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

BRIEF ON THE MERITS – PETITIONER ON REVIEW

Review of the decision of the Court of Appeals on an 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: October 24, 2012
Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge

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

Review Allowed: March 28, 2013

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BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

I. QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented: Does a person commit the felony offense of unlawful use of a weapon, ORS 166.220(1)(a), by carrying a dangerous weapon with the intent to merely threaten someone?

Proposed Rule of Law: The legislature intended to make it a felony for a person to attempt to cause bodily injury to another with dangerous weapons, or objects appropriated as weapons, going so far as to prohibit the possession of such a weapon or object when the person intends to use it to cause bodily injury. The legislature did not intend to make it a felony to possess a weapon, or an object that *could* be used as a weapon, when the person does not intend to use it to harm anyone—such as when a person intends merely to scare another.

II. STATEMENT OF THE CASE

This consolidated case stems from two petitions to review decisions that affirmed a conviction for unlawful use of a weapon. *State v. Ziska*, 253 Or App 82, 288 P3d 1012 (2012); *State v. Garza*, 253 Or App 551, 291 P3d 774 (2012) (per curiam; citing *Ziska*)). Defendants argued below that intending merely to *threaten* to use a weapon to injure another was not the intent "to use" the weapon within the meaning of ORS 166.220(1)(a).

A. Defendant Ziska

The Court of Appeals opinion includes the pertinent facts:

> "After an evening of drinking with friends, defendant [Ziska] got into an argument with one of his housemates, A, while sitting in their living room. Tensions rose, and defendant eventually stood and challenged A to a fight. Others intervened, and a houseguest escorted A into the backyard in order to defuse the situation. Defendant, in turn, went to his room.
>
> "Minutes later, defendant returned to the living room carrying a crowbar and sat down in a chair. A came back inside and also walked into the living room. During their subsequent exchange, defendant, who was still upset with A, would raise the crowbar and wave it above his head. Eventually, defendant stood, raised the crowbar, and said, 'I'm going to level you.' A believed that defendant was coming toward him and intended to hit him with the crowbar. Several people intervened at that point, disarmed defendant, separated defendant and A, and called the police.
>
> "Police arrived, took defendant into custody, and gave him *Miranda* warnings. As police questioned him at the scene, defendant, who was noticeably intoxicated and upset, explained that A had offended him. A, who was much younger than defendant, had called defendant names, and defendant felt that A was belittling him.[1] Defendant initially denied having brought the crowbar to the living room, although he eventually admitted having done so for his protection. Aside from A's derisive comments, however, defendant did not explain why he had felt threatened. Defendant claimed that he had kept the crowbar behind his back and that nobody could see it, yet he acknowledged that his housemates had forcibly taken it from him. When asked

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[1] The opinion's statement of facts (with which defendant Ziska has no quarrel) saves mention of his sex offender status and outrage that "a 20-year old who never had a job was calling him names like 'rapist.'" Appellant's Opening Brief at 5, *Ziska*, 253 Or App 82; *see also* Tr 36 (officer's testimony).

> how, if no one could see the crowbar, his housemates knew to take it from him, defendant answered, 'Just take me to jail. I'm the bad guy.' Police then asked if defendant had wanted his housemates to know that he 'meant business'; defendant nodded his head and said, 'yes.'
>
> "Defendant was charged with one count of unlawfully using a weapon, ORS 166.220(1)(a), and one count of menacing, ORS 163.190. Defendant pleaded not guilty and proceeded to a bench trial, where he argued that unlawful use of a weapon, under ORS 166.220(1)(a), requires the intent—or an attempt—to physically injure another person with a dangerous weapon. * * * .
>
> "In his closing argument, defendant conceded that he had intended to threaten A with a crowbar and, consequently, that he was guilty of menacing. However, he argued that the state had failed to present evidence that he had intended to physically injure A with the crowbar and, therefore, had failed to prove that he was guilty of unlawfully using the crowbar against A.
>
> "Ultimately, the trial court rejected defendant's arguments, agreeing that the state had failed to prove that defendant intended to assault A, but concluding
>
> > 'as I look at the language of the statute, it does say "use," and use can include holding it up in a menacing manner. And, just from a common sense point of view, it makes sense that a statute would prohibit that[,] because menacing someone with a dangerous weapon does create a very risky situation * * * .'"

Ziska, 253 Or App at 83-84 (alteration and second omission in opinion).

Defendant appealed, claiming that the trial court erred in a manner akin to misinstructing a jury and by entering a conviction after finding that the state failed to prove a fact necessary to the offense. The Court of Appeals concluded "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." *Ziska*, 253 Or App at 88.

B. Defendant Garza

Defendant Garza was living at a group home that M operated to help people who had been released from custody. Tr 7-8, 22. On the day of their annual yard sale, M was on the front porch manning some tables on which some knives and other items were laid out. Tr 8-9, 18. Defendant, who was very heavily intoxicated, was trying to sell items but also doing things that M considered "abrasive or standoffish" and engaging people in "off the wall" conversations. Tr 13, 16. M asked defendant to leave the porch area. Tr 9. Defendant picked up a folding knife as he left. Tr 9-10.

M said, "Hey, put the knife back. Garza, put the knife back." Tr 9. Defendant kept walking off the porch onto the yard. Tr 9. M followed defendant and told him to put down the knife. Tr 9. When M was three feet away, defendant turned toward him, flipped open the knife, and held it out in a threatening manner. Tr 9, 11, 25. Defendant started approaching M, who backed up and "was scared that he might use it." Tr 9-10.

M called to another group home resident. Tr 10. That resident, who knew defendant from prison, talked to him and convinced him to hand over the knife. Tr 10, 24-27. M called police, who arrested defendant. Tr 10, 37-39.

Defendant was charged with one count of unlawfully using a weapon, ORS 166.220(1)(a), and one count of menacing, ORS 163.190. Defendant pleaded not guilty and proceeded to a bench trial, where he argued in a motion

for judgment of acquittal that unlawful use of a weapon, under ORS 166.220(1)(a), requires the intent—or an attempt—to physically injure another person with a dangerous weapon. Tr 50-51. He argued that the state had failed to present evidence that he had intended to physically injure M with the knife and, therefore, had failed to prove that he was guilty of unlawfully using the knife against M. Tr 50-51. The trial court denied the motion, noting two theories of liability for unlawful use of a weapon:

> "In this case, the defendant, in the light most favorable to the State, was using the knife and I think in actually two different ways. One, he was using the knife in a threatening manner in order to retain the knife. I have some question about whether (inaudible) charge with robbery in this case.
>
> "In using that knife in order to commit a robbery, he's using it unlawfully. * * * . Is that an unlawful use of a weapon? I think it is.
>
> "In addition, he was using it in order to place another individual in fear of serious physical injury. Again, I believe that that, in and of itself, also is an unlawful use of a weapon because he's attempted to use that weapon in an unlawful manner and was carrying it with that intent.
>
> "Instead, in this case, in the light most favorable to the State, he turned around, opened that knife or opened it and then turned around, pointed it. He didn't just hold it or display it. He actually pointed it toward the victim who was only a couple of feet away."

Tr 56-57.

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The trial court found defendant guilty after the state argued in closing that defendant intended to use the knife in the two ways that the court had noted. Tr 72-74. The Court of Appeals affirmed. *Garza*, 253 Or App at 551.

III. SUMMARY OF ARGUMENT

The 1917 Oregon Legislature enacted regulations for the manufacture, sale, and possession of certain weapons designed for ambush and combat. It made carrying those weapons—merely possessing the most objectionable—a misdemeanor. It made it a felony to attempt "to use," or even to carry or possess with the intent "to use," "unlawfully against another" those or "any other dangerous or deadly weapon." Finally, the legislature created a statutory presumption that, when a person carried or possessed a dangerous weapon while committing, attempting to commit, or threatening to commit a felony, a breach of the peace, or an act of violence, the person intended "to use" the weapon unlawfully against another.

This court must decide whether the legislature meant that a person *with no intention of causing physical harm to anyone* commits the felony offense when he carries or possesses a weapon with the intent to menace another, *e.g.*, to brandish the weapon in an empty threat to use it. That is, did the legislature intend that an attempt or the intent "to use unlawfully against another" a weapon encompass anything less than employing a weapon to injure another?

Although the phrase "to use unlawfully against another" is subject to several interpretations, the conduct that comes to mind upon mention that Bob attempted to use a dagger, a club, or a brick unlawfully against John suggests more than a show of bravado. Rather, as the terms are generally used, one imagines Bob's goal to be a bit bloodier. The legislature's use of the phrase "attempts to use" would have been strange if it meant "attempts to use, even if only by attempting to threaten to use," especially when it could have described the prohibited conduct as attempting or *threatening* to use a dangerous weapon.

The same sense of "use" should apply when considering whether John carried or possessed a dangerous weapon with "the intent to use" it unlawfully against Bob. The legislature meant to describe someone who carried or possessed a dangerous weapon and *intended to use it in the use for which it was designed or appropriated—violence*.

This is not to say that the 1917 Legislature would have approved of people menacing others with dangerous weapons. To the contrary, Oregon law at the time included a very strong presumption that people intended to carry out threats—that was the very basis of common law assault, which Oregon had adopted. Assault, robbery, rape, and other offenses occurred only when the perpetrator *actually* intended to physically harm the victim—a notion lost under our current criminal code, which criminalizes menacing and other actions taken under a feigned or empty threat of force.

The legislature went as far as to incorporate those presumptions in the unlawful use of a weapon statute. It drew a rebuttable presumption that a person who carried or possessed a dangerous weapon while *threatening* to commit, *inter alia*, an act of violence in fact intended "to use" the weapon, *i.e.*, the person intended to carry out the threat. The legislature placed the burden on the defendant to show that he in fact did not intend to use the weapon. If the presumed intent "to use" included the intent "to use by threatening," the presumption would not serve any purpose.

The text and context of ORS 166.220(1)(a) do not suggest that the legislature intended to make it a felony to pick up an object that would be dangerous weapon (if it was *used* as a weapon) when the person does not attempt or intend to use the object to harm anyone.

IV. ARGUMENT

The consolidated case on review presents a narrow issue of statutory construction. By its plain terms, ORS 166.220(1)(a) prohibits a person from either (1) attempting "to use" a weapon unlawfully against another or (2) carrying or possessing a weapon with the intent "to use" it unlawfully against another. At the risk of begging the question, the crux of the issue is whether someone intends *to use* a weapon when the only contemplated action is feigning the intent to use it against someone. In other words, does the statute make a felon out of the camp counselor who, after a few campfire stories,

surreptitiously grabs a hockey mask and hatchet "to use" to scare the bejesus out his charges? A myriad of reasons suggests not.

When identifying the meaning of a statute, the legislature has instructed the court to "pursue the intention of the legislature if possible." ORS 174.020. This court's "goal is to determine the meaning of the statute that the legislature that enacted it most likely intended." *Halperin v. Pitts*, 352 Or 482, 486, 287 P3d 1069 (2012) (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993)). To identify the meaning of a statute, this court will "examine its text, in context, and, where appropriate, legislative history and relevant cannons of construction." *Halperin*, 352 Or at 482 (citing *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009)).

A. Text in context reveals the legislature's intent to capture actors who possess weapons and intend to use them to harm another, not actors who possess weapons but do not intend to use them to harm others.

The words used in the statute are the best evidence of the legislature's intent. *Gaines*, 346 Or at 171. The unlawful use of a weapon statute, ORS 166.220, is set out in its entirety at App-1, and provides in part:

> "(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[.]
>
> "* * * .
>
> "(3) Unlawful use of a weapon is a Class C felony."

Subsection (1)(a) originated in a 1917 legislative act restricting the manufacture, sale, possession, carrying, and use of certain weapons and the sale and carrying of certain firearms. Or Laws 1917, ch 377. As originally enacted, the disputed terms appeared in the following sentence:

> "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."

Or Laws 1917, ch 377, § 7.

When considered side-by-side and omitting the weapons' particulars, the minor amendments to the original text do not portent any change in meaning:

[a]ttempts to use unlawfully against another, or carries or possesses with intent to use unlawfully against another, any dangerous or deadly weapon	attempts to use, or who with intent to use the same unlawfully against another, carries or possesses * * * any * * * dangerous or deadly weapon
ORS 166.220(1)(a)	Or Laws 1917, ch 377, § 7.

"An attempt is defined as an 'intent to do a particular criminal thing, with an act toward it falling short of the thing intended.'" *State v. Taylor*, 47 Or 455, 458, 84 P 82 (1906) (quoting 1 Joel Prentiss Bishop, *New Criminal Law*, § 728 (1892)). Thus, the original and current statutes prohibit several acts with weapons (attempts to use, carries, possesses) accompanied with the same intent (to use). Consequently, identifying the intent of the 1917 Legislature is the key

to discerning the meaning of the current statute. *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995) ("The proper inquiry focuses on what the legislature intended at the time of enactment and discounts later events."); *see, e.g., State v. Perry*, 336 Or 49, 52-57, 77 P3d 313 (2003) (construing concealed firearm statute by considering meaning intended by the 1925 Legislature that used the disputed terms in original enactment).

1. "To use" a weapon unlawfully against another is subject to several interpretations.

This court usually will begin with the "plain, natural, and ordinary meaning" of the terms of ordinary usage in a statute. *PGE*, 317 Or at 611. When "interpreting the words of a statute enacted many years ago," this court will consult "dictionaries that were in use at the time." *Perry*, 336 Or at 53.

The transitive verb "to use" meant then largely what it means now:

> "1. To 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; to *use* a chair; to *use* time; to *use* flour for food; to *use* water for irrigation."

Webster's Revised Unabridged Dictionary 1558 (1913). Should it need mention, "unlawfully" meant "contrary to law" or "[n]ot lawful." *Webster's* at 1578. The preposition "against" included the familiar literal and figurative senses:

> "2. From an opposite direction, so as to strike or come in contact with; upon, as hail beats *against* the roof.
>
> "3. In opposition to, whether the opposition is of sentiment or of action; on the other side; counter to; in contrariety to; hence,

> adverse to; as, *against* reason; *against* law; to run a race *against* time."

Webster's at 277. Finally, "weapon" referred to an object *used*, or designed to be *used*, to injure another:

> "1. An instrument of offensive of [*sic*] defensive combat; something to fight with; anything *used*, or designed to be *used*, in destroying, defeating, or injuring an enemy, as a gun, a sword, *etc*."

Webster's at 1636 (emphasis added).[2]

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[2] The phrase "dangerous and deadly weapon" also included legal terms:

> "**DANGEROUS WEAPON.** One dangerous to life; one *by the use of which* a fatal wound may probably or possibly be given. As the manner *of use* enters into the consideration as well as other circumstances, the question is for the jury."
>
> "**DEADLY WEAPON.** Such weapons or instruments as are made and designed for offensive or defensive purposes, or for the destruction of life or the infliction of injury.
>
> "A deadly weapon is one likely to produce death or great bodily harm.
>
> "A deadly weapon is one *which in the manner used* is capable of producing death, or of inflicting great bodily injury, or serious wounding."
>
> "**WEAPON.** An instrument *used* in fighting; an instrument of offensive or defensive combat. The term is chiefly used, in law, in the statutes prohibiting the carrying of 'concealed' or 'deadly' weapons."

Black's Law Dictionary 316-17, 332, 1224 (2d ed 1910) (emphasis added).

Those definitions give rise to (at least) three possible meanings of narrowing exactitude, which the legislature could have intended by using the phrase "to use unlawfully against another" with regard to attempted and intended actions with dangerous and deadly weapons.

First, the legislature could have contemplated making *any* service or employment of a weapon in a manner that is, in *any* way, contrary to law and, in *any* way, in opposition to another. For example, using a valuable dagger to place an illegal bet against a boxer would implicate the statute as much as using it to slice off his ear. Notable in that regard is the Court of Appeals' conclusion that the minimum sentence for felonies involving "[t]he use or threatened use of a firearm," ORS 161.610(2), means discharge or threatened discharge:

> "That reading of the statute is confirmed by consideration of the consequences of construing the statutory term to mean *any* use for *any* purpose, as urged by the state. For example, a burglar who used an inoperable shotgun to prop open a window would be subject to a gun minimum sentence of five years, while a burglar who used an inoperable short-barreled shot gun to prop open the same window would be subject to a sentence of ten years. * * * . Similarly, and closer to the facts of this case, if a burglar used or threatened to use an inoperable rifle as a club, he or she would be subject to the five-year minimum sentence, but if the burglar used a short-barreled inoperable rifle he or she would be subject to twice the minimum sentence, even though the short-barreled rifle is *less* dangerous when used as a club."

State v. Harris, 174 Or App 105, 111-12, 25 P3d 404 (2001) (emphasis in original); *see also State v. Perez*, 186 Or App 122, 129-30, 61 P3d 945 (2003)

(holding that "use of a weapon" as aggravating factor for manufacturing offense did not mean using a steak knife to cut methamphetamine).

Tossing that straw man aside, the second sense the legislature may have intended was to refer to the employment of a weapon for its dangerous qualities in opposition to another to achieve any unlawful purpose. That, of course, would include *using* a weapon or *threatening to use* a weapon counter to someone for the purpose of, *inter alia*, committing menacing, assault, or robbery. The courts below adopted that interpretation.

Finally, a third meaning can be derived from a still narrower sense of the terms, namely, attempting or intending to *use* combat weaponry *against* someone, both literally and figuratively, in the unlawful manner that makes the object dangerous or deadly. In other words, the legislature intended to prohibit the attempt to use, even carrying or possessing with an intent to use, a dangerous weapon—whether fashioned as such (*e.g.*, a dagger, a stiletto, a billy) or adopted to use as such (*e.g.*, a chef's knife, an ice-pick, a crowbar)—*in the manner for which it was designed or appropriated*: an injurious weapon used bodily against another to cut, stab, or strike. Indeed, that is the very sense of the verb "use" that dictionaries use to define "weapon." *See, e.g., Webster's* at 1636 ("anything used, or designed to be used").

Of course, definitions do not resolve whether the legislature intended to include attempts or intents to use a dangerous weapon to menace someone

within the purview of the statute. One certainly *uses* a knife against another by stabbing him. But one also *uses* a knife against that person by brandishing it in a threatening manner to terrorize him or get him to hand over his wallet. Context, however, strongly suggests that the legislature did not intend that an empty threat to use a weapon be considered, in and of itself, *using* that weapon.

2. The legislature enacted legislation that made it a felony to attempt or intend to use a weapon in the dangerous manner for which it was designed or appropriated, an instrument used against another to cause injury.

The context of the entire act reveals that the legislature had the narrower meaning of "to use" in mind when enacting Oregon Laws 1917, chapter 377, section 7. ORS 166.220(1)(a) derives from an enactment of comprehensive regulation of concealable firearms and other dangerous and deadly weapons. Oregon Laws 1917, chapter 377, consisted of 16 sections, set out in full at APP-2-6, with parts of four sections particularly informative:

> "Section 2. Any person who carries or possesses an instrument or weapon commonly known as a blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, or who carries a dirk or a dagger, or stiletto is guilty of a misdemeanor.
>
> "Section 3. Any person who manufactures, or causes to be manufactured, or sells or keeps for sale, or offers or gives or disposes of any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag or metal knuckles, to any person, is guilty of a misdemeanor. * * * .
>
> "Section 4-D. For the purpose of this Act any blackjack, slungshot, billy, sandbag, metal knuckles, dirk, dagger, stiletto, or

> knife with a blade longer than three and one-half inches when carried concealed upon the person, shall be deemed a dangerous weapon.
>
> "* * * .
>
> "Section 7. 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 and 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. * * * ."[3]

The 1917 Legislature sought to accomplish several things. First, it made certain objects verboten by prohibiting their manufacture, sale, and possession, namely, blackjacks, slungshots, billies, sandclubs, sandbags, and metal knuckles. Or Laws 1917, ch 377, §§ 2, 3. Similarly, while not outright banning from commerce or ownership, the legislature made it illegal to arm oneself with

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[3] Of the other 12 sections, five concern concealable firearms only. Or Laws 1917, ch 377, § 1 (prohibiting carrying in city limits); § 4-C (declaring as dangerous weapons); § 5 (requiring the registration of sales); § 9 (providing for permits to conceal and openly carry); and § 10 (prohibiting sale to a minor). Five specify the punishment for violating other sections. *Id.* §§ 3-A, 4, 4-A, 4-B, 11. The remaining two require the prosecution of an offending arrestee and give justice courts jurisdiction over some violations. *Id.* §§ 8, 8-A.

a knife designed to injure or kill a person.[4] Or Laws 1917, ch 377, § 2. Finally, not prohibited (unless possessed or carried with the intent to use them) was another class of weaponry: "dangerous knives" (concealed knives with a blade longer than three and one-half inches), razors, bombs, bombshells and "other dangerous or deadly weapons." Or Laws, ch 377, §§ 4-D, 7.

The disfavored weapons (blackjacks to stilettos) shared two traits not held by the other weapons. First, the sole purpose of the disfavored weapons is to injure the person that they are used against. The others (long-bladed knives, razors, and other dangerous or deadly weapons) have ordinary nonviolent uses, *e.g.*, food preparation (chef's knife), shaving (razor), and construction

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[4] It should indisputable that dagger, dirk, and stiletto were the common terms used to refer to knives specifically designed for combat and assault. *See* B. E. Sargeaunt, *Weapons: A Brief Discourse on Hand-Weapons other than Fire-Arms* 38-39, 41 (1908); *see also Webster's* at 364 (defining "dagger" to mean "1. A short weapon used for stabbing. This is the general term; *cf.* Poniard, Stiletto, Bowie knife, Dirk, Misericorde, Anlace.").

(crowbar). Second, with exceptions for billies and bombs,[5] no respectable officer or gentleman in 1917 would choose to use the disfavored weapons martially or defensively. For example, consider the view in New York.

In 1912, that state's high court considered a challenge to a conviction for carrying a slungshot under a 1910 precursor to Oregon's unlawful use of a weapon statute, which criminalized mere possession of such a weapon.[6] *People*

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[5] "Billy" described "[a] club; esp[ecially], a policeman's club." *Webster's* at 145. Consequently, billies were the weapon of choice for police. *See, e.g.*, Matthew G. Forte, *American Police Equipment: A Guide to Early Restraints, Clubs & Lanterns*, 27-54 (2002). Similarly, "bombs and bombshells" were specifically designed to be used by the military. *Webster's* at 164 (defining "bomb" to mean "**2.** (Mil.) A shell; esp. a spherical shell, like those fired from mortars" and "bombshell" to mean "[a] bomb"). Perhaps, however, the legislature believed that no one possessed a bomb with a benign intent and to do so was too serious to be classified as a misdemeanor offense.

[6] The statute provided in part:

> "A person who attempts to use against another, or who carries, or possesses any instrument or weapon of the kind commonly known as a slungshot, billy, sandclub or metal knuckles, or who with intent to use the same against another, carries or possesses a dagger, dirk or dangerous knife, is guilty of a felony."

New York Penal Code § 1897, *amended by* NY Laws 1911, ch 195, § 1.

The version on which the Oregon Legislature apparently relied provided:

> "A person who attempts to use against another, or who carries, or possesses, any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, bludgeon, bomb or bombshell, or who,

(cont.)

v. Persce, 204 NY 397, 97 NE 877 (NY 1912). The court found that the weapons' notorious reputation justified criminalizing their possession absent any "specific ulterior intent":

> "The evidence and *the well-understood character of slungshots, billies, sandbags, and brass knuckles* make it evident that the Legislature were entirely justified in regarding them as *dangerous and foul weapons seldom used for justifiable purposes but ordinarily the effective and illegitimate implements of thugs and brutes in carrying out their unlawful purposes*. For instance a standard dictionary defines a slungshot as 'a metal ball of small size with a string attached *used by ruffians for striking*.' * * * .
>
> "* * * [T]he act in question relates to *instruments which are ordinarily used for criminal and improper purposes and which are not amongst those ordinary legitimate weapons of defense and protection* which are contemplated by the Constitution and the Bill of Rights."

People v. Persce, 204 NY 397, 402-03, 97 NE 877, 878-79 (NY 1912) (quoting *Webster's* at 1357) (emphasis added).

Webster's highlighted the lawless nature of the other banned weapons:

> "Knuckle * * * **6.** A contrivance, usually of brass or iron, and furnished with points, worn to protect the hand, *to add force to a blow, and to disfigure the person struck*; as, brass knuckles[.]"

> with intent to use the same unlawfully against another, carries or possesses a dagger, dirk, dangerous knife, razor, stiletto, or any other dangerous or deadly instrument or weapon is guilty of a felony."

NY Penal Code § 1897 (NY Laws 1913, ch 608, § 1), *amended by* NY Laws 1915, ch 390. "Bludgeon" was the only term that Oregon did not appropriate.

> "Sand * * * **5.** * * * Sand bag * * * A long bag filled with sand, *used as a club by assassins*."

Webster's at 819, 1273 (emphasis added).

Webster's lacked such a definition for "blackjack," but Oregonians were all too familiar with the association between blackjacks and violent crime. *See, e.g., Pendleton Arrest Recalled: Hooker, When Taken in 1914, Well Supplied with Weapons*, Morning Oregonian, September 29, 1915, at 2 (describing arrest of Otto Hooker (a man who later escaped and murdered Warden Harry Minto of the Oregon State Penitentiary) with "a loaded revolver in one hand, a blackjack in the other and a long-lbaded [*sic*] dirk lying close to his hand") (available at http://oregonnews.uoregon.edu/lccn/sn83025138/1915-09-29/ed-1/seq-2/); *Auto Bandits are Daring: New York Cashier Beaten and Robbed before Crowd*, Morning Oregonian, September 27, 1915, at 4 (available at http://oregonnews.uoregon.edu/lccn/sn83025138/1915-09-27/ed-1/seq-4/); *Badly Beaten with Blackjack: A.L. Innis, Victim of Three Highwaymen on Hoyt*

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Street, Morning Oregonian, Dec. 30, 1905, at 11 (available at http://oregonnews.uoregon.edu/lccn/sn83025138/1905-12-30/ed-1/seq-11/).[7]

So, one clear intention of the 1917 Oregon Legislature was to rid the community of offensive injurious weapons that did not otherwise serve a legitimate utilitarian purpose. In other words, the legislature wanted to keep certain weapons designed solely to injure out of the public's hands by placing an outright ban on them (blackjacks, slungshots, metal knuckles, *etc.*) or prohibiting persons from carrying them (dirks, daggers, and stilettos). The legislature made violations of those prohibitions a misdemeanor.

The second legislative intent was to make it an even more serious offense, a felony, when a person intended to actually *use* weapons designed or appropriated to injure or kill. That provision applied to persons who manifested that intent by actually attempting to use banned and restricted combat weaponry or any other weapon deemed dangerous because, *when used*, it would wound or kill. Alternatively, carrying or possessing such a weapon was sufficient when *other evidence* showed the intent to so use it.

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[7] This court subsequently quoted a definition of "blackjack" from a subsequent edition of *Webster's*: "'a small striking weapon typically consisting at the striking end of a leather enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact.'" *State v. Kessler*, 289 Or 359, 372 n 18, 614 P2d 94 (1980).

When considering the offense now described in ORS 166.220(1)(a) in the context of the entire statute enacted, it becomes apparent that the legislature intended to restrict the public's access to assaultive weaponry through misdemeanor treatment and to make it a more serious felony offense to possess such a weapon and attempt or intend to actually use it to assault another.

3. The legislature's use of statutory presumptions provides additional evidence that "to use" means to actually use against another rather than merely threatening to use.

The second sentence of section 7 reinforces that the legislature meant *actual* and not *threatened* use. It created a presumption that a person intended "to use" a weapon if carrying or possessing it "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." Or Laws 1917, ch 377, § 7. The legislature conspicuously discerned between doing something, attempting to do something, and *threatening* to do something. It did not do so when prohibiting attempting or intending "to use" a weapon—suggesting that the legislature did not mean *threatening* to use a weapon.

Furthermore, the statutory presumption implies that a person who carries a weapon and threatens violence is *not* yet using or attempting to use the weapon, only that the person *intends* to do so. The legislature was comfortable presuming that a person who threatened violence while carrying a knife *intended "to use" the knife in the manner threatened*. Similarly, it seems

unlikely that the legislature would presume that someone committing armed robbery intended merely *to threaten to use* a carried weapon. More plausibly, the legislature presumed that the robber intended, if necessary, to use the knife to do violence to the victim.

At this point, it is important to stress some fundamental ways that criminal law has changed since 1917. The 1917 Legislature was comfortable *presuming* that a person intended "to use" a weapon against another in any manner threatened. Oregon then adhered to the common law notion of assault as an uncompleted battery. A person did not commit an assault unless the person intended *to harm someone*:

> "The intent with which an assault is committed may be inferred by the jury from the circumstances attending the perpetration of the overt act, notwithstanding testimony given by the accused tending to excuse or explain his conduct on the particular occasion, *but the intentional attempt of the party charged with the offense to do injury to the person of another by force or violence, coupled with a present ability to carry that design into effect, is an indispensable ingredient of the definition of an assault*."

State v. Cancelmo, 86 Or 379, 388, 168 P 721 (1917) (emphasis added) (after testimony that defendant intended only to scare the victim, jury was erroneously instructed assault with a dangerous weapon could be committed recklessly). Empty threats, those that the actor had no intention of carrying out, were not criminal acts and did not meet the definition of assault:

> "[M]ere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages."

State v. Godfrey, 17 Or 300, 305, 20 P 625 (1889).[8]

The same was true of robbery in 1917—the perpetrator must have intended to commit an assault, *i.e.*, the intent to kill or wound the victim unless the victim prevented that harm by submitting to the theft:

> "If any person being armed with a dangerous weapon *shall assault another with intent, if resisted, to kill or wound the person assaulted*, and shall rob, steal or take from the person assaulted any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished, * * * ."

Lord's Oregon Laws, title XIX, ch II, § 1920 (1910) (emphasis added). For lack of a better term, "bluffing" your way through a heist (if a jury could be so convinced) was not robbery. Unlawfully using a weapon to commit robbery

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[8] That remained unchanged until the 1971 enactment of the misdemeanor offense "menacing." Or Laws 1971, ch 743, § 95, *codified at* ORS 163.190(1) ("A person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury."). Moreover, a threat of "imminent serious physical injury" strongly implies that the actor would have immediate access to a real or purported "dangerous weapon." ORS 161.015(1) ("'Dangerous weapon' means any instrument, article or substance which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury."). Consequently, the legislature seems to have enacted menacing as the very means to prosecute threats to use dangerous weapons (and classified it as a misdemeanor).

required that the actor intend to harm the victim—*intending to merely threaten the victim was insufficient.*

The other criminal statutes governing combative or threatening uses of dangerous weapons in 1917 did not make threats to use them an unlawful use.[9] The crime of "assault with a cowhide" even distinguished between *using* one weapon and *threatening* to use another:

> "If any person shall assault, or assault and beat another with a cowhide, whip, stick, or like thing, having at the time in his possession a pistol, dirk, or other deadly weapon, with intent to intimidate and prevent such other from resisting or defending himself, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years."

Lord's Oregon Laws, title XIX, ch II, § 1918 (1910). Regardless of whether society viewed threatening behavior to be reprehensible or unseemly, merely intimidating someone with a dangerous weapon would not have been unlawfully *using* it. Given that backdrop, it is unlikely that the legislature intended to make it a *felony* to attempt to menace (merely scare) someone with

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[9] Those statutes included one that fixed the punishment for one who, "being armed with a dangerous weapon, shall assault another with such weapon[.]" Lord's Oregon Laws, title XIX, ch II, § 1923 (1910). Two other statutes set the punishment for an inmate who, with a "deadly weapon," "strikes, wounds, stabs, shoots, or shoot at" his guards. *Id.* at §§ 2047, 2049.

a dangerous weapon or to carry or possess a dangerous weapon with the intent to menace them.[10]

Finally, the presumptive evidence provision with respect to breaches of the peace supports defendants' construction. A breach of the peace required "'personal violence, either actually inflicted or immediately threatened.'" *State v. Moyle*, 299 Or 691, 703, 705 P2d 740 (1985) (quoting *Ware v. Branch Circuit Judge*, 75 Mich 488, 492, 42 NW 997 (1889)). Hence, committing, attempting, or threatening to commit a breach of the peace while carrying a dangerous weapon was "presumptive evidence" that the person intended to carry out the threat of violence with the weapon.

If *using* a weapon meant *utilizing the weapon with words or conduct to threaten its use*, there would be no need for a legal presumption that a person

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[10] The Court of Appeals, however, relied on those same statutes to conclude that "to use" meant both *to use* and *to threaten to use*, because ORS 166.220 did not employ unambiguously assaultive terms. *Ziska*, 253 Or App at 88. Drawing that inference poses two problems. First, those statutes predate the 1917 legislation by 53 years (rivaling the 54 years between 1917 and 1971), rendering any variance in terms unremarkable. General Laws of Oregon, Crim Code, p 441 & n 1 (Deady 1845-1864) (noting passage of criminal code in 1864); *see also id.*, Crim Code, ch XLIII, §§ 527, 532, 662, 664, p 531-32, 566-67. Second, compiling a laundry list of violent verbs to convey the same meaning as "to use" would have proven difficult given the disparate manner in which bladed and blunt weapons are used (not to mention explosive or "any other" dangerous weapon). The legislature's choice of "to *use*" is scant sign that it meant "to cut, stab, beat, *etc.*" *and* "*to threaten* to cut, stab, beat, *etc.*"

engaging in that conduct intends "to use" the weapon at some later point in time—the person is, right then, using (or attempting to use) the weapon. The only way the statutory presumption adds anything is if the menacing behavior gives rise to the presumption that the perpetrator intends to carry out the threat by *actually* using the weapon. This court appears to have reached the same conclusion in 1983 simply from the face of the enacting legislation:

> "Sections 1, 2 and 3 of chapter 377 made it a misdemeanor to carry, possess or manufacture the kind of weapons with which the chapter was concerned. The legislature made violation of section 7 a felony, presumably because the conduct there proscribed was believed to be more blameworthy than the mere carrying or possessing the weapon. *The second sentence of the first paragraph makes it clear that carrying or possessing the weapon in described circumstances, including attempted violent use against another person was a matter of concern to the legislature and gave rise to a presumption of unlawful intent to use.*"

State v. Linthwaite, 295 Or 162, 170, 665 P2d 863 (1983) (footnote omitted; emphasis added).

B. Amendments to the unlawful use of a weapon statute do nothing to suggest that the legislature intended to alter the meaning of "to use unlawfully."

The legislature did not substantively amend what now appears in ORS 166.220(1)(a) until four years after the enactment of the Oregon Criminal Code

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of 1971.[11] At that point, the legislature added "nunchaku sticks" to the list of prohibited weapons and designated the offense a Class C felony. Or Laws 1975, ch 700, § 1. A more substantive amendment was adopted in 1985, nearly 70 years after the original enactment.[12]

The 1985 Legislature eliminated the presumptive evidence section, subsection (2) of ORS 166.220 (1953), with the passage of HB 2384 (1985). Or Laws 1985, ch 543, § 1. But the amendments made to ORS 166.220, at least those that possibly could alter the meaning of "use," actually provide additional context to conclude that the statute concerns the actual use of dangerous weapons to inflict harm rather than mere threats to use them.

HB 2384 began as a legislative response to *State v. Delgado*, 298 Or 395, 403, 692 P2d 610 (1984), which held that the prohibition in *former* ORS 166.510 (1983), *repealed by* Or Laws 1985, ch 709, § 4, against the mere

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[11] Because of the "particularly volatile nature" of "gun control," the Commission was unable to agree on a revision to the statutes governing their registration and possession (of which ORS 166.220(1)(a) was a part). Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report, Forward, XXII (July 1970).

[12] *Since* 1985, the legislature added subsection (1)(b) (relating to the discharge of firearms) and subsection (2) (providing exceptions for lawful defense of life or property and regulated shooting activities). Or Laws 1991, ch 797, § 1. After defendants engaged in their menacing behavior, subsection (2)(e) was added. Or Laws 2009, ch 556, § 5 (adding a wildlife taking exception). Both amendments appear irrelevant to the issue in this case.

possession of switch-blade knives violated the state constitutional right to bear arms. Minutes, House Committee on Judiciary, Subcommittee 1, Apr 8, 1985, 4 (so noting); Minutes, Senate Judiciary Committee, May 30, 1985, 3-4. It quickly expanded to other matters, including this court's decision in *Linthwaite*, 295 Or 162 (holding that unlawful use of a weapon committed against multiple victims gives rise to multiple convictions but concurrent sentences).

In response to the first proposal, which would have added switchblade knives to the list of dangerous weapons in ORS 166.220(1)(a), the Oregon District Attorneys Association proposed eliminating the comprehensive list of weapons by instead referring to the definitions of dangerous and deadly weapons provided by the Oregon Criminal Code of 1971. Testimony, House Judiciary Committee, HB 2384, April 8, 1985, Ex F (letter from Peter Sandrock). Not to be outdone, the ACLU proposed deleting the presumptive evidence section because, if followed literally, it was unconstitutional. Minutes, House Committee on Judiciary, Subcommittee 1, Apr 8, 1985, 4; *see also Linthwaite*, 295 Or at 170 n 8 (noting that statutory presumption "would now have only the force of a permitted inference"). Finally, the legislature added "unlawfully against another" after "attempts to use" to match the interpretation in *Linthwaite*, 295 Or at 170 (so construing to avoid absurd result). Or Laws 1985, ch 543, § 1.

The two changes prompted by *Linthwaite* do not appear to have any bearing on the meaning of "to use unlawfully against another" in ORS 166.220(1)(a). However, the legislature's adoption of the 1971 definitions of "dangerous weapon," if anything, suggests that the 1985 Legislature believed that one did not "use" a weapon merely by trying to scare someone with it:

> "'Dangerous weapon' means any weapon, device, instrument, material or substance *which under the circumstances in which it is used, attempted to be used or threatened to be used,* is readily capable of causing death or serious physical injury."

ORS 161.015(1) (emphasis added).

The 1985 Legislature apparently believed that the definition of "dangerous weapon" given above meshed easily with the pre-existing unlawful use of a weapon statute. However, that definition uses the term "use," itself, in a manner whereby it is understood that someone actually "uses" a dangerous weapon by attempting to harm another with it. Tellingly, the definition even highlights the issue by noting that a dangerous weapon retains its characteristics when "under the circumstances in which it is * * * *threatened to be used*, is readily capable of causing death or serious physical injury." ORS 161.015(1). That is, an object such as a crowbar is considered a dangerous weapon when the manner in which someone threatens to "use" it could harm another.

When considered in conjunction with ORS 166.220(1)(a), a person does not commit unlawful use of a dangerous weapon until the person either (1) attempts to use it as such (tries to carry out the threat) or (2) possesses or

carries it with the intent to use it as such (intends to carry out the threat). The definition in ORS 161.015(1) defies a grammatical reading that supports the conclusion that a person *uses* a crowbar or knife when only threatening its use.

The definition of "dangerous weapon" is not the only indication that the 1985 Legislature understood that the statute it was amending, ORS 166.220, prohibited using a weapon to harm another rather than merely *threatening to use* it. By that time, the 1971 criminal law revision had been in existence and use for 14 years. The revision's new crimes, too, distinguished between *using* a dangerous weapon and *threatening to use* a dangerous weapon. ORS 162.165(1)(b) (elevating offense to escape in the first degree when the person "uses or threatens to use a dangerous or deadly weapon escaping from custody"); ORS 164.225(1)(c) (elevating offense to burglary in the first degree when the person "[u]ses or threatens to use a dangerous weapon").[13] If "using" a weapon necessarily included making a threat with one, those statutes suffered from redundancy. Thus, the 1985 Legislature would have understood that "to

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[13] In the case of robbery, the 1971 Legislature instead distinguished between *using* and *attempting to use* a dangerous weapon. ORS 164.415(1)(b). However, in that specific context, *using* a weapon necessarily included employing it to threaten injury, because *threatening* to use physical force was an element of robbery. ORS 164.395(1); ORS 164.415(1).

use a weapon" meant its employment to attempt to inflict injury or harm rather than conduct constituting a threat to use it.

C. As properly construed, defendants' convictions for unlawful use of a weapon cannot stand.

The trial court convicted defendant Ziska of unlawful use of a weapon because he carried and possessed a crowbar with the intent to menace another person. The trial court affirmatively found that the state had failed to prove that he intended to actually use the crowbar to assault anyone. As shown above, that was error. Possession of a dangerous weapon without any intent to injure another necessarily does not constitute carrying or possessing such a weapon with the intent to use it unlawfully against another. Defendant Ziska's conviction must be vacated.

The trial court convicted defendant Garza without such a clear expression of the theory of liability that it relied upon. However, in denying his motion for judgment of acquittal, the trial court clearly identified two theories on which the charge could proceed: (1) possession of the knife with the intent to use it to menace another person and (2) possession of the knife with the intent to use it to commit robbery (of the knife itself). That too was error, because both theories of liability did not adhere to the intended meaning of the statute.

As in defendant Ziska's case, an intent "to use" a dangerous weapon means intending to employ the object to harm another. Intending to merely menace or threaten another does not constitute the intent element in

ORS 166.220(1)(a) unless the actor also intends to inflict injury with the weapon. Because the trial court misunderstood the elements of the unlawful use of a weapon offense, this court should reverse defendant Garza's conviction. However, because the trial court did not find that the state failed to prove that defendant intended to use the knife (but the evidence could support such a finding), his case should be remanded for a new trial.

V. CONCLUSION

For the reasons given above, defendant Ziska asks this court to vacate his conviction for unlawful use of a weapon and remand for resentencing.

For the reasons given above, defendant Garza asks this court to vacate his conviction for unlawful use of a weapon and remand for a new trial.

Respectfully submitted,

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

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 9.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,552 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on May 10, 2013.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General; Matthew J. Lysne, #025422, Assistant Attorney General; and Jeremy Rice, #055416, Assistant Attorney General; attorneys for Respondent on Review.

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