) § 206 (1970) (criminalizing resisting arrest because of concern about "civil disorder" and violence during an arrest). The safety of parole and probation officers was one of the driving forces behind adding them to the resisting arrest statute in 2005. *See* Tape Recording, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Tape 59 A (statement of Brennan Mitchell) (describing dangerous arrest situation he experienced as a parole officer); Tape Recording, Senate Committee on Rules, HB 3379, June 27, 2005 (statement of Lucinda Carroll) (describing dangerous arrest situation that a fellow parole officer experienced). Given the rationale for enacting the crime of resisting arrest, the legislature could not have intended to authorize arrest warrants for parole or probation violations and require law enforcement officers to execute those warrants, but exclude such detentions from the crime of resisting arrest. The trial court correctly denied defendant's motion for judgment of acquittal because when he resisted being detained on a parole violation, he resisted arrest.

B. The state agrees that the trial court erred in admitting evidence of defendant's prior conviction for resisting arrest; however, the error was harmless.

At trial, the state introduced evidence related to defendant's prior conviction for resisting arrest to prove that defendant intentionally resisted arrest in this case. Defendant objected to that evidence. As explained below, the state concedes that the trial court should not have admitted the evidence

because defendant's prior resisting arrest conviction did not satisfy the standard for admissibility articulated by this court in *State v. Johns*, 301 Or 535. However, this court should nonetheless affirm because the error was harmless.

In *Johns*, this court considered whether it was appropriate to admit evidence of the defendant's prior bad acts pursuant to OEC 404(3). 301 Or at 542. In so doing, the court applied the doctrine of chances. *Id.* at 552-55. The court explained that while "sometimes one prior similar act will be sufficiently relevant for admissibility," generally when the prior similar act is "unremarkable" rather than a "complex act requiring several steps," it will not qualify. *Id.* at 555.

This court recently applied its reasoning from *Johns* in *Leistiko*, 352 Or at 186. In *Leistiko*, this court held that the fact that defendant had previously resorted to force when a woman resisted his sexual advances was not a "complex factual scenario" that would suffice to establish intent under the doctrine of chances. 352 Or at 186. Here, defendant's single prior incident of resisting arrest was dissimilar and was not a complex act. The trial court should not have admitted it under the *Johns* test.

But this court should nonetheless affirm defendant's conviction because admission of evidence related to defendant's prior conviction for resisting arrest was harmless. OEC 103(1) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party

is affected * * * ." A criminal defendant who assigns error to the admission of evidence therefore "must establish that the error was not harmless." *State v. Lotches*, 331 Or 455, 487, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001). Moreover, Article VII (Amended), section 3, of the Oregon Constitution requires an appellate court to affirm a conviction, notwithstanding evidentiary error, if there is little likelihood that the error affected the verdict. *State v. Davis*, 336 Or 19, 33, 77 P3d 1111 (2003). In this case, the evidentiary error was harmless because the two arresting officers both testified at defendant's trial and their testimony, described below, was clear and established that defendant intentionally resisted arrest.

The two arresting officers, Shaw and Reister, testified to the following. Both officers were wearing their police uniforms when they encountered defendant. Tr 120. Officer Shaw told defendant that there was a warrant outstanding for his arrest. Tr 82. Defendant asked, "For what? For what?" Tr 132. As soon as the officers tried to handcuff defendant, defendant immediately tensed up and started pulling away. Tr 133. Defendant's reaction was more than just surprise at being grabbed by the officers. Tr 134. The officers tried to take defendant into "two-on-one custody," meaning that the two officers grabbed defendant at the same time. Tr 132. Each officer tried to get control of one side of defendant. Tr 134-35.

Officer Shaw was trying to get control of defendant's right arm and hand. Tr 82, 135. Defendant grabbed the back of his neck with his right hand and locked his arm tight so that Officer Shaw could not get defendant's arm in a position to handcuff him. Tr 83, 101. Officer Shaw said, "Give me your arm" and unsuccessfully tried to pull defendant's right arm down. Tr 83. As Officer Shaw was trying to pull defendant's right arm down, defendant grabbed onto Officer Shaw's left hand. Tr 83. Defendant squeezed Officer Shaw's knuckles together, causing the officer significant pain. Tr 83, 102. Officer Shaw again told defendant to give him his arm, that he was under arrest, and to stop resisting. Tr 83, 87. Defendant refused to comply. Tr 83, 87.

Meanwhile, Officer Reister was trying to get control of defendant's left hand and arm. Tr 135. Defendant was able to maneuver out of Officer Reister's first two control techniques. Tr 134-35. Officer Reister was surprised at defendant's "extraordinary amount of strength." Tr 136. Officer Reister, like Officer Shaw, repeatedly told defendant to "stop resisting" and "you're under arrest." Tr 136.

Having been unable to get control of defendant's left hand while defendant was standing, Officer Reister attempted to get defendant onto the ground. Tr 135-36. Defendant grabbed a lamppost to prevent being taken to the ground. Tr 84, 87, 139. It was chaotic; defendant was struggling against the officers the entire time, "yelling and screaming, thrashing about" and

"pulling away to both sides." Tr 140, 142. Eventually, Officers Shaw and Reister were able to press defendant up against the lamppost and hold him there. Tr 139-40. Two private security officers came running across the street and helped get control of defendant so that he could be handcuffed. Tr 141-42.

The officers' testimony was clear and compelling. In fact, defendant did not dispute that the above took place. Rather, defendant argued that the officers created the chaotic situation by not communicating with each other, that defendant was protecting himself, and that defendant grabbed the lamppost to stop himself from falling to the ground. Tr 220-24, 227. In view of the unambiguous testimony from Officers Shaw and Reister, there is little likelihood that the additional evidence related to defendant's previous incident of resisting arrest had any impact on the jury's verdict. Therefore, even though admission of the prior conduct evidence was in error, this court should affirm.

CONCLUSION

For all the reasons explained above, this court should affirm the judgments of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 21, 2013, I directed the original Respondent's Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Jedediah Peterson, attorneys for appellant/petitioner on review, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,403 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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