IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. THOMAS ELDON EASTEP, Defendant-Appellant, Petitioner on Review.	Coos County Circuit Court No. 13CR0802 CA A155418 SC S064057

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 Coos County
Honorable RICHARD L. BARRON, Judge

Opinion Filed: April 20, 2016
Author of Opinion: Flynn, J.
Before: Duncan, Presiding Judge, and Lagesen, Judge, and Flynn, Judge.

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INTRODUCTION

Must a vehicle be operable for a defendant to be guilty of unauthorized use of a vehicle? Defendant asks this court to hold that a pickup truck was not a "vehicle" under the UUV statute, ORS 164.135, simply because the clutch was not working and the truck was not, therefore, "operable" at the moment that the unlawful use occurred. But, regardless of whether a broken part or some other malfunction renders a vehicle inoperable, it is still a "vehicle" for the purposes of the UUV statute. Depriving an owner of the use of his or her vehicle negatively affects the owner in a myriad of ways, and the legislature intended to prevent such deprivation even if the vehicle needs some repair. As long as a vehicle is capable of becoming operable it is a vehicle under ORS 164.135(1), even if it is inoperable at the time a defendant exercises control over it.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented: Does a person commit the crime of unlawful use of a vehicle, ORS 164.135(1)(a), if the person sells another person's truck for scrap when the vehicle is not fully operable?

Proposed Rule of Law: Yes. ORS 163.135(1)(a) makes it a crime if a person "takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner." Because it

criminalizes acts that can be accomplished with a vehicle that is not operable, the statute applies to inoperable vehicles. Thus, an inoperable truck is a "vehicle" under ORS 163.135(1)(a).

SUMMARY OF ARGUMENT

To convict a person of unauthorized use of a vehicle, the state must prove that the person "takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner[.]" ORS 164.135(1). Analysis of that statute in context establishes that a "vehicle" need not be presently operable at the time that a person commits the act of unlawful use. Legislative history confirms that understanding. Therefore, when a person "exercises control" over a vehicle, as defendant did in this case, the state need not prove that the vehicle is operable for the person to be guilty of unauthorized use of a vehicle.

SUMMARY OF MATERIAL FACTS

Denise Stuart owned a 1992 GMC pickup truck that she parked outside of her house. The clutch had been "out" for approximately four or five months. Tr 13, 15. The truck was missing one evening and Stuart, believing that it had been stolen, called the police. Tr 16-17, 19. Officer David Smith investigated and learned that the truck had been towed by Shinglehouse Auto Wreckers, a scrap metal business. Tr 27, 28, 45, 47. Shinglehouse told Officer Smith that defendant—who did not know Stuart—had scrapped Stuart's truck, calling

Shinglehouse to tow it and representing that he had a lien on the pickup. Tr 31-33; Ex 2. Shinglehouse paid defendant $100 for the truck. Tr 35-36; Ex 3. Defendant later admitted to Officer Smith that he had the car towed and received $100 for it. Ex 4. Shinglehouse returned the truck to Stuart. Tr 17, 36.

Stuart later sold the pickup to Steve Britton for scrap. Tr 58-60. Because the "transmission or clutch was seized up" the truck would not travel "under its own power." The engine started up and ran, but Britton opined that it was "no good" because it was "rattling[.]" Tr 60, 66.

The state charged defendant with unauthorized use of a vehicle under ORS 164.135. Specifically, the indictment alleged that defendant "did unlawfully and knowingly exercise control over a vehicle, without the consent of Denise Danielle Stuart, the owner thereof." ER 1.[1] At the close of the state's case, defendant moved for a judgment of acquittal, arguing that under *State v. Macomber*, 269 Or 58, 523 P2d 560 (1974), defendant had to knowingly exercise control over an "operable vehicle." Tr 56. The trial court denied the motion, noting that *State v. Blair*, 54 Or App 228, 634 P2d 491 (1981), had upheld a conviction for unauthorized use of a motorcycle when the motorcycle was missing an ignition key and a battery. Tr 69-70. Defendant requested that

[1] The state cites to the Excerpt of Record contained in appellant's opening brief in the Court of Appeals.

the court instruct the jury that "[f]or the purposes of the crimes of Unauthorized Use of a Vehicle, the state must prove that the vehicle in question was a 'single operable unit.'" ER 3. The court declined to give defendant's requested instruction. Tr 70-71. The jury found defendant guilty of UUV. ER 7.

Defendant appealed, again arguing that, under *Macomber*, the state was required to prove that the vehicle was a "single operable unit," and because the clutch was not working the truck was "inoperable." Therefore, defendant argued, his actions in towing the truck for scrap did not constitute UUV. Defendant also argued that the trial court erred in declining to deliver his requested jury instruction.

The Court of Appeals affirmed the trial court's judgment. *State v. Eastep*, 277 Or App 637, 371 P3d 1287 (2016). It held that, consistent with *Blair*, 54 Or App 228, *Macomber* did not require the state to prove that defendant exercised control over an "operable" vehicle. Additionally, based on the evidence that defendant had sold and had towed the truck without the owner's consent, the jury could find that defendant took control of a "vehicle" under ORS 164.135, even though the truck was not "operable." Therefore, the trial court did not err in declining to give defendant's request jury instruction, or in denying defendant's motion for judgment of acquittal. 277 Or App at 678.

ARGUMENT

This case turns on what the legislature intended "vehicle" to mean when it enacted ORS 164.135(1)(a). The text of that statute, its context, and its legislative history establish that the legislature intended "vehicle" to include vehicles that are not fully operable at the time that the unauthorized use occurs. A person commits the crime of unauthorized use of a vehicle, therefore, by exercising control over a vehicle that cannot be driven simply because the clutch is out or there is some other mechanical failure.

A. The text and context of ORS 164.135 demonstrate that a vehicle need not be fully operable for a defendant to commit UUV.

To determine what the legislature intended when it enacted that statute, this court looks to the text of the statute in context, as well as relevant legislative history and, if necessary, maxims of construction. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). As explained below, the text of ORS 164.135 contains no requirement that a vehicle be "operable." Moreover, the context—including this court's prior case law, prior versions of the statute, and New York case law interpreting the New York statute upon which Oregon's UUV statute is based—further demonstrates that a vehicle need not be "operable."

1. The text of ORS 164.135 does not include the term "operable" or anything similar.

ORS 164.135(1) provides, in pertinent part, that a

> "person commits the crime of unauthorized use of a vehicle when:
>
> (a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner[.]"[2]

ORS 164.135(1) does not define the term "vehicle" or refer to any other statutory definition of the term. Significantly, the statute does not contain the term "operable," "mobile," "drivable," or any term of similar meaning that limits the utility of the "vehicle" that is the subject of the unauthorized use. In examining the text and context of the statute, the court may "not * * * insert what has been omitted, or * * * omit what has been inserted." ORS 174.010; *PGE*, 317 at 611. Defendant's attempt to insert "operable" into ORS 164.135 violates that basic rule of interpretation.

Moreover, the plain meaning of "vehicle" does not compel the conclusion that only operable vehicles are covered by the statute. *See PGE*, 317 Or at 611 (in examining the text, the court gives words of common usage their "plain, natural, and ordinary meaning"). The legislature enacted ORS 164.135 as part of the 1971 revisions to the criminal law code. Or Laws 1971 c 743 § 134. At that time, *Webster's* defined vehicle as

> **5 :** a means of carrying or transporting something : CONVEYANCE; as **a :** a carrier of goods or passengers * * * *specif* : MOTOR VEHICLE * * * **b :** a container in which

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[2] The complete text of ORS 164.135 is set out at App-1.

> something is conveyed * * * **c :** a piece of mechanized equipment **d :** a propulsive device * * * **syn** see MEAN[.][3]

Webster's Third New Int'l Dictionary 2358 (unabridged ed 1961).

From this, defendant extrapolates that a "vehicle" is used for "conveying, carrying, [or] transporting" and, if at the moment that the unlawful use occurs it is incapable of doing one of those activities due to a malfunctioning part, it is not a "vehicle." App Br 10-11. But of all the possible ways that an act can fall within the UUV statute, only "rides in" implies that a vehicle must be capable of those activities at the moment that the unlawful use occurs. Moreover, "drive"—another verb that could imply an operability requirement—is not included in the statute. That omission strongly undermines defendant's contention that a vehicle must be capable of operating as a means of conveying, carrying or transporting.[4]

Defendant's argument also ignores the rest of the statute's text, which demonstrates that "vehicle" should not be read in the narrow manner that defendant suggests. "Vehicle" does not appear in isolation in ORS 164.135(1).

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[3] None of the preceding definitions are applicable in this case; they define vehicle as "'an inert substance * * * in a medicinal compound," "an agent of transmission," "a mode of expression," and "a material embodiment or repository." *Webster's* at 2358.

[4] But a vehicle can be driven or ridden in even if some parts are malfunctioning. A vehicle parked on a hill can be driven or ridden in if someone puts it in neutral and releases the brake, thus allowing it to coast downhill.

Rather, it is the object of a series of verbs that set out the criminalized acts—verbs that demonstrate that "vehicle" should be read to include vehicles that are inoperable. For example, the statute criminalizes "tak[ing]" and "exercis[ing] control over" a vehicle. Performing either of those acts does not require that the vehicle be capable of operating as a means of conveyance or transportation when the unlawful use occurs. Indeed, a person can "take" a vehicle that is not running by simply towing it away. Additionally, a person can "exercise control over" a vehicle that is broken down and inoperable by storing things in it, sleeping in it, or having it towed. That is particularly important in this case, because defendant was charged with UUV in that he "exercise[d] control over a vehicle"—not that he rode in it or operated it. ER 1 (Indictment).

The statute also includes "otherwise us[ing]" a vehicle. A person can still "use" a vehicle with a non-functioning clutch by turning on the radio, lighting a cigarette with the cigarette lighter (in older models), or charging up a cell phone or other personal data device (in newer models). The exclusion of "drives"—and the inclusion of "takes," "exercises control over," or "otherwise uses"—indicates a much broader range of prohibited conduct, including conduct that does not require a vehicle to be operable.

Moreover, relying on the dictionary definition to limit "vehicle" does not take into account the changing nature of "operability." For instance, an automobile might not be "operable" in the sense that it cannot be driven

because it has a flat tire or dead battery, is out of gas, or the clutch is out. But it does not cease to be a vehicle. As long as the vehicle has all of the parts necessary for a person to take, operate, exercise control over, ride in, or otherwise use it, it is a "vehicle" even if one or more of the parts are broken at the time of the unlawful use.

Put differently, as long as a vehicle is *capable* of becoming operable it is a "vehicle" even if it is inoperable at the time of the unlawful use. Indeed, defendant appears to concede as much when he states, "[t]o be a vehicle, something must at least be *capable* of operating as a means of conveyance or transportation." App Br 10 (emphasis added). To the extent that defendant is arguing that it must be "capable of operating" at the exact moment that the unlawful use occurs, that requirement cannot be inferred from the text or the dictionary definitions. In short, the text demonstrates that the legislature did not intend a "vehicle," as ORS 164.135 uses that term.

2. The context of ORS 164.135 demonstrates that a vehicle need not be operable.

The state now turns to the context of ORS 164.135, including prior versions of the statute, prior case law interpreting ORS 164.135, and case law interpreting the predecessor statute from New York. The context further confirms that the legislature did not intend that a vehicle be operable for a person to commit UUV.

a. Prior versions of the statute demonstrate that a vehicle need not be operable.

In considering the context of a statute, this court considers previous versions of the statute and the changes made to it. *See, e.g.*, *State v. Cloutier*, 351 Or 68, 76-94, 261 P3d 1234 (2011) (tracing ORS 138.050 from the Deady code to present version); *State v. Blair*, 348 Or 72, 76, 228 P3d 564 (2010) ("[T]he context that we consider along with the text [of the criminal code] includes the law as it existed before the adoption of the 1971 criminal code.").

Here, two prior statutes that were subsumed by ORS 164.135—*former* ORS 164.650 and 164.660—provide context demonstrating that a vehicle need not be operable under ORS 164.135. Commentary to the Criminal Law Revision Commission Proposed Oregon Criminal Code Final Draft and Report § 134 (July 1970). *Former* ORS 164.650[5] criminalized "climb[ing] upon or into" a motor vehicle "whether it is at rest or in motion" *or* while the vehicle was "at rest or unattended, attempt[ing] to manipulate[] any of the levers, the

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[5] *Former* ORS 164.650 provided in full:

> With the exception of an authorized officer, marshal, constable or policeman, any person who, without the consent of the owner or person lawfully in charge of a motor vehicle, as defined in ORS 483.014, climbs upon or into such motor vehicle, whether it is at rest or in motion; or, while it is at rest or unattended, attempts to manipulate any of the levers, the starting crank or other device, brakes or mechanism, or sets the vehicle in motion, shall be punished, upon conviction, as provided in subsection (1) of ORS 483.990 for violation of the statutes listed therein.

starting crank or other device, brakes or mechanism, or set[ting] the vehicle in motion[.]" Thus, on its face, *former* ORS 164.650 could apply to vehicles that were inoperable.

Likewise, *former* ORS 164.660 criminalized an extensive list of acts, some of which would not necessarily require operability.[6] In part, it criminalized "wilfully break[ing], injur[ing], tamper[ing] with or remov[ing] any part of such vehicle for the purpose of injuring, defacing or destroying it[.]" Even if a clutch is not working and the car is not presently operable in the sense that it cannot be driven, a person can still break, injure, tamper with, or remove some part of it. Moreover, the fact that the statute was concerned with "injuring" or "defacing" the vehicle indicates that it was not solely concerned with acts that deprive an owner of the ability to use it as a means of transportation.

As discussed further, below, when the legislature enacted ORS 164.135 it "included" the acts covered by those statutes. Commentary at §134.

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[6] *Former* ORS 164.660 provided in full:

> Any person who, individually or in association with one or more others and against the will or without the consent of the owner of any motor vehicle, as defined in ORS 483.014, wilfully breaks, injures, tampers with or removes any part of such vehicle for the purpose of injuring, defacing or destroying it, or temporarily or permanently preventing its useful operating for any purpose, or in any manner wilfully or maliciously interferes with or prevents the running or operation of such motor vehicle, shall be punished, upon conviction, as for a misdemeanor.

Accordingly, because those statutes did not require that a "vehicle" be operable, neither does ORS 164.135. *See Harris and Harris*, 349 Or 393, 402, 244 P3d 801 (2010) ("[T]he context of a statutory provision, including its prior versions, is helpful in determining [the statute's] reach.").

b. This court's prior case law does not hold that a "vehicle" must be operable.

Context includes prior case law interpreting and applying a statute. *State v. McDonnell*, 343 Or 557, 563, 176 P3d 1236 (2007). This court has considered ORS 164.135 only in *State v. Macomber*, 269 Or 58, 523 P2d 560 (1974), and this court did not hold in that case that a vehicle must be "operable."

In *Macomber*, the defendant was convicted under ORS 164.135 in that he "exercised control" over "a large number of parts of a partially disassembled" log truck. 269 Or at 59, 61. The Court of Appeals upheld the conviction under the assumption that the truck was operable when the defendant first acquired it. Unable to find any evidence in the record that the truck was fully assembled when the defendant acquired it, the Supreme Court reversed, concluding that "[t]here is no evidence which either directly or by inference shows that defendant exercised control over the * * * truck as a single, operative unit." *Id.* at 61. The court held that parts of a disassembled truck do not constitute a "vehicle," as used in ORS 164.135. But the court did not further limit the

definition of "vehicle" to require that it be completely and presently operable as well as assembled. The court used the phrase "single, operative unit," merely to distinguish the "large number of parts" that the defendant possessed from a fully-assembled, identifiable vehicle.

Defendant aptly states that *Macomber* is "not a model of clarity," but still argues that the court imposed an "operability" requirement because it stated that the defendant possessed a "wrecked truck, which would not constitute a vehicle capable of operation." App Br at 16, citing *Macomber*, 269 Or at 62 n 2. Defendant's argument is unpersuasive.

First, *Macomber* predates *PGE* and *Gaines* and contains no statutory analysis under the framework of those two cases. *Macomber* turned on a factual issue—whether the defendant ever possessed a fully assembled truck—and the case contains no discussion of the text, context, or legislative history of ORS 164.135. Absent the requisite analytical process, *Macomber* cannot be cited to hold that a vehicle must be fully and presently "operable." *See State v. S.G.L.*, 177 Or App 715, 718-20, 33 P3d 1023 (2001) (*per curiam*) (Kistler, J., concurring) (noting that the appellant's argument was premised on a case that was decided pre-*PGE* and, under *PGE*, that case's holding could not be extended to other cases absent a textual basis).

Second, and relatedly, *Macomber* hinged on the lack of evidence that the defendant exercised control over "an integral operable vehicle," as opposed to

"separate parts of a truck." 269 Or a 60-61. That was because it was "impossible to determine from reading the transcript how defendant acquired the truck parts[.]" *Id.* The court noted that defendant might have driven or "towed the truck while it was inoperable," or he might have dismantled it first and carried the parts away, or he might have bought the parts from someone else who had stolen the truck. *Id.* Although not entirely clear, the court's enumeration of those possibilities— particularly its statement that the defendant might have "towed the truck while it was inoperable"—implies that, had the truck been fully assembled when the defendant acquired it, he would have been guilty of UUV, even if it was inoperable. It is telling that the court did *not* take that opportunity to hold that a temporarily inoperable truck would not be a vehicle under ORS 164.135.

Third, the primary support for defendant's argument comes from the concurring opinion's characterization of the majority opinion, but that characterization was mistaken. The concurrence included the following statement:

> I concur in reversal of the conviction in this case because I agree that the evidence was insufficient. I do not agree, however, with the apparent assumption by the majority to the effect that ORS 164.135 is confined in its application to "operable vehicles" and thus, for example, would have no application to a car without a battery or with a flat tire.

Macomber, 269 Or at 62 (Tongue, J; specially concurring). But the majority opinion contains no assumption that the unauthorized use of a car without a battery or with a flat tire—which is the equivalent of the nonfunctioning clutch here—would not be prohibited by ORS 164.135. Thus, at least in instances in which a defendant is charged with "exercising control" over a vehicle, *Macomber* does not support an operability requirement.

c. Interpretation of the corresponding New York statute upon which Oregon's UUV statute is based supports the conclusion that a vehicle need not be operable.

"As a general rule, when the Oregon legislature borrows wording from a statute originating in another jurisdiction, there is a presumption that the legislature borrowed the controlling case law interpreting the statute along with it." *Lindell v. Kalugin*, 353 Or 338, 355, 297 P3d 1266 (2013). ORS 163.135 was adapted from the Model Penal Code § 223.9 and New York Revised Penal Law § 165.06. Commentary § 134. Like Oregon's statute, NY Penal Law § 165.06 provides:

> A person is guilty of unauthorized use of a vehicle when:
>
> 1. Knowing that he does not have the consent of the owner, he takes, operates, exercises control over, rides in or otherwise uses a vehicle.

In *People v. McCaleb*, 25 NY 2d 394, 255 NE 2d 136 (1969), the New York Court of Appeals considered the breadth of Penal Law § 165.06, and held that it was not limited to only "vehicles in motion." *McCaleb* involved two

different defendants. The first, McCaleb, had been found sitting in the rear car seat with the engine turned off but with a working key in the ignition. The second, Gibbs, was found sleeping in the front passenger seat of a vehicle whose motor was running. 25 NY 2d at 397.

In its analysis, the court compared the UUV statute to an earlier version which had been "strictly construed." *Id*. at 398. It noted that the new version included the phrases "exercises control over" and "rides in," which were textual changes indicating that a "broader range of conduct was being prohibited." 25 NY 2d at 398-99. Moreover, the addition of "otherwise" to the verb "uses," "serves only the purpose of broadening rather than narrowing" that word. *Id.* at 399. As a further textual matter, "the exercise of control is not limited to a moving vehicle, for otherwise it would be largely synonymous with 'operates,' or covered by 'riding.'" *Id.* Thus, because the statute evidenced a legislative intent to cover a wider range of acts than mere joyriding, the court concluded that it did not require the vehicle be mobile.

Although *McCaleb* appears to be the only New York case decided prior to the Oregon legislature's adoption of the New York statute in 1971, subsequent New York cases confirm that *McCaleb* did not require vehicles to be operable. *See, e.g.*, *Dupra v. Benoit*, 270 AD 2d 856, 856, 705 NYS 2d 781 (2000) (explaining that a vehicle is still a vehicle if it is temporarily disabled); *People v. Lopez*, 144 Misc 2d 325, 326–27, 544 NYS 2d 410, 411 (Sup Ct

1989) (holding that an automobile is a motor vehicle regardless of whether it is operable). Thus, it is appropriate to regard *McCaleb* as at least highly persuasive as to the intentions of the Oregon legislature in borrowing from the New York statute. *See, e.g., BRS, Inc. v. Dickerson*, 278 Or 269, 275, 563 P2d 723 (1977) ("'When one state borrows a statute from another state, the interpretation of the borrowed statute by the courts of the earlier enacting state ordinarily is persuasive.' ") (quoting *State ex rel. Western Seed v. Campbell*, 250 Or 262, 270–71, 442 P2d 215 (1968)). In sum, the text and context of ORS 164.135 demonstrates that a "vehicle" need not be mobile for a defendant to commit the crime of UUV.

B. Legislative history demonstrates that "vehicle" includes those that are not operational.

In addition to considering the text and context of the statute, this court considers legislative history to the extent that it illuminates the text and context. *Gaines*, 346 Or at 172. As set out below, the legislative history—particularly the commentary to the Proposed Oregon Criminal Code—establishes that the legislature intended to include vehicles that are not operable.

1. Legislative commentary establishes that the UUV statute that the legislature adopted in 1971 was intended to include acts that had been criminalized under *former* ORS 164.650 and 164.660, which criminalized acts that did not require a vehicle to be operational.

In considering legislative history, the Criminal Law Revision Commission's official commentary to the Proposed Oregon Criminal Code,

when relevant, is particularly persuasive. *See State v. White*, 341 Or 624, 639 n 7, 147 P3d 313 (2006) (finding that although the legislative history was "helpful" and confirmed the court's view of the legislature's intent, the official commentary was "determinative").

The commentary to ORS 164.135 states:

> This section covers the "joy-riding" type of offense where the actor makes unauthorized use of another's vehicle but without the intent to steal it or permanently deprive the owner of its use. The purpose of the language, "takes, operates, exercises control over, rides in or otherwise uses," is to prohibit not only the taking or driving of another's vehicle without permission but, also, to prohibit *any* unauthorized use of the vehicle.

Commentary §134 (emphasis in original).

Thus, while the commentary specifically mentions that the statute prohibits "driving," which at least theoretically would require operability, it emphasizes that the statute is much broader than that: "*any* unauthorized use" of a vehicle necessarily encompasses acts that do not require a vehicle to be operable. As pointed out, one can "use" a vehicle by sleeping in it or storing things in it.

The commentary also reflects that the drafters of ORS 164.135 deliberately refrained from applying a restrictive definition of "vehicle." The commentary explains that

> "[t]he first draft of the section limited its coverage to 'motor-propelled' vehicles only; however, the Commission believed that

> the proposal should also protect owners of such things as trailers, sailboats and gliders."

Commentary § 134. The drafters specifically declined to incorporate a definition of "vehicle" from another ORS Chapter. The commentary states that, while *former* ORS 164.650 and 164.660 incorporated by reference the term "motor vehicle as defined in ORS 483.014," the draft did *not* incorporate that definition. *Id.* The legislature's conscious choice not to define "vehicle" in that way is consistent with the text and context analysis set out above that demonstrates that "vehicle" should be read broadly. As discussed, the text and context demonstrate that ORS 164.135 was intended to cover a wide variety of acts by prohibiting "*any* unauthorized use of [a] vehicle," not merely those that required the vehicle to be operable. The legislature's decision not to define "vehicle" points to its intent to permit a reading that covers a wide variety of vehicles in various states of operability.

Furthermore, the commentary states:

> The section is meant to include the kinds of acts covered by ORS 164.670, the existing "joy-riding" statute, *as well as conduct such as manipulating, starting or tampering* with motor vehicles (ORS 164.650, 164.660).

Id. (emphasis added). As discussed above, "manipulating" and "tampering" do not demand or imply an operability precondition for a vehicle. Thus, the commentary demonstrates that a "vehicle" need not be fully operable under the UUV statute.

2. Legislative history demonstrates that the legislature intended the statute to be used broadly to cover acts that do not require a "vehicle" to be operable.

Although the legislative history for the 1971 revisions to the criminal code is extensive, the material related to ORS 164.135 does not provide direct discussion as to the meaning and reach of "vehicle." But to the extent that the legislative history discusses that statute, it further confirms that the legislature intended to not only encompass the former "joyriding" statute, but to expand the statute to incorporate other crimes related to vehicles that were inoperable.

The Senate Criminal Law and Procedure Committee reviewed the proposed Senate Bill 40 in March 1971. The proposed provision was "not limited to motor vehicles." The Commission "specifically intended this, believing the proposal should also protect such things as sailboats and other items that might be a vehicle for some purposes but which might not be motorized." Senate Criminal Law and Procedure Committee, Minutes at 4, March 2, 1971.

At the meeting of the Oregon Criminal Law Commission to review the preliminary draft of the statute, there was discussion about the proposed expansion of the joyriding statute. Donald Paillette, the project director, explained that the draft went "beyond the present taking and using statute and prohibited unauthorized conduct presently covered under other statutes such as tampering with a motor vehicle." Criminal Law Revision Commission,

Minutes at 12, April 6, 1968. Representative Edward Elder asked if entering an automobile was covered in the draft, and Mr. Paillette explained that "'exercises control over' was, in his view broad enough to apply to entering, and other members agreed." *Id.* at 13.

The committee did not attempt to define "vehicle" or state whether the statute was intended to cover only operable vehicles, but it did discuss whether other "vehicles" such as "gliders, ballo[o]ns, sailboats and horse drawn vehicles," should be included in the statute. *Id.* at 12. Committee Member Robert Chandler proposed deleting "motor" from the draft and inserting "or other vehicle which is not propelled by human power" in place of "or other motor-propelled vehicle[.]" The matter was left unresolved, because that was a "policy decision for the committee to make and if the members decided to include vehicles other than motor driven in the statutes, the draft could be easily remedied to do so." *Id.* Subsequent history contains no discussion of the issue but, as adopted, the statute included vehicles, boats, and aircraft, and did not define "vehicle" or limit it to "motor-propelled vehicles."

Defendant contends that, because the committee discussed including boats and gliders in addition to vehicles, this "makes it clear" that the legislature "wished to single out functional vehicles for protection." App Br 22-23. But that discussion of boats and gliders does not bear the weight that defendant places upon it. Defendant's argument ignores the other pertinent

point of the committee's discussion, that is, that the statute was intended to incorporate other existing statutes— *former* ORS 164.650 and 164.660. As set out above, those statutes did not require operability and nothing in the legislative history even hints that, when the legislature incorporated those older statutes into ORS 164.135, the legislature contemplated adding an operability element.

Moreover, if, as defendant contends, the legislature intended to "single out functional vehicles" for inclusion in the statute, it would not have included sailboats and gliders. By their very natures, sailboats and gliders are not operable unless the wind is up or air currents are strong enough. Gliders are put into use by first being pulled into the sky by a motorized airplane. It makes no sense to argue that if a towing plane is unavailable the glider is not an aircraft, or a sailboat is not a boat if the wind is still. If that were the case, a defendant could be charged with UUV by taking a glider when a towing plane was available, but could not be so charged when one was not available. Or he could be charged with UUV for taking a sailboat when the wind was blowing, but not when it was calm.

Just as it defies logic to make a UUV charge dependent upon the state of the wind, it likewise defies logic to make it dependent upon the operability of every single part of a vehicle. Vehicles regularly become temporarily inoperable because batteries run dead, tires go flat, clutches go out, and starters

give out. Under defendant's proposed construction, a vehicle with such a malfunction is not a "vehicle" under ORS 164.135. As long as a vehicle is *capable* of becoming operable it is a vehicle under ORS 164.135. In sum, the legislative history confirms what the text and context demonstrate, *viz.*, that the legislature did not intend to impose an operability requirement when it criminalized unlawful use of a vehicle.

C. Because the legislature did not intend that a "vehicle" be operable, defendant committed UUV when he had the victim's truck sold for scrap.

Because the vehicle over which a person exercises control need not be operable for the person to be guilty of UUV, the trial court correctly denied both defendant's motion for a judgment of acquittal and his proffered jury instruction.

To recap, defendant was charged with "unlawfully and knowingly exercise[ing] control over a vehicle, without the consent of Denise Danielle Stuart, the owner thereof." ER 1 (Indictment). Defendant contacted Shinglehouse Auto Wreckers, asking them to tow Stuart's truck for scrap and representing that he had a lien on the truck. Defendant later admitted to the investigating officer that he had the truck towed and received $100 for it. Although the truck started up and ran, it was inoperable—only in the sense that it could not be driven—because the clutch was out. But a clutch is easily

repaired and is not a malfunction that renders a vehicle permanently and irreparably inoperable.[7]

From that evidence, a trier of fact could reasonably infer that defendant exercised control over the vehicle, regardless of whether it was operable. Thus, the state presented sufficient evidence in this case to establish the elements of UUV, and the trial court properly denied defendant's motion for a judgment of acquittal.

Defendant requested the following jury instruction:

> "For the purposes of the crime if Unauthorized Use of a Vehicle, the state must prove that the vehicle in question was a 'single operable unit.'"

ER 1-4 (Defendant's Requested Jury Instructions).

If a proffered instruction is refused there is no error if the instruction is not a correct statement of the law. *State v. Nefstad*, 309 Or 523, 542, 789 P2d 1326 (1990). As set out above, ORS 164.135(1) does not require that a vehicle be operable. Accordingly, defendant's requested instruction was not a correct

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[7] The testimony at trial established that the engine rattled but started up. Tr 60, 66. There was no evidence that, had the clutch been working at that time, the engine was in such poor shape that the truck could not have been driven at least a short distance, thus making it "operable" at the time that defendant exercised control over it. Even if the engine was on its last legs, it could be replaced and there was no evidence that the clutch and engine could not be replaced or, if they were replaced, that the truck would still be inoperable.

statement of the law, and the trial court did not err in refusing to give the instruction.

CONCLUSION

This court should affirm the judgment of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 8, 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 Ernest Lannet and Laura E. Coffin, attorneys 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 5,990 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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