IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. ALEN VLADIMIR SIMONOV, Defendant-Appellant, Respondent on Review.	Umatilla County Circuit Court No. CF110325 CA A151415 SC S063135

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Umatilla County
Honorable CHRISTOPHER BRAUER, Judge

Opinion Filed: March 18, 2015
Before: Sercombe, P.J., Tookey, J., and Hadlock, J.

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INTRODUCTION

To effectuate a preference against strict-liability offenses, the 1971 Oregon Legislative Assembly provided that, even if a statute does not prescribe a culpable mental state, culpability generally is required and "is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence." The legislature simultaneously adopted an "element by element" approach to culpable mental states, under which different elements of the same crime may require proof of different culpable mental states. As defined by the Oregon Criminal Code, those culpable mental states may apply to an element depending on whether the element describes "conduct," a "circumstance," or a "result." As relevant here, "criminal negligence" is the minimum culpable mental state that can apply to a "circumstance" element.

The question in this case is whether, for purposes of the statute defining unauthorized use of a vehicle (UUV), an element such as the victim's lack of consent to the defendant's conduct constitutes a "circumstance" to which criminal negligence—the failure to be aware of a substantial risk that a circumstance that is an element of a crime exists—can apply, or whether the state must prove some other culpable mental state. Because the victim's lack of consent is merely an accessory fact that accompanies the defendant's physical

act of using the vehicle, it is a "circumstance" element to which criminal negligence can apply.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

First Question Presented

For an element that describes a victim's lack of consent to a defendant's conduct, what is the minimum culpable mental state that the Oregon Criminal Code requires the state to prove, assuming that the statute defining the crime does not explicitly prescribe a culpable mental state?

First Proposed Rule of Law

If a statute that defines a crime does not expressly refer to a culpable mental state, and if an element of the crime can be described as a "circumstance," proof of criminal negligence suffices to establish the requisite mental state. Because a victim's lack of consent to a defendant's conduct is an accessory fact that accompanies a defendant's acts, the lack of consent is a "circumstance." Consequently, with respect to an element describing a victim's lack of consent, proof that the defendant was criminally negligent suffices.

Second Question Presented

For purposes of the crime of UUV, which requires proof that a defendant used the vehicle "without consent of the owner," is the owner's lack of consent a "circumstance" element to which criminal negligence can apply?

Second Proposed Rule of Law

Yes. The "without consent" element in the UUV statute describes an accessory fact that accompanies the defendant's acts. For that reason, it is a circumstance to which criminal negligence can serve as a minimum culpable mental state.

STATEMENT OF FACTS

While discussing a possible vehicle purchase, defendant and his brother arranged with a neighbor, to take vehicle to a car wash in Pendleton to check for an oil leak. Twenty minutes later, when they had not returned, called defendant, who told her that they had taken the truck to a mechanic's shop instead. told defendant to return the truck, but he did not, so she reported the truck stolen. 269 Or App at 737. Defendant later left a voicemail saying that the men had taken the truck to Portland but were about to return. They returned the truck several hours later. *Id*. at 738.

The state charged defendant with violating ORS 164.135(1)(a), which provides that a person commits the crime of unlawful use of a vehicle when he or she "takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner." The indictment specifically alleged a culpable mental state of "criminal negligence" for the crime.

At trial, defendant claimed that his brother had obtained permission to use the truck, and that he did not know that their use of the vehicle exceeded what had authorized. *Id.* at 738. To support that theory, defendant requested special jury instructions that would have informed the jurors that defendant could be guilty only if he "knew the use of the [vehicle] was without the consent of the owner," and that he had "actual knowledge" that the vehicle's owner had not consented to the use. (App Br, ER-9).

The trial court refused to give defendant's requested instruction and instructed the jury that, for purposes of the "without consent" element, the state needed to prove only that defendant acted with criminal negligence as defined in ORS 161.085(10)—*i.e.*, that he "failed to be aware of a substantial and unjustifiable risk that he did not have the consent of the owner." (Tr 253-54). The jury found defendant guilty, and he appealed.

On appeal, defendant assigned error to the court's instruction on lack of consent and criminal negligence and to its refusal to give his proposed jury instructions. (App Br 4-5). The state argued that the trial court correctly instructed the jury consistently with ORS 161.115(2), which provides that, if the legislature has not prescribed a culpable mental state, *any* of the applicable culpable mental states—intent, knowledge, recklessness, or criminal negligence—will suffice. (Resp Br 6). The Court of Appeals reversed, concluding that it was bound by several of its prior decisions that hold that, for

the crime of UUV, "knowledge" is the minimum culpable mental state that can apply to a vehicle owner's lack of consent. *State v. Simonov*, 269 Or App 735, 743, 346 P3d 589 (2015).

SUMMARY OF ARGUMENT

The statute that defines the crime of UUV, ORS 164.135, does not provide a culpable mental state for any of its elements, but Oregon law nonetheless requires that the state prove some level of culpability. The trial court correctly instructed the jury that the culpable mental state of "criminal negligence" could serve as the culpable mental state with respect to the fact that the victim did not consent to the use of the vehicle.

In Oregon, the culpable mental states that can apply to a particular element will depend on whether the element is one that describes "conduct," a "circumstance," or a "result." Criminal negligence is the lowest level of culpability in Oregon, and, by definition, can apply to "circumstances" or to "results." As long as criminal negligence is one of the available culpable mental states for an element, proof of criminal negligence suffices, even if the state would also be free to prove one of the higher culpable mental states of knowingly or recklessly. The dispositive issue in this case thus is whether a victim's lack of consent, for purposes of the crime of UUV, constitutes a "circumstance."

The text and legislative history of the term "circumstance" shows that it refers to an accessory fact that accompanies the offender's acts. Under that definition, a victim's lack of consent is a "circumstance" to which criminal negligence can apply. That conclusion thus applies to the lack-of-consent element of UUV, and nothing in the UUV statute itself requires a different interpretation. Therefore, the trial court correctly concluded that criminal negligence can serve as a minimum culpable mental state for the "without consent" element of UUV.

ARGUMENT

A. To determine the minimum culpable mental state that applies to an element, the court must determine whether the element describes a circumstance, a result, or conduct.

The issue presented in this case is, for purposes of the UUV statute, the minimum culpable mental state that can apply to the victim's lack of consent to the defendant's use of the vehicle. Because the UUV statute does not prescribe a culpable mental state for any of the elements of that crime, general culpability provisions govern that question. For that reason, the state begins by discussing those general rules.

1. Oregon law generally requires some culpable mental state.

Despite the lack of an express culpable mental state requirement, UUV is not a strict-liability offense. Rather, the Oregon Criminal Code contains

general culpability requirements that require proof of a culpable mental state for most offenses. ORS 161.115(2) provides:

> Except as provided in ORS 161.105 [which outlines the legislature's authority to create violations or strict-liability crimes], if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence.

Thus, the legislature has determined that, as a default matter, crimes require proof of *some* culpable mental state unless the legislature classifies the offense as a strict-liability offense or a violation.[1] As this court has noted, "the statutory directive to imply a culpable mental state is consistent with one of the declared purposes of the Oregon Criminal Code—to 'limit the condemnation of conduct as criminal when it is without fault.'" *State v. Rutley*, 343 Or 368, 375, 171 P3d 361 (2007), *quoting* ORS 161.025(1)(d).

2. Most elements require proof of a culpable mental state.

The general requirement of a culpable mental state for criminal liability does not determine *which* elements require proof of a culpable mental state. To that end, ORS 161.095(2) provides:

> Except as provided in ORS 161.105, a person is not guilty of an offense unless the person acts with a culpable mental state with

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[1] The four available culpable mental states referenced in ORS 161.115(2) are defined in ORS 161.085. The state will discuss the applicability of the particular culpable mental states in the sections that follow.

> respect to each material element of the offense that necessarily requires a culpable mental state.

Therefore, for crimes that are neither violations nor strict-liability offenses, the requirement of a culpable mental state with respect to a particular element depends on whether a culpable mental state is "necessarily required."

This court has seldom discussed how to determine whether a culpable mental state is "necessarily required" with respect to a particular element. However, its prior discussion of the issue, relying on the commentary to the 1971 code, establishes that the category of offenses that "necessarily require[]" a culpable mental state broadly includes any element other than those that relate "solely to the statute of limitations, jurisdiction, venue and the like." *State v. Blanton*, 284 Or 591, 595, 588 P2d 28 (1978). In short, unless a crime is defined as a violation or as a strict-liability offense, each of its elements normally will require proof of a culpable mental state.

In this case, the parties and the trial court assumed that a culpable mental state is required for the lack-of-consent element for UUV, and instead addressed only *which* of the culpable mental states was the minimum level of culpability. Therefore, the question of whether a culpable mental state is required is not squarely before this court. But, because it is a preliminary question in applying the culpability provisions, the state acknowledges that, under *Blanton,* a culpable mental state is "necessarily required" for the "without

consent" element of UUV. The lack of consent of the owner is a material element, and it is not one that relates to statute of limitations, jurisdiction, or venue. Moreover, because the owner's lack of consent is a fact that makes otherwise innocent conduct—the use of a vehicle—criminal, the state acknowledges that, whatever the precise scope of ORS 161.095(2), an element of that type is one that "necessarily requires" proof of a culpable mental state.

3. The applicable culpable mental states for an element depend on the type of element involved.

Even when proof of a culpable mental state is "necessarily required" with respect to an element, ORS 161.095(2) does not designate which mental state applies to that element. For that purpose, the legislature has broadly stated that culpability is satisfied if the defendant "acts intentionally, knowingly, recklessly or with criminal negligence." ORS 161.115(2).[2] That authorization is limited only to the extent that the definitions of those culpable mental states logically preclude application to the type of element in question.

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[2] The first several drafts of the provision that was ultimately codified at ORS 161.115(2) did not include any reference to criminal negligence, and stated that culpability could be satisfied if the defendant acted "intentionally, knowingly, or recklessly." *See* Preliminary Draft No. 2, Art 2, § 3 (February 1969); Preliminary Draft No. 3, Art 2, § 3 (March 1969). For that reason, some discussions at early committee hearings state that criminal negligence would not apply unless the substantive statute allows it. *See* Minutes, Criminal Law Revision Commission, Subcommittee No. 1, December 18, 1968. However, the final draft includes criminal negligence as one of the default culpable mental states.

Under ORS 161.085, the application of each culpable mental state to a particular element depends on whether the element describes conduct, a circumstance, or a result:

> (7) "Intentionally" or "with intent," when used with respect *to a result or to conduct* described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.
>
> (8) "Knowingly" or "with knowledge," when used with respect *to conduct or to a circumstance* described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.
>
> (9) "Recklessly," when used with respect *to a result or to a circumstance* described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.
>
> (10) "Criminal negligence" or "criminally negligent," when used with respect *to a result or to a circumstance* described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists.

(Emphasis added.) Under those definitions, the culpable mental state of "intentionally" applies only to a result or conduct. "Knowingly" can apply to elements that describe conduct or circumstances. And "recklessly" and "criminal negligence" apply to elements that describe results or circumstances.

As explained above, ORS 161.115(2) expressly provides that *any* of the statutory culpable mental states is sufficient to establish culpability with respect

to an element. And, because ORS 161.115(3) provides that proof of a higher culpable mental state will satisfy a requirement of a lower culpable mental state, the prosecution may choose to proceed on a theory that requires proof of only the minimum culpable mental state for the element at issue. The only limitation on the application of each of the culpable mental states to an element is the definition of the culpable mental state itself. That is, because each of the culpable mental states is defined with respect to particular types of elements—conduct, circumstances, and results—the application of a particular culpable mental state depends on the type of element at issue.

Here, the question in this case is whether the "without consent" element of UUV is a "circumstance." If so, the minimum culpable mental state of criminal negligence can apply, and proof of criminal negligence satisfies the UUV statute's culpable mental state requirement. As explained in the sections that follow, the Court of Appeals incorrectly concluded that only proof of the higher culpable mental state of "knowingly" can suffice. Rather, this court should conclude that criminal negligence is a sufficient culpable mental state for that element.

The culpable mental state on which the trial court instructed the jury here—criminal negligence—applies "to a result or to a circumstance described by a statute defining an offense," and means that the person "fails to be aware of a substantial and unjustifiable risk that the result will occur or that the

circumstance exists." ORS 161.085(10). No plausible reading of the term "result" would encompass a victim's lack of consent to the defendant's conduct. Therefore, criminal negligence is a permissible minimum culpable mental state for the victim's lack of consent only if the "without consent" element is a "circumstance." As explained below, lack of consent is a "circumstance."

B. Because the victim's lack of consent is a circumstance, negligence is a sufficient culpable mental state.

1. The legislature intended a "circumstance" to mean an accessory fact that accompanies the defendant's acts.

Whether the victim's lack of consent is a "circumstance" within the meaning of the definition of criminal negligence is a question of statutory interpretation. When construing a statute this court's goal is to discern the legislature's intent. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). Here, the statutory text, context, and legislative history show that an element describing the victim's lack of consent is a "circumstance" to which criminal negligence can apply.

a. The statutory text shows that an element describing a victim's lack of consent is a "circumstance" for purposes of the definitions in ORS 161.085.

Oregon law does not define the terms "result" or "circumstance." It does, however, define "conduct," which provides an important starting point for the analysis. "Conduct" is an "act or omission and its accompanying mental state."

ORS 161.085(4).[3] Moreover, as used in the definitions of the respective culpable mental states, the term "conduct" refers to the *offender's* conduct. *See* ORS 161.085(7)-(8) (referring to the offender's intent or knowledge with respect to his conduct).

When the legislature uses different terms in a single statute, this court assumes that it "intends different meanings for those terms." *Dept. of Transportation v. Stallcup*, 341 Or 93, 101, 138 P3d 9 (2006), *citing State v. Keeney*, 323 Or 309, 316, 918 P2d 419 (1996). As a general rule, this court construes statutes to give effect to all of their provisions. *Crystal Communications, Inc. v. Dept. of Rev.*, 353 Or 300, 311, 297 P3d 1256 (2013). The legislature's use of the three distinct terms "conduct," "circumstances," and "results" demonstrates that circumstance and result elements must relate to something other than the offender's conduct.

When a statute does not contain a specific definition, this court assumes that the legislature intended the word to carry its ordinary meaning. *Powerex Corp. v. Department of Revenue*, 357 Or 40, 61, 346 P3d 476 (2015). The relevant dictionary definition of "circumstance" is " **1 a :** a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of

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[3] An "act" means a "bodily movement." ORS 161.085(1). Moreover, to be criminal, an act must be "voluntary." ORS 161.095(1).

the prevailing conditions in which it exists or takes place **:** a condition, fact, or event accompanying, conditioning, or determining another **:** an adjunct or concomitant that is present or logically likely to be present." *Webster's Third New Int'l Dictionary* 410 (unabridged ed 1961). That definition supports a conclusion that a "circumstance," for purposes of the statutory culpable mental states, refers to a condition that exists apart from, and accompanies, the element or elements that describe the defendant's act or conduct.

Although this court has not expressly defined the term "circumstance," it has provided helpful guidance on its meaning. This court examined that term in *State v. Crosby*, in the context of a defendant's challenge to jury instructions on recklessness in her manslaughter trial. In that case, the defendant was alleged to have recklessly caused her mother's death by neglect that led to bedsores that became infected and could not be treated. *Crosby*, 342 Or 419, 421,154 P3d 97 (2007). Because the statutory definition of "recklessness" refers to both results and to circumstances, the trial court had instructed the jury in those general terms. *Crosby*, 342 Or at 423. In response to a question by the jury whether defendant's disregard of the "circumstance" that the victim had bedsores could support a finding of recklessness for the homicide, the trial court stated, "[t]he phrase 'that a particular circumstance exists' does not necessarily mean only one thing in this case." *Id.* at 427. That is, the trial court's instruction told the jurors that they could base their decision on the defendant's disregard of *either*

the risk that the victim would develop bedsores *or* the risk that she would die. *Ibid.*

This court reversed, concluding that the crime of manslaughter does not refer to circumstances, but, rather, refers only to a *result*—death. This court reasoned that "death" is not a circumstance because it is "not merely an accessory fact that accompanies the defendant's conduct." *Id.* at 430. For that reason, the jury instruction referring to a "circumstance" was improper. *Id.* at 431.

This court's characterization of a circumstance as an "accessory fact that accompanies the defendant's conduct" is consistent with the dictionary definition of the term, which refers to a fact that accompanies another fact or event. Moreover, that characterization gives effect to the legislature's use of distinct terms for different types of elements.

b. Legislative history confirms that accessory facts that accompany the defendant's acts are "circumstances."

In adopting the Oregon Criminal Code, the 1971 legislature followed the approach of the Model Penal Code in distinguishing between elements describing conduct, circumstances, and results in its definitions of the culpable mental states. Commentary to Criminal Law Revision Commission Proposed

Oregon Criminal Code, Final Draft and Report, § 11, 10 (July 1970).[4] The commentary to the revised criminal code provides examples that offer helpful insight into what the drafters believed "circumstance" to mean. In discussing the definition of "knowingly," the commentary explains the decision not to include a reference to results, but, rather, only to conduct and circumstances. *Ibid.* The commentary explains that "knowingly" applies only to "awareness of the nature of one's conduct or of the existence of specified circumstances (*e.g.*, that property is stolen, that one has no right to enter a building, etc.)." *Ibid.* Those examples show that the drafters considered facts such as the character of property or the lack of authorization to engage in conduct to be "circumstances," not "conduct." The drafters' understanding, then, is consistent with *Crosby*'s description of a "circumstance" as an accessory fact that accompanies the defendant's conduct. And, as explained in the previous section, a victim's lack of consent to use of a vehicle is a "circumstance" under that interpretation.

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[4] The Model Penal Code provides a definition for "element of an offense" that includes: "(i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct" as is provided in the description of the offense. MPC § 1.13(9). Its definitions of the four culpable mental states are not identical to those in Oregon, but they do similarly distinguish between conduct, attendant circumstances, and results. MPC § 2.02(2)(a)-(d).

The audiotapes of the early subcommittee discussions of the culpability provisions are not as helpful as the commentary itself, because of the preliminary nature of the discussions and the novelty of the Model Penal Code distinctions. Nevertheless, the subcommittee members consistently used the term "conduct" to refer to an offender's physical act, and "circumstance" to refer to a fact that accompanies or characterizes that act. Specifically, the committee members discussed at length the distinction between conduct and circumstances, and characterized as "circumstances," for the crimes of statutory rape and forcible rape, facts such as the victim's age or lack of consent to sexual intercourse. Tape Recording, Criminal Law Revision Commission, Subcommittee No. 1, Dec 18, 1968, Tape 29, Side 1 (statement of Courtney Arthur) (using lack of consent as an example of an attendant circumstance).[5] In

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[5] That interpretation is consistent with the understanding of the Model Penal Code's drafters, on which the drafters of the Oregon provision relied heavily. The Model Penal Code itself does not define the term "circumstance," but the Oregon subcommittee would have had available to it the comments to the 1955 tentative draft of the culpability provisions in MPC § 2.02, in which the drafters discussed the distinction between conduct and circumstances—and identified lack of consent as a "circumstance"—in the context of the crime of rape:

> A purpose to effect the sexual relation is most certainly required. But other circumstances also are essential to establish the commission of the crime. The victim must not have been married to the defendant and her consent to sexual relations would, of course, preclude the crime. Must the defendant's purpose have encompassed the facts that he was not the husband of the victim

Footnote continued…

discussing the crime of burglary, the committee members similarly described the "entry" as conduct, and the fact that a building is a dwelling, and even the fact that the defendant was armed with a deadly weapon at the time of the burglary, as circumstances. Tape Recording, Criminal Law Revision Commission, Subcommittee No. 1, Dec 18, 1968, Tape 29, Side 2 (statements of Courtney Arthur and other unidentified subcommittee members).[6] Although the committee members did not arrive at a comprehensive definition of "circumstance," each example that the members discussed as a "circumstance" shares the quality that it is an element describing a fact that accompanies the offender's physical act.

(…continued)

> and that she opposed his will? These are certainly entirely different questions. Recklessness, for example, on these points may be sufficient although purpose is required with respect to the sexual result with is an element of the offense.
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> Model Penal Code, Tentative Draft No. 4, Comments § 2.02, 124.

[6] The early subcommittee discussions reveal some confusion at times, with members occasionally using the term "circumstances" to refer to facts collateral to the elements of the crime, such as the fact that a murder victim had previously threatened the victim. Tape Recording, Criminal Law Revision Commission, Subcommittee No. 1, Dec 18, 1968, Tape 29, Side 2. But because such a collateral fact is not an element of the crime, it would not be subject to culpability requirements, and those comments seem to have missed the point. However, the general theme throughout the discussions is that circumstances are facts that exist apart from, but accompany, the "acts" of the offender.

A victim's lack of consent is an element that describes a fact that accompanies the offender's physical act. It is one of the examples the subcommittee members expressly used in describing "circumstances," and is akin to other facts that the subcommittee members described as circumstances, such as a victim's age, the fact that property is stolen, and that an entrant into a building lacks permission to do so.

In sum, the text and the legislative history of the general culpability provisions demonstrate that when a victim's lack of consent is an element, it constitutes a "circumstance," and that the criminal-negligence culpable mental state applies.

2. For purposes of the UUV statute, a victim's lack of consent is an accessory fact and thus a "circumstance" to which criminal negligence can apply.

As the previous discussion demonstrates, the drafters of the general culpability provisions would have viewed an element such as the victim's lack of consent as a "circumstance," rather than conduct. It is a fact that exists independent from the offender's physical acts, and therefore is distinguishable from "conduct." The only remaining question is whether, when a defendant is prosecuted for UUV, anything in the text or history of the UUV statute itself requires a different conclusion. It does not.

A person commits UUV if the person "takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without

consent of the owner." ORS 164.135(1)(a). The statute, therefore, first describes the offender's conduct—*i.e.*, the ways in which the defendant can "use" the vehicle. It then describes the fact that the offender did so "without consent of the owner." The owner's lack of consent is a fact that exists apart from and accompanies the offender's use of the vehicle. Nothing in that phrasing suggests that the legislature intended to create a single "conduct" element or to deviate from its general approach to elements that are accessory facts to the offender's conduct, such as the fact that a victim has not consented to the conduct.

The phrasing of the UUV statute is distinguishable from the phrasing of other statutes that contain qualifying terms that cannot logically be separated from the offender's conduct. For example, in *State v. Olive*, 259 Or 104, 312 P3d 588 (2013), the Court of Appeals examined the text of the statute defining the crime of resisting arrest to determine whether it required the state to prove that, at the time of his conduct, the defendant *knew* that he was being arrested (and therefore intended to resist arrest). That statute states that a person resists arrest "if the person intentionally resists a person known to be a peace officer or parole and probation officer in making an arrest." ORS 162.315(1). The Court of Appeals concluded that, as a grammatical matter, that phrasing showed that the legislature intended that the mental state of "intentionally" applies not only to the conduct of *resisting a person*, but to the conduct of "resisting a person in

making an arrest." *Olive*, 259 Or App at 112 (emphasis in original). In arriving at that conclusion, the court considered the first draft of the provision, which used the phrase "prevent or attempt to prevent a person from making an arrest." *Id.* at 111. The court noted that it does not make sense to say that a person "intentionally prevent[ed] or attempt[ed] to prevent a person," and that that phrase describing the defendant's conduct would be "incomplete" without reference to the arrest. *Ibid.* And the fact that the legislature later had substituted the term "resist" in the place of "prevent or attempt to prevent" did not indicate an intent to make "from making an arrest" a separate "circumstance" element that could be subject to a different culpable mental state than that used to describe the act of resistance. *Id.* at 112.

By contrast, the phrase in the UUV statute that describes the offender's conduct—that the person "takes, operates, exercises control over, rides in or otherwise uses another's vehicle"—is not an incomplete phrase. The owner's lack of consent is not necessary to describe the element that describes the offender's act. Therefore, unlike the incomplete phrase "resists a person," the phrase "takes * * * another's vehicle" is a complete one that describes the "conduct" element of the crime.[7]

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[7] The UUV statute was tentatively approved in its current form by the Criminal Law Commission in July 1968. Minutes, Criminal Law Revision Commission, July 19, 1968, 2. The subcommittee discussions of the general

Footnote continued…

In sum, based on the text and the legislative history of the culpability statutes and the UUV statute itself, this court should conclude that a culpable mental state of criminal negligence is the minimum culpable mental state for the "without consent of the owner" element of UUV.

CONCLUSION

The trial court correctly denied defendant's requests for jury instructions requiring proof that he acted "knowingly" with respect to the victim's lack of consent to the use of the vehicle. The Court of Appeals erroneously concluded

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(…continued)
culpability provisions began in December 1968. Minutes, Subcommittee No. 1, Criminal Law Revision Commission, December 18, 1968, 1. For that reason, the legislative history of the "without consent" element in the UUV statute itself contains no discussion of how the drafters would characterize its elements under the "conduct vs. circumstances" framework.

Early legislative history of the general culpability provisions contains one discussion of UUV as an example of how a statute without an express culpable mental state nonetheless would be subject to the general rules. However, those early discussions do not reflect a cohesive understanding of the distinction between conduct and circumstances, and do not address the "without consent" element at all. For example, when asked how the general rule would apply, Professor Arthur replied: "This draft would say that the elements of culpability required for guilt of that offense would be that you intentionally used the other guy's car, or that you used it knowing that you were using the other guy's car." Tape Recording, Criminal Law Revision Commission, Subcommittee No. 1, Dec 18, 1968, Tape 29, Side 1 (reel-to-reel counter at 310) (statement of Courtney Arthur). Therefore, although the subcommittee discussed the crime of UUV, the discussions do not illuminate the issue presented here.

otherwise. This court should reverse the opinion of the Court of Appeals and should affirm the judgment of conviction and sentence.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 6, 2015, I directed the original Brief on the Merits of State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Lindsey Burrows, attorney 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 5,355 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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