IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review v. ROBERT CLATE MAKIN, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court No. C100549CR CA A153309 SC S063440

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 Washington County
Honorable RICK KNAPP, Judge

Opinion Filed: May 20, 2015
Author of Opinion: PER CURIAM
Before: Nakamoto, Presiding Judge, and Egan, Judge,
and Wilson, Senior Judge.

Continued…

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INTRODUCTION

While his three children were in the back seat of his SUV, defendant transported more than 27 grams of methamphetamine, along with drug scales and other drug paraphernalia. When police stopped his car, he admitted that was a drug dealer and that the methamphetamine was for delivery to his clients. He was charged with and convicted of delivery of a controlled substance, based on his possession of drugs with the intent to deliver them — what is commonly known as a "*Boyd* delivery." He was also convicted of first-degree child neglect for permitting the children to be "in a vehicle where controlled substances are being criminally delivered." ORS 163.547(1)(a)(A).

At issue in this case is whether a *Boyd* delivery can form the basis for a child neglect charge, or whether the child-neglect statute applies only in cases involving actual deliveries of a controlled substance. Applying this court's statutory construction methodology reveals that the statute encompasses all types of criminal deliveries, and is not limited to actual deliveries. The legislature created the crime of child neglect against the backdrop of the existing definition of "delivery" in the Uniform Controlled Substances Act, and signaled its intent to apply that definition in the child-neglect statute by referring to "criminally delivered." Although there was no evidence that

defendant committed an *actual* delivery of drugs with his children present, the child neglect statute does not require such proof. Correctly construed, a person commits first-degree child neglect when he knowingly allows a child to be in a vehicle when he possesses those controlled substances with the intent to deliver them — that is, when he is presently committing a *Boyd* delivery.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Does a person commit the crime of first-degree child neglect, ORS 163.547(1)(a)(A), if the person allows a child to be present in a vehicle in which the person presently possesses a controlled substance with the intent to deliver it?

Proposed Rule of Law

Yes. ORS 163.547(1)(a)(A) makes it a crime to permit a child to be present in a vehicle where controlled substances "are being criminally delivered." By referring specifically to criminal deliveries without limitation, the statute encompasses all conduct that constitutes the crime of delivery of a controlled substance under Oregon law. Because possession of a controlled substance with the intent to deliver it is a criminal delivery, a person commits the crime of child neglect if he allows a child to be present in a vehicle when he possesses controlled substances with the intent to deliver them.

SUMMARY OF ARGUMENT

To convict a person of first-degree child neglect, the state must prove that a person with custody or control of a child under 16 knowingly left or allowed the child to stay "in a vehicle where controlled substances are being criminally delivered." ORS 163.547(1)(a)(A). Analysis of that phrase in context indicates that "a vehicle where controlled substances are being criminally delivered" includes any vehicle in which a person presently possesses controlled substances with the intent to deliver them — an "attempted" or *Boyd* delivery. Legislative history confirms that understanding. Therefore, a person need not "actually" deliver a controlled substance in the presence of a child to be guilty of child neglect.

SUMMARY OF MATERIAL FACTS

A citizen called police to report that defendant was "acting very erratically, violently hitting the steering wheel, pulling on it, acting very erratic, [and] unstable." The caller was concerned that defendant was "possibly high on drugs[,]" and was "very concerned" that three children were in the SUV with him. (Tr 12, 14-15, 46).

Officer Sutton responded to the call. When he stopped defendant, his three children — all under 16 years old — were sitting in the back seat. Defendant told the officer that his driver's license was suspended "because of a

DUI," and he had no proof of insurance or registration for the vehicle. (Tr 16-17, 20-21, 32-33, 53, 175).

While waiting for confirmation from dispatch that defendant's license was suspended, Officer Sutton asked defendant to step out of the car, then asked if he had "any drugs, weapons, or illegal documents on him." Defendant stated that he had "dope" in his sock. (Tr 27, 29, 49, 74-75, 84-85, 92-93). A second officer, who had arrived to assist with the stop, searched defendant's socks and found several syringes and a methamphetamine pipe with residue in one sock, and approximately 20 grams of methamphetamine in the other sock. The officer also searched defendant's pants pockets and found a film canister containing 7.5 grams of methamphetamine, as well as a notebook that defendant acknowledged contained drug records and information about his customers. (Tr 24, 30, 46, 49-51, 75-76). As for the car, defendant stated that, if the officers looked inside, "it will be DCS[,]" explaining that he had in his vehicle baggies, scales, "an ounce of weed," and "some moonshine." (Tr 52, 78, 82).

Defendant consented to a search of the vehicle, which turned up approximately 50 baggies, two sets of scales with methamphetamine residue, cotton balls and straws, 30.3 grams of marijuana, four knives, $96 in cash, and a bottle of moonshine. (Tr 30, 52, 60-61, 77-80, 179; Ex 2-10). Defendant told the officer that the syringes were for his customers, along with the cotton balls,

which "act as filters for the methamphetamine." (Tr 172). Defendant indicated that the moonshine was a form of payment from one of his drug sales. (Tr 174).

Defendant explained that he been "selling from two weeks to one month" and had "about 15 customers." He kept the drugs and paraphernalia in his vehicle because he did not want his fiancée to discover them in the house. (Tr 54, 69, 174). Defendant acknowledged that he had purchased methamphetamine approximately one week earlier and repackaged it for sale. (Tr 174, 176).

The state charged defendant with unlawful delivery, possession, and manufacture of methamphetamine, as well as three counts of first-degree child neglect, ORS 163.547.[1] In a bench trial, defendant argued in closing that his mere possession of the methamphetamine and drug paraphernalia in the vehicle with the children was insufficient to convict him, because ORS 163.547(1)(a)(A) requires proof that the children were present in the vehicle when he was "in the process of a delivery" to a buyer — that is, engaged in an actual delivery — and the state presented no evidence of that. (Tr 189-91). The trial court rejected that argument and convicted defendant on all charges. (Tr 192-96). As to the charges of child neglect, the court found that "this was a Possession With an Intent to Deliver, so it was a Delivery, and

[1] The state also charged defendant with unlawful possession of marijuana, but dismissed that charge before trial. (Tr 168).

the children were in the car, while he possessed these with the intent to deliver at some point." (Tr 196).

On appeal, defendant reiterated his argument that, to prove child neglect, the state was required to prove an actual delivery, and failed to do so. The Court of Appeals rejected that argument without written discussion. *State v. Makin*, 271 Or App 374, 348 P3d 1197 (2015) (*per curiam*) (attached at ER 2-3).[2]

ARGUMENT

This case turns on what the legislature meant when it made it a crime to permit a child to be in a vehicle "where controlled substances are being criminally delivered." ORS 163.547(1)(a)(A).[3] The text of the statute in context, and its legislative history, establish that the legislature intended to capture all kinds of "criminal deliveries" — that is, attempted, constructive, and actual deliveries of controlled substances. A person commits the crime of first-degree neglect, therefore, when he permits a child to be in a vehicle when the

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[2] Defendant also argued that, under *State v. Mills*, 354 Or 350, 312 P3d 515 (2013), which was decided after he was convicted, his case should be remanded to allow him to assert a venue challenge on the charge of manufacturing methamphetamine. The state conceded that, under *Mills*, remand was appropriate. The Court of Appeals thus reversed and remanded on Count 2, and otherwise affirmed. *Makin*, 271 Or App at 376.

[3] The complete text of ORS 163.547 is appended to this brief.

person presently possesses controlled substances with the intent to deliver them.[4]

A. By using the phrase "criminally delivered," the legislature incorporated the definition of "delivery" from the Uniform Controlled Substances Act.

To determine what the legislature intended in enacting the crime of first-degree child neglect, this court looks to the text of the statute in context, as well as relevant legislative history and, if necessary, maxims of construction. *See State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). In examining the text, the court gives words of common usage their "plain, natural, and ordinary meaning." *PGE*, 317 Or at 611.

ORS 163.547(1)(a) provides that a person commits the crime of first-degree child neglect if the person,

> having custody or control of a child under 16 years of age * * * knowingly leaves the child, or allows the child to stay:
>
> (A) In a vehicle where controlled substances are being criminally delivered or manufactured[.]

The legislature did not define the term "criminally delivered" in ORS 163.547,

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[4] The statutory construction analysis demonstrates that "criminal delivery" encompasses attempted, constructive, and actual deliveries. However, because this case concerns only an attempted delivery, the state limits its discussion to that type of delivery.

or elsewhere in ORS Chapter 163. Therefore, to determine what the legislature meant when it used that phrase, this court considers its plain meaning. *Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 295, 337 P3d 768 (2014).

The plain meaning of the term "deliver," standing alone, superficially supports defendant's argument. It means "**2 :** GIVE, TRANSFER : yield possession or control of : make or hand over : make delivery of : COMMIT, SURRENDER, RESIGN * * * **5 :** to send (something aimed or guided) to an intended destination * * *. *Webster's Third New Int'l Dictionary* 597 (unabridged ed 2002).

But the word "deliver" does not appear in isolation. It is modified by the adverb "criminally," which means "**1 :** according to criminal law * * * **2 :** in a criminal manner : in violation of law : WICKEDLY * * *." *Id.* at 537. In turn, "criminal" means **1 :** involving or being a crime < ~ carelessness> **2 :** relating to crime or its punishment <a ~ action> — distinguished from *civil*[.]" *Id.* at 536.

By including the modifier "criminally," then, the legislature indicated its intent to apply a particular meaning of the term "delivered": the type of delivery that constitutes a crime under Oregon law. Although the legislature did not expressly define "delivered" for purposes of the child-neglect statute, by including the term "criminally" it effectively incorporated the definition of delivery of a controlled substance that appears elsewhere in the criminal law —

specifically, the crime of delivery of a controlled substance in ORS chapter 475, the Uniform Controlled Substances Act. *See State v. Cloutier*, 351 Or 68, 96, 261, 261 P3d 1234 (2011) ("in construing statutes, we do not simply consult dictionaries and interpret words in a vacuum").

The legislature enacted the definition of "delivery" in 1977 in chapter 475 long before it created the crime of first-degree child neglect in 1991. *See* Or Laws 1977, ch 745 § 1. Therefore, ORS chapter 475 provides critical context for interpreting the child-neglect statute. *See, e.g., Gaines*, 346 Or at 177 n 16 (statutes enacted simultaneously with or before a statute at issue are pertinent context for interpreting that statute); *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 415-16, 908 P2d 300 (1995), *mod on other grounds*, 325 Or 46 (1997) (examining the context of preexisting common law and statutory framework within which the law was enacted).

The Uniform Controlled Substances Act defines "delivery" more expansively than just actual, completed deliveries. ORS 475.752(1) makes it unlawful for a person to "manufacture or deliver a controlled substance." A delivery of a controlled substance, in turn, is "the actual, constructive or attempted transfer, other than by administering or dispensing, from one person to another of a controlled substance[.]" ORS 475.005(8). Therefore, in enacting that definition the legislature treated attempted and constructive deliveries as equivalent to "actual," completed deliveries — all three types

constitute the crime of delivery of a controlled substance. *See, e.g.*, *State v. Wheeler*, 343 Or 652, 677 n 11, 173 P3d 348 (2007) (recognizing that the legislature "has determined that some 'attempt' crimes are as serious as the 'completed' crime" and citing delivery of a controlled substance under ORS 457.005(8) as an example).

Said another way, a person commits an "attempted delivery" of a controlled substance — and therefore commits the crime of delivery of a controlled substance — when he or she possesses a controlled substance with the intent to deliver it. The Court of Appeals so held in *State v. Boyd*, 92 Or App 51, 756 P2d 1276, *rev den*, 307 Or 77 (1988). A person's intent to deliver is established when he or she possesses a controlled substance in a quantity "not for personal use but for sale." *Id.* at 53. In *Boyd*, the defendant's possession of "a large amount" of heroin, together with her admission that she had acquired it to sell, demonstrated she had taken a "substantial step" toward delivery — *i.e.*, she "attempted" to deliver controlled substances under ORS 475.005(8). 92 Or App at 52.

Therefore, when the legislature made it a crime to allow a child to be present "[i]n a vehicle where controlled substances are criminally delivered," ORS 163.547(1)(a)(A), it encompassed more than *actual* deliveries of controlled substances. It also included *attempted* delivery in a vehicle — that is, possession of a controlled substance within the vehicle, with the intent to

deliver it.[5]

Defendant argues that, because the legislature specified that the child must be present when controlled substances "*are being* criminally delivered," the legislature intended to limit the reach of the statute to only actual deliveries. In defendant's view, the phrase "are being" describes "an active, physical delivery, not a passive possession with an intended future delivery." (Pet Br 8). But he misunderstands the function of that phrase.

The use of the present continuous tense "are being" does nothing more than require proof that the delivery — whether actual, attempted, or constructive — is presently taking place when the child is present in the vehicle. *See* Randolph Quirk *et al, A Comprehensive Grammar of the English Language* 197 (1985) (the present continuous tense (also called the present progressive tense) "indicates a happening IN PROGRESS at a given time") (capitalization in original).

That conclusion is reinforced by the text of the neighboring subsection (1)(a)(B). That subsection criminalizes the act of leaving a child to stay "[i]n or upon premises and in the immediate proximity where controlled substances *are*

[5] That conclusion is reinforced by the fact that ORS 475.005(8) distinguishes criminal and non-criminal transfers of controlled substances. Under that statute, "administering or dispensing" controlled substances is exempt from the definition of "delivery." By referring to "criminally delivered," ORS 163.547(1)(a)(A) includes the acts of illegally transferring controlled substances but not the acts of legally transferring them.

criminally delivered[.]" ORS 163.547(1)(a)(B) (emphasis added). The use of the simple present tense "are" in subsection (1)(a)(B) demonstrates that the criminal deliveries at issue in that subsection may have occurred in the past or are regularly occurring, but not that they must occur contemporaneously with the child's presence. *See, e.g., State v. Gonzalez-Valenzuela*, 358 Or 451, 464, __P3d__(2015) ("A verb used in the simple present tense may express habitual activity, which 'impl[ies] an inherently unrestricted time span' and 'refers to a whole sequence of events, repeated over the period in question.'" (Quoting Quirk, *Comprehensive Grammar of the English Language* 179).[6] In other words, subsection (1)(a)(B) criminalizes the act of leaving a child on premises where controlled substances have been or are habitually delivered, even if the substances are not being delivered while the child is present. By contrast, subsection (1)(a)(A), by criminalizing the act of allowing a child to be a vehicle where controlled substances "*are being* criminally delivered," requires that the delivery occur when the child is present. In the context of an attempted delivery, that means the person presently possesses controlled substances with the intent to deliver them when the child is in the vehicle.

Moreover, defendant's analysis is faulty because, regardless of whether

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[6] As discussed later in this brief, the legislature's intent to distinguish between current drug activity in subsection (1)(a)(A) and habitual or recurring drug activity in subsection (1)(a)(B) is confirmed by the legislative history. *See infra* at 20-22.

the statute uses the active or passive voice, the pivotal term is the modifying adverb "criminally." As set out above, the analysis hinges on the meaning of that word. By substituting "actually" for "criminally," defendant is asking this court to both "insert what has been omitted" and "omit what has been inserted[.]" This court may not do that. ORS 174.010. In sum, the text of ORS 163.547(1)(a)(A) considered in context establishes that the legislature intended a "vehicle where controlled substances are being criminally delivered" to mean a vehicle in which a criminal delivery is presently being committed, regardless of whether it is an actual or attempted delivery.

B. Legislative history confirms that "criminally delivered" includes actual, constructive or attempted deliveries of controlled substances.

The legislative history for the first-degree child neglect statute further confirms that the legislature intended "criminally delivered" to include a *Boyd* delivery. The bill's sponsors specifically explained to legislators that the statute was intended to incorporate the definition of "delivery" in ORS 474.005, and that "criminally delivered" had a meaning consistent with *Boyd*.

The weight that a court accords legislative history varies with the clarity with which it reveals the legislature's intentions as to the statutory construction dispute in issue. The more clearly the history speaks to the meaning of the disputed terms at issue, the more weight it carries. *See, e.g.*, *SAIF v. Drews*, 318 Or 1, 8, 860 P2d 254 (1993) (statement of legislator before legislative

committee: "[T]his will do away with the current court interpretations of what is a new injury for responsibility purposes. Do you hear that, judges on the Court of Appeals * * *?" (Emphasis omitted.)). When a witness represents the original sponsor of legislation and it is clear that legislators relied on the witness's statements, those statements are regarded as reliable indicators of legislative intent. *See, e.g.*, *Ram Technical Services, Inc. v. Koresko,* 346 Or 215, 234–35, 208 P3d 950 (2009) (relying on statements of a representative of the Oregon Law Commission). Here, because the legislative history is directly on point as to the issue at hand — the meaning of "criminally delivered" — and legislators relied on the sponsor's explanation of the intended meaning of that phrase, it should be accorded significant weight.

a. In enacting the child neglect statute, the legislature intended "criminally delivered" to have the meaning used in ORS 475.005(8).

ORS 163.547(1)(a)(A) originated as part HB 2545, which was introduced during the 1991 legislative session at the request of the Oregon State Sheriff's Association.[7] The introduced version of HB 2545 provided, in pertinent part:

> SECTION 1. (1) A person having custody or control of a child under 16 years of age commits the crime of child neglect in the first degree if the person knowingly leaves the child, or allows the child to stay, in a

[7] Because discussions for HB 2545 were extensive — they cover several hearings — and bear directly on the question before this court, the state sets out substantial portions of the transcripts.

> structure or vehicle and in the immediate proximity where controlled substances are criminally delivered or manufactured.
>
> (2) Child neglect in the first degree is a Class B felony.
>
> * * * * *
>
> SECTION 3. (1) A person having custody or control of a child under 16 years of age commits the crime of child neglect in the second degree if the person knowingly leaves the child, or allows the child to stay, in a structure or vehicle and in the immediate proximity where controlled substances are criminally possessed or consumed.
>
> (2) Child neglect in the second degree is a Class C felony.
>
> * * * * *

At the first hearing on the bill, legislators questioned Jim McIntyre of the Oregon State Sheriff's Association about the meaning of "criminally delivered" in Section 1. He explained that it had the meaning as defined in the Uniform Controlled Substances Act:

> Chair Miller: Your understanding of the phrase in line 7 "criminally delivered" is that have some meaning?
>
> McIntyre: That exempts by saying "criminally delivered" you're exempting the legal definition — the *legal acts* of delivery or manufacture which are set forth in the crimes control, drug control statutes, the Uniform Controlled Substances Act. If you look at the, I think it's 495.005, the initial enabling definitions you'll find *both legal and illegal activity* dealing with delivery and manufacture. *By saying "criminally delivered" you are dealing with illegal activity*.

Tape Recording, House Committee on Judiciary hearing, Feb 19, 1991, Tape

28, Side A at 049 (emphases added).[8] As set out above, ORS 475.005(8) defines criminal deliveries of a controlled substance as actual, attempted, and constructive deliveries, and non-criminal deliveries as administering or dispensing. McIntyre's explanation of the distinction between legal and illegal delivery therefore demonstrates that "criminally delivered" included "actual, constructive or attempted" delivery of controlled substances.

Legislators also questioned whether *Boyd* might affect the proposed legislation. McIntyre reiterated that the definition of "deliver" from ORS 475.005(8) was the operative definition, and that *Boyd* was consistent with that:

> Representative Mason: Well again you're – you've got Section 3 where it's criminally possess and that bumps it up to a C felony —but I hate to keep returning to this case, but the case is a reality, *Boyd, State v. Boyd,* thank you Mr. McIntyre for that — *Boyd* has gutted delivery. Basically, if you've got a lot of dope around and they throw in a few elements that's constructive delivery and *Boyd* has gutted delivery. So there isn't much left of delivery if there's enough dope around, now it's ironic that I'm arguing *Boyd* because most of the prosecutors are usually on the other side of *Boyd,* he's probably going to argue that *Boyd* really hasn't gutted delivery but I would say *Boyd* has gutted delivery.
>
> * * * * *
>
> Why hasn't *Boyd* gutted delivery portion that if you've got a lot of dope in the apartment they're going to say you constructively deliver, that's basically *Boyd*.

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[8] Although McIntyre cites "495.005," it is clear, given the context, that he meant ORS 475.005. There is no ORS Chapter 495.

> McIntyre: Mr. Chair, Representative Mason, *State v. Boyd,* we've discussed what it stands for. It springs from a long line of Oregon cases and analogous federal circuit cases, where we got our statutory scheme from that define what an attempt is. And the focus in *Boyd* is not whether or not it's constructive possession or in fact it wasn't even a move to gut that part of the statute. It was an additional set of criteria and additional proof that we were able to establish based upon the long rather lengthy analysis of what the attempt statutes have always been.
>
> * * * * *
>
> Representative Mannix: *Boyd* involves attempt to deliver and trying to determine whether or not there's an intent to deliver by looking at the quantity. We're not talking attempted delivery here we're talking actual delivery, aren't we?
>
> McIntyre: Mr. Chair, Representative Mason, Representative Mannix, the delivery in Oregon is defined as "attempted, actual and constructive." That is the — in 475.99 — uhm.
>
> Representative Mannix: But *Boyd* is as ethereal as the next panel sitting in the Court of Appeals. Whereas this is hard law.
>
> McIntyre: The Court of Appeals* * *
>
> Representative Mannix: That's a philosophical statement. (Talks over McIntyre).

Tape Recording, House Committee on Judiciary hearing, Feb 19, 1991, Tape 28, Side A at 123-37. At a work session following the hearing, amendments unrelated to "criminally delivered" were adopted, and the bill was moved to the full committee with a "do pass" recommendation. *Id.* at 244.

Significantly, although legislators discussed the definition of "deliver" and the significance of *Boyd,* none of them proposed that "criminally delivered" be defined as "actually delivered," or expressed any understanding that

ORS 475.005(8) did not provide the operative definition. No one suggested that the bill be amended to define "criminally delivered" differently from ORS 475.005(8).

b. Subsequent hearings confirmed the meaning of "criminally delivered."

The bill then went to the senate. At a hearing on May 29, 1991, the Committee on Judiciary considered the amended bill, which provided:

> SECTION 1. (1) A person having custody or control of a child under 16 years of age commits the crime of child neglect in the first degree if the person knowingly leaves the child, or allows the child to stay, in a vehicle or on premises where controlled substances are criminally delivered or manufactured *for consideration or profit*.
>
> (2) Child neglect in the first degree is a Class B felony.
>
> * * * * *
>
> SECTION 3. (1) A person having custody or control of a child under 16 years of age commits the crime of child neglect in the second degree if the person knowingly leaves the child, or allows the child to stay, in a vehicle *or on premises* where controlled substances *are consumed in the presence of the child or are criminally possessed with intent to distribute in the presence of the child.*
>
> (2) Child neglect in the second degree is a Class C felony.
>
> * * * * *

(Amendments emphasized). There were no amendments indicating that, under Section 1, "criminal delivery" was limited to an actual delivery.

At a hearing, legislators were concerned that the bill was drafted too broadly and would encompass mere possession of illegal substances. Tape Recording, Senate Committee on Judiciary hearing, May 29, 1991, Tape 197, Side A at 155. John Bradley, of the Multnomah County District Attorney's office, explained that the changes were intended to distinguish between activity which would not be criminalized — for instance, "if somebody was growing a marijuana plant for their own personal use" — and activity that would be criminalized, such as manufacture or delivery for profit:

> Bradley: * * *. The conduct that this is going to get to is generally when the people deliver or they manufacture and the children are present. Now what we've put in this bill to kind of temper it a little bit is when we say "manufacture for consideration or profit." * * *.

Id. He emphasized that "[t]he intent of this bill was to get people that if they're going to deal in these activities to make sure that they deal in these activities without children being around." *Id*.

The "delivery" issue was raised again, and Bradley explained that possession with intent to deliver constituted a "delivery":

> Ingrid Swenson (Committee Counsel): Madam Chair may I ask John Bradley a question? John, if you could prove possession with intent to deliver, don't you basically have a delivery?
>
> Bradley: Madam Chair, Legal Counsel, yes, currently in Oregon law you do, but also there's always talk to kind of cut back on that, I know Representative Mason has from time to time talked about doing away with it.

> Swenson: So that behavior is actually covered in subsection (1) is what I'm saying.
>
> Bradley: Yes, currently under Oregon law that is correct.

Id. at 323-360.

At a work session on June 11, 1991, the same committee considered further amendments. There was extended discussion about whether, as drafted, the bill required a child to be present on premises where drugs were delivered or manufactured at the time of the delivery or manufacture. The bill's sponsors affirmed that the intent was to cover situations in which children were in a drug house even if a delivery was not occurring at that time:

> Russ Spencer (Oregon State Sheriff's Association): [I]t would be our contention that when you're involved in the manufacture and delivery of drugs there are inherent dangers whether that's taking place at that given time or not. * * *.
>
> Senator Hill: [S]uppose you have someone who sells drugs while the child is at school. And they don't sell drugs while the child is at home. * * * [I]s that the person that you'd want to get under this as well?
>
> Lieutenant Brunelle (Multnomah County Sheriff's Office): Yes sir, I think that's very important. I think the availability* * * the availability of drugs is the problem. Be it whether the parent is home or not, the drugs are there. * * *.
>
> * * * * *
>
> Spencer: Madam Chair, to Senator Hill's question however the danger is posed by the fact that it is commonly known among the drug consuming community, if you will, that there are drugs present in that house, that by its very nature makes that house a target. And unfortunately, in the increasingly violent society that the drug's society is developing, violent drug rip offs, drive by

> shootings, you know—competition, all of those come into to play and make that a dangerous activity. And that's what we're after here. * * *.

Tape Recording, Senate Committee on Judiciary Work Session, June 11, 1991, Tape 226, Side A at 195-347.

Legislators sought clarification whether that standard — that a child's presence around drugs was enough — applied to criminal delivery in vehicles. Spencer reiterated that the bill was intended to apply when a child was present in a vehicle contemporaneously with drug activity:

> Senator Shoemaker: [H]ow about the automobile situation? An automobile is used for a delivery, without the child—does that then make them neglect to ever have the child in that car?
>
> * * * * *
>
> Assume an automobile is used for deliveries, without the child. The child's not there. The next day the mother drives the car with the child in it. Is that neglect?
>
> Spencer: * * * I would defer to Ingrid [Swenson, Committee Counsel] to say whether or not under the law as it's written here it would be, that's not our intention. The reason the language "in the car" is there is because we've had situations where—one rather well documented one, I don't remember the guy's name, but where he –when he was arrested at that time after making three controlled buys in his car he had two of his children and a half a pound of cocaine and three loaded firearms.
>
> * * * * *
>
> And that's what we're after, as to whether it would constitute neglect under the bill, if the next day they were driving down the road with them—
>
> * * * * *

> I don't know, but that's not our intent.
>
> Swenson: Madam Chair, Senator Shoemaker, if the intent is to treat vehicles differently from premises then I think it is necessary to make that clearer than it is here. Yes. And I think it would be – it could be simply done to say "in a vehicle where controlled substances are being criminally delivered or manufactured."
>
> Senator Shoemaker: Or on premises where they are. Then that would make it —
>
> Chair Cohen: [D]o we have it clear how we're going to do this then, separate them in that way? Is there objections to our making that technical what would be an amendment to accommodate the differences between and a vehicle and a premises. Okay, so ordered.

Id. at 347-end of tape.

The above discussion makes three things plain: (1) legislators understood "criminally delivered" to be the operative language; (2) an attempted delivery in a vehicle with children present constituted first-degree child neglect; and (3) legislators did not intend to criminalize the act of allowing children in a vehicle in which a "criminal delivery" had occurred in the past but was not occurring at that time. It also confirms that, as discussed *infra* 11-12, the legislature's choice to use "are being" in subsection (1)(a)(A) and "are" in subsection (1)(a)(B), was intended to distinguish between deliveries that were contemporaneous with a child's presence and those that were ongoing over time, but the legislature did not require an actual delivery in either instance.

As ultimately enacted, the statute read, in pertinent part:

> SECTION 1. (1) A person having custody or control of a child under 16 years of age commits the crime of child neglect in the first degree if the person knowingly leaves the child, or allows the child to stay, in a vehicle where controlled substances are being criminally delivered or manufactured for consideration or profit or on premises in the immediate proximity where controlled substances are criminally delivered or manufactured for consideration of profit. As used in this subsection, "vehicle" and "premises" do not include public places as defined in ORS 161.105.
>
> (2) Child neglect in the first degree is a Class B felony.
>
> * * * * *

Or Laws 1991, § 832.[9]

Thus, the legislative history confirms what the text provides — that is, "criminal delivery" includes an actual, attempted, or constructive delivery. From the text, context, and legislative history, it follows, therefore, that when a person permits a child to be present in a vehicle in which the person presently possesses controlled substances with the intent to deliver them, he or she has committed first-degree child neglect.

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[9] In the 2001 legislative session, Section 1 was divided into two subsections, what are now ORS 163.547(1)(a)(A) and (1)(a)(B). The phrase "for consideration or profit" was removed from subsection (1)(a)(A) due to the decriminalization of marijuana. Thus, in cases of child neglect in a vehicle in which the controlled substance was marijuana, the state must prove that delivery was for consideration or profit. *See* Senate Judiciary Committee, Minutes, May 16, 2001 (HB 2918), Tape 144. Nothing in the legislative history of the 2001 changes indicates that they were intended to alter the meaning of "criminally delivered."

Defendant's recounting of the legislative history ignores the discussions of the meaning of "criminally delivered" and the legislature's stated intent to import the definition of "delivery" from ORS 475.005(8).[10] Although defendant is correct that the legislative history demonstrates that the "delivery" must take place in the presence of the child, it does not demonstrate that it must be an actual delivery. Indeed, as the state has explained, the legislative history demonstrates that the legislature intended the term "criminally delivered" to include attempted deliveries.

C. Because defendant "criminally delivered" drugs with his children in his vehicle, he committed the crime of first-degree child neglect.

The state presented sufficient evidence in this case to establish the elements of first-degree child neglect. To recap, defendant was stopped with his three children in the back seat of his vehicle. They were all under 16. On his person and in the vehicle, police found more than 27 grams of methamphetamine, baggies, scales, drug paraphernalia, and records. Defendant admitted he that the drugs were for his customers and that he kept the drugs and paraphernalia in the vehicle to prevent his fiancée from finding them. (Tr 24, 30, 46, 49-52, 75-78, 82, 172-79; Ex 2-10). Defendant does not dispute that he had custody or control of his children of that he knowingly allowed them to stay

[10] It appears that defendant relies on the minutes of the hearings and not the actual tapes.

in the vehicle.

From that evidence, a trier of fact could reasonably infer that 27 grams of methamphetamine was more than an amount for personal use, and therefore that defendant intended to deliver it. Coupled with the paraphernalia found in the vehicle and defendant's acknowledgement that he was selling the drug, a factfinder could reasonably infer that defendant committed attempted delivery. Thus, the state submitted sufficient evidence from which the trier of fact could find that defendant knowingly left his children or allowed them to stay in a "vehicle where controlled substances are being criminally delivered." The trial court properly denied defendant's motion for a judgment of acquittal.

CONCLUSION

This court should affirm the judgments of the trial court and the Court of Appeals with respect to defendant's conviction for first-degree child neglect.

Respectfully submitted,

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JJP:ka3/7139150

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 4, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Rankin Johnson IV, attorney for 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 6,044 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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