IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Plaintiff-Respondent,	)	Trial Court No. 00FE0217AB
Respondent on Review,	)	
	)	
vs.	)	Appellate Court No. A112752
	)	
JAMES LEWIS GLASPEY,	)	
	)	Supreme Court No. S50105
Defendant-Appellant,	)	50105
Petitioner on Review.	)	

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment
of the Circuit Court for Deschutes County
Honorable ALTA J. BRADY, Judge

Affirmed En Banc: October 9, 2002
Author of Opinion: Brewer, J.
Before Diets, Chief Judge
Edmonds, Landau, Haselton, Armstrong, Linder,
Wollheim, Kistler and Brewer, Judges

PETER A. OZANNE #74246
Executive Director
PETER GARTLAN #87046
Chief Defender
RANKIN JOHNSON IV #96490
Deputy Public Defender
1320 Capitol St. NE - Suite 200
Salem, Oregon 97303
Phone: 378-3349

Attorneys for Petitioner on Review

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
KATHERINE H. WALDO #80395
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: 378-4402

Attorneys for Respondent on Review

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases Cited

TABLE OF AUTHORITIES

PAGE

Cases Cited (cont'd...)

Constitutional and Statutory Provisions

TABLE OF AUTHORITIES

PAGE

Constitutional and Statutory Provisions (cont'd...)

TABLE OF AUTHORITIES

PAGE

Constitutional and Statutory Provisions (cont'd...)

Miscellaneous

BRIEF ON THE MERITS

Nature of the Proceeding

In this criminal case, defendant seeks vacation of one of his two convictions for felony assault in the fourth degree.

Defendant pleaded no-contest to two counts of felony assault in the fourth degree. Pursuant to the state's recommendation and ORS 161.705(1), the court treated both felony counts as misdemeanors for purposes of both conviction and sentence. The court sentenced defendant to 18 months of probation on each count.

Legal Question Presented

Defendant struck the victim once, which was witnessed by the victim's two minor children. As a result of that conduct, he was convicted of two counts of felony assault in the fourth degree. If there had been no such witnesses, that conduct would have been a single misdemeanor assault in the fourth degree.

Under those circumstances, may the trial court properly enter judgment on two convictions, one for the assault as witnessed by one child, and one for the assault as witnessed by the other child?

Proposed Rule of Law

A child, whose presence or status as a witness elevates a misdemeanor assault to a felony, is not a "victim" for purposes of determining the proper number of convictions.

Summary of Argument

For purposes of this case, misdemeanor assault in the fourth degree becomes a felony when witnessed by the victim's minor child. The issue is whether such an assault

in the presence of two child-witnesses constitutes two assaults. That depends, in part, on whether the child-witnesses are "victims" of the assault.

Whether the child-witnesses are also "victims" is a question of legislative intent. Defendant's conduct constituted a single offense because, for the following reasons, the legislature did not intend that a single assault in front of two child-witnesses constitutes two assaults.

First, the statute refers both to the "victim," the person struck, and the "victim's minor child." Therefore, the statute does not designate the child as a "victim" of the assault.

Second, and contrary to the Court of Appeals' unstated assumption, not every person the legislature seeks to protect by a criminal statute is a "victim" of the violation of that statute. Many statutes are intended to protect broad classes of people, but those people are not "victims." Accordingly, in the absence of clear legislative direction otherwise, the "victim" of an offense is the direct victim. That view is consistent with other, related statutes, in particular the statutes forbidding other degrees of assaults, murder, and aggravated murder.

The statute at issue in this case does not rebut the presumption that the "victim" of an offense is the direct victim. Rather, it strengthens the presumption by using different terms to refer to the direct victim and the child-witnesses. Further, the presence of a particular child-witness, as opposed to one or more unspecified child-witnesses, is not an element of the offense. Rather, the presence of multiple children establishes the same aspect of the offense multiple times. Therefore, under Oregon statutory law and this court's prior cases, there was only one offense.

Summary of Facts

Defendant pleaded no-contest to both counts of the indictment. By pleading no-contest, defendant conceded that the state could prove that defendant intentionally, knowingly, or recklessly caused physical injury to the victim, and the assault was witnessed by two of the victim's minor children. *See* ORS 163.160.

Discussion

I. Introduction

This case relates to the construction and combination of two statutes, ORS 163.160, defining the crime of assault in the fourth degree, and ORS 161.067, regarding the number of punishable offenses for, *inter alia*, a single wrongful act with multiple victims.[1] Defendant argues that those two statutes authorize a single conviction where the defendant struck one person, one time, while witnessed by two of the victim's children.[2] Regardless of whether it was proper to charge two counts, or submit two counts to a jury, two guilty verdicts or pleas should have been combined into a single

---

[1] The Court of Appeals opinion suggests that defendant's position in the trial court was that he could not receive separate sentences for his conduct, not that he could not receive separate convictions. That is not accurate. Because the statute at issue here renders defendant's conduct criminal in one subsection, and assigns a penalty based on the presence of witnesses in another section, the distinction between defendant's crime and his penalty is not perfectly clear. Nonetheless, defendant has always objected to having two convictions, and argued below that the two convictions 'merge.' Further, the Court of Appeals explicitly considered whether defendant's conduct supports multiple convictions.

[2] For clarity, defendant refers to the person struck as the "victim" and the child-witnesses as 'children' or as 'child-witnesses.' Whether the children are also "victims" of defendant's conduct is part of the issue presented by this case.

conviction for purposes of sentencing, criminal history, and other collateral consequences.[3]

ORS 163.160 reads in part as follows:

Assault in the fourth degree.

"(1) A person commits the crime of assault in the fourth degree if the person:

"(a) Intentionally, knowingly or recklessly causes physical injury to another, or

"(b) With criminal negligence causes physical injury to another by means of a deadly weapon.

"(2) Assault in the fourth degree is a Class A misdemeanor.

"(3) Notwithstanding subsection (2) of this section, assault in the fourth degree is a Class C felony if the person commits the crime of assault in the fourth degree and:

"(a) The person has previously been convicted of assaulting the same victim;

"(b) The person has previously been convicted at least three times under this section or under equivalent laws of another jurisdiction and all of the assaults involved domestic violence, as defined in ORS 135.230; or

"(c) The assault is committed in the immediate presence of, or is witnessed by, the person's or the victim's minor child or stepchild or a minor child residing within the household of the person or victim.

"(4) For the purposes of subsection (3) of this section, an assault is witnessed if the assault is seen or directly perceived in any other manner by the child."

(Emphasis added.)

ORS 161.067 reads in part as follows:

"Determining punishable offenses for violation of multiple statutory provisions, multiple victims or repeated violations.

"* * * * *

---

[3] This combination is sometimes called 'merger.' *See, e.g., State v. Lucio-Camargo*, 172 Or App 298, 302 n 3, 18 P3d 467 (2001). This court, however, has written that the term 'merger' is only applicable when one offense is a lesser-included offense to another. *State v. Cloutier*, 286 Or 579, 586 596 P2d 1278 (1979). Because defendant does not seek "merger" as that term is used in *Cloutier*, he avoids the use of that term in this brief.

> "(2) When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims."

The issue is how many convictions may properly be entered against a criminal defendant who assaults a person while witnessed by, or in the presence of, two of the defendant's or victim's children. That is a question of statutory construction; defendant does not dispute that the legislature could provide that such an assault justified multiple convictions. The issue is whether the legislature intended single or multiple assaults for a single assault witnessed by, or in the presence of, multiple children.

This court explained how to interpret statutes in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). The *PGE* analysis has three levels, all employed to ascertain the legislature's intent. At the first level, the court looks at the statute's text and context. If the legislature's intent is clear from the text and context, the analysis ends. If the statute is susceptible of multiple interpretations, the court examines the legislative history in order to resolve the ambiguity. If the legislative history resolves the ambiguity, the analysis ends. Otherwise, the court employs canons of statutory construction to resolve any remaining ambiguity. *PGE* at 610-612.

Applying the analysis from *PGE*, and reading the two statutes together, defendant can be punished for multiple offenses if, by assaulting the victim, he violated one statutory provision against two or more victims. There could only be two or more victims if the children are victims of defendant's offense; otherwise there was one victim, the person struck, and only one conviction was proper.

II. The text of the assault statute establishes that that the child-witnesses are not "victims"

II. The text of the assault statute establishes that that the child-witnesses are not "victims"

The text of ORS 163.160 refers to the person struck as the "victim," and to the witness as "the victim's minor child." If the legislature had intended for the victim's child to be treated as a separate victim, it could easily have said so. By referring to the victim and the victim's child separately, the legislature put the two into separate classes. Accordingly, examination of the statute's text supports defendant's position.

Although the Court of Appeals held that the use of the terms "victim" and "child-witness" were simple textual references, 184 Or App 176-177, that does not explain the legislature's use of those terms in this statute. It is true that many similar statutes that clearly have a direct victim do not use that term. *See, e.g.*, ORS 163.165 (third-degree assault); ORS 163.175 (second-degree assault); ORS 163.185 (first-degree assault). However, ORS 163.160, fourth-degree assault, is different precisely because of the dispute in this case; it would not be clear, without legislative guidance, whether the child-witnesses were victims. First-degree assault involves physical harm to a single person, and there can be no dispute that that person is a victim. However, because felony fourth-degree assault involves more people than the defendant and the direct victim, additional legislative guidance is necessary. By referring to the child-witnesses as "the person's or the victim's minor child" rather than "victims," the legislature has provided that guidance; it did not contemplate or intend that the child-witnesses were to be considered victims.

Also at this first level of analysis, the court looks at rules of construction that bear on how to interpret the text. *PGE* at 611. One such rule of construction is that "words of common usage typically should be given their plain, natural, and ordinary meaning. *State v. Langley*, 314 Or 247, 256, 839 P2d 692 (1992).

The term "victim" is defined many times, both in statutes and in the Oregon Constitution. Each definition applies to listed statutes or constitutional provisions, and none apply to ORS 163.160.[4] Some of those definitions are broad; *e.g.*, ORS 131.007 ("the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime"), and some are narrow; *e.g.*, ORS 135.139(12)(e) ("the person or persons to whom transmission of body fluids from the perpetrator of the crime occurred or was likely to have occurred in the course of the crime.") The presence of numerous definitions for the term "victim" and the lack of a definition applicable to this crime suggest that the legislature intended that the term be given its ordinary meaning. If the legislature had intended a more specific or technical meaning, it could easily have provided an additional definition.

Dictionary definitions support defendant's position that the child-witnesses are not "victims." *Webster's Third New Int'l Dictionary* 2550 (unabridged ed. 1993) defines "victim" as (1) "a living being sacrificed to some deity or in the performance of a religious rite"; (2) "someone put to death, tortured, or mulcted by another: a person subjected to oppression, deprivation, or suffering"; (3) "someone who suffers death, loss, or injury in an undertaking of his own"; and (4) "someone tricked, duped, or subjected to hardship: someone badly used or taken advantage of." Definitions (2) and (4) appear to include the victim of a crime. However, they do not include the child-witnesses in this case, because the child-witnesses need only be present for the assault. They do not need to witness the assault or be affected by it in any way, in which case they are not subjected

---

[4] *See* ORS 9.162; ORS 131.007; ORS 135.139(12)(e); ORS 137.103; ORS 137.530(4); ORS 147.005(13); Or Const, Art 1, Sec 42-44, all providing a definition of "victim" applicable in limited instances.

to "oppression, deprivation, or suffering" or to "hardship." Accordingly the child-witnesses are not "victims" according to the dictionary definition.

In this first level of *PGE*'s analysis, this court should not "insert what has been omitted, or...omit what has been inserted," ORS 174.010, *PGE*, 317 Or at 611. Interpreting the statute to include the child-witnesses in the class of victims requires inserting into the text a definition that is inconsistent with the common meaning of the term. This court should decline to do so, and hold instead that the child-witnesses are not "victims" of a violation of ORS 163.160.

III. The context of ORS 163.160(3)(c) establishes that multiple child-witnesses to a felony assault in the fourth degree do not create multiple offenses.

The next step in the *PGE* analysis is the statute's context. In considering the context, defendant will discuss the other provisions of ORS 163.160, authorities for the definition of the term "victim," similar offenses, and this court's prior cases.

A. The other provisions of ORS 163.160 demonstrate that the legislature did not intend that the child-witnesses be treated as "victims."

Each of the three subsections sections of ORS 163.160(3) increase the offense from a misdemeanor to a felony. ORS 163.160(3)(a) provides that, if defendant has previously assaulted the victim, the second assault is also a felony, apparently the same severity of the offense at issue here. It is implausible that the legislature intended that a criminal defendant who committed a single assault on the victim, and had multiple prior convictions for assaulting the victim, would be subject to multiple convictions under ORS 163.160(3)(a). Further, such an interpretation would be inconsistent with ORS 161.067, and unique in Oregon law. Although multiple prior offenses frequently increase the length of a criminal defendant's sentence, defense counsel is unaware of any statute

providing that multiple prior convictions increase the number of current convictions. By putting all three sentence-increasing factors next to one another, the legislature indicated an intent that all three be treated the same way. In that case, just as multiple prior convictions would not give rise to multiple offenses, neither do multiple child-witnesses.

In other words, under the trial court's and state's construction of this statute, a defendant convicted under ORS 163.160(3)(c) would be subject to an additional conviction, and a possible separate, consecutive sentence, when compared to a defendant convicted under ORS 163.160(3)(a) or -(b). That is unlikely, because the legislature probably intended that all three sections of ORS 163.160(3) would have the same effect. The trial court's construction violated that legislative intent.

B. Statutes for other grades of assault, and for murder and aggravated murder, establish that the legislature intended that such offenses have a single victim.

The structure of the assault in the fourth degree statute, ORS 163.160, is similar to that of aggravated murder, ORS 163.095-115; there is a core offense, with different degrees of severity depending on the surrounding circumstances. As explained in *State v. Barrett*, 331 Or 27, 10 P3d 901 (2000), which is discussed immediately below, the gravamen of aggravated murder is the death of the victim, not the presence of the aggravating factors. And, as explained in the discussion of legislative history, below, the gravamen of an assault is the person injured. Accordingly, because of the similarity between the two offenses, *Barrett*, which relates to the proper number of aggravated murder convictions when there is a single victim and multiple aggravating factors, is instructive as to this case.

In determining that multiple convictions were proper, the Court of Appeals relied both on *Barrett* and on *State v. Barnum* 333 Or 297, 39 P3d 178 (2002). Defendant agrees that *Barrett* is helpful in deciding the issue before this court. However, *Barnum* is inconsistent with *Barrett* and with ORS 161.067, and this court should not follow it.

The defendant in *Barrett* was accused of three counts of aggravated murder. Ordinary murder is elevated to aggravated murder if a statutory aggravating factor is present. The *Barrett* defendant killed a single victim, and there were multiple aggravating factors present. The issue was whether the multiple aggravating factors supported multiple convictions for aggravated murder.

Suppose, for example, that murder has elements A and B, and, if any aggravating factor, such as C or D or E is present, the murder becomes aggravated murder. In that case, if each aggravating factor is treated as an element for purposes of ORS 161.067, the *Barrett* defendant committed three separate offenses. One offense has elements A and B and C, one has A and B and D, and one has A and B and E. Because each offense has an element that the others do not, there are three separate offenses.

That is the analysis that the Court of Appeals used in *Barrett*. This court explicitly rejected that analysis, and decided that multiple aggravating factors did not convert a single murder into multiple offenses. 331 Or 36. The *Barrett* court held that "the of the statute that we just have reviewed shows that the harm that the legislature intended to address by ORS 163.095 was the intentional, aggravated killing of another human being. The aggravating factors constitute no more than different theories under which murder becomes subject to the enhanced penalties for aggravated murder." *Id.*

Similarly, each child-witness to an assault under ORS 163.160 is a different factual basis to elevate the misdemeanor assault to a felony.

The *Barrett* court concluded that the correct procedure was for the judgment to reflect defendant's guilt of one count of aggravated murder, supported by three aggravating factors. 331 Or 36-37.

In *Barnum*, this court relied on ORS 161.067 and *Barrett* to decide that the defendant in that case could not receive multiple punishments, although multiple convictions were proper. The *Barnum* court relied on this passage from *Barrett*:

> "If the trial court were to enter a conviction on only one count [of aggravated murder], and dismiss the other * * *, it always would be possible that an appeal would result in a reversal, for insufficient evidence, of the count that was selected to serve as the basis for conviction. With the other [count] dismissed, defendant would be able to argue that he was entitled to a judgment of acquittal on the [remaining charge]."

Barnum 333 Or at 302, quoting *Barrett*, 331 Or at 36-37. The *Barnum* court went on to conclude that the defendant in that case could properly be "charged and convicted" of two counts of burglary, *Barnum* 333 Or at 302, and interpreted ORS 161.067 to conclude that only a single sentence was proper. In doing so, the *Barnum* court misinterpreted both *Barrett* and ORS 161.067.

The *Barrett* court held that the defendant in that case should have a single conviction, not three convictions, and that the judgment should reflect multiple aggravating factors. *Barrett*, 331 Or 36-37. That is not how the *Barnum* court interpreted *Barrett*. Further, ORS 161.067 is captioned "Determining punishable offenses for violation of multiple statutory provisions, multiple victims or repeated violations." Other cases on ORS 161.067, and the nearly identical *former* ORS 161.062, relate to the number of convictions, not to the number of sentences. *E.g., Barrett; State v. Kizer*, 308

Or 238, 779 P2d 604 (1989): *State v. Crotsley*, 308 Or 272, 779 P2d 600 (1989). Whether defendant may receive separate, consecutive sentences is the subject of a different statute, ORS 137.123.

Accordingly, and language to the contrary in *Barnum* notwithstanding, this court should rely on *Barrett* and on ORS 161.067 to decide that the defendant in this case should have received a single conviction for felony assault in the fourth degree.

C. Other statutes protect classes of people that are not "victims."

The Court of Appeals apparently assumed that a person is a "victim" of an offense if, in promulgating the statute, the legislature intended to protect that person or a class to which the person belongs. Although that seems plausible, it is wrong. There are many statutes that prevent specific conduct because the conduct creates a risk of harm to a class of people. Such people are not necessarily "victims" of those offenses.

For example, ORS 811.140, reckless driving, forbids driving in a manner likely to injure others, but there need not be any people injured for defendant to be guilty. Similarly, although the offense of delivery of a controlled substance within 1000 feet of a school, ORS 475.999, protects the children in the school, no child is a victim, nor would there be two offenses if there were two schools within 1000 feet of the location of the offense. Public indecency, ORS 163.465, forbids indecent displays in public, but no member of the public need see the offense for the defendant to be guilty.[5] The people protected by those offenses do not meet the dictionary definition of "victim," because

---

[5] The Court of Appeals explained that public indecency and reckless driving have no true victims in *State v. Dugger*, 73 Or App 109, 112-13, 698 P2d 491 (1985).

they are not subjected to "oppression, deprivation, or suffering" or to "hardship." *Webster's Third New Int'l Dictionary* 2550 (unabridged ed. 1993).

As a result, this court should hold that, as the dissent argued below, "the victim of a murder is the person killed, the victim of a robbery is the person robbed, the victim of a rape is the person raped, and the victim of an assault is the person assaulted." *State v. Glaspey*, 184 Or App 170, 181, 55 P3d 562 (2002) (Armstrong, J., dissenting). In reaching that conclusion, the dissent relied on *State v. Stalheim*, 275 Or 683, 688, 552 P2d 829 (1976), arguing that *Stalheim* held that the "'victim' of a crime is the 'direct victim' unless there is a clear legislative determination otherwise." 184 Or App at 187. There is no such clear legislative determination here; to the contrary, the text suggests that the legislature did not intend for the children to be treated as victims. Because the legislature was protecting the children from the risk of harm, rather than from a completed harm, the children are no more "victims" than the bystanders to an act of reckless driving. Because a child could be present for the assault but not witness it, the child need not be harmed in any way, and therefore is not a "victim."

As the Court of Appeals pointed out in its opinion, there are other statutes that criminalize conduct because children are caused to witness it. *See, e.g.*, ORS 163.575(1)(a) (defining the crime of endangering the welfare of a minor as inducing, causing, or permitting a minor to "witness" sexual conduct or sadomasochistic abuse). But, in that case, the child is the only victim of that offense; if there is no child present, there is no offense at all. Further, the child must "witness" the conduct; the child's presence is insufficient. In that case, the child-witness must be the direct victim.

However, in the case of felony assault in the fourth degree, even if the child is not present, the underlying assault is still a crime with a specified victim. Further, there is no need to show that the child actually witnessed the assault; the child's presence is sufficient. It is implausible that a child who is present but unaware of the assault is a "victim;" otherwise, the child is a "victim" although unaware of the crime and suffering no ill effects.

Accordingly, regardless of whether the legislature intended to protect children by passing ORS 163.160(3), the child is not a "victim" of a violation of that statute. Although that is unusual under Oregon law, it is not the only such instance. Other offenses are also defined by multiple statutes or multiple sections or subsections, one statute providing an *actus reus*, and other statutes providing for a penalty based on additional facts. Those statutes do not appear to create new classes of victims, allowing multiple convictions and consecutive sentences for a single violation. For example, kidnapping in the second degree, ORS 163.225, becomes kidnapping in the first degree if it is with the intent to seek a ransom, ORS 163.235(a), or terrorize a person other than the person kidnapped. ORS 163.235(d). However, other methods of committing kidnapping in the first degree clearly involve only a single victim, the person kidnapped. It would be anomalous to hold that the legislature intended that kidnapping with the intent to terrorize a person other than the person kidnapped supports two convictions and consecutive sentences, when kidnapping with the intent to injure the victim supports only a single conviction and sentence.

Similarly, burglary in the second degree, ORS 164.215, becomes burglary in the first degree, ORS 164.225, if, in immediate flight from the burgled building, the

defendant causes or attempts to cause physical injury to "any" person. ORS 164.225(1)(b). Under the Court of Appeals opinion in this case, if an escaping burglar injured a police officer outside the burgled house, he would be guilty of two burglaries: one against the resident of the house, and one against the police officer who has never been inside the house, because both of those people are "victims." Those two offenses could be sentenced consecutively to one another. ORS 137.123(5). Surely the legislature did not intend such an anomalous result. Rather, it intended that the offense be punished more severely because of the assault on the police officer, but still only punished once.

So, the text and context of the statute support defendant's position that the child-witnesses are not "victims" of the assault. If this court concludes that ORS 163.160 remains ambiguous after considering its text and context, the next step in the *PGE* analysis is legislative history. 317 Or at 611-612.

IV. The legislative history suggests that the only victim of an assault is the person struck.

The legislative history makes it clear that, in passing ORS 163.160(3)(c), the legislature intended to protect the child-witnesses to an assault. *See, e.g.*, Minutes, Senate Committee on Crime and Corrections, March 14, 1997, statements of Senator Kate Brown, a copy of which is attached at App-1. That does not answer the question, however; as discussed above, the legislature can create an offense to protect a class of people without designating those people as "victims" of the offense.

Further, there is no indication that anyone considered the possibility of multiple child-witnesses. The fiscal analysis prepared by the Legislative Fiscal office, attached at App-2, appears to assume that every offender will receive one sentence, not two, as would be possible if children were victims of such an assault.

In addition, the legislative history for the statutory scheme creating different grades of assault indicates that the legislature intended assaults be graded based on aggravating factors which raise the severity of the offense, without changing the core of the offense or creating duplicitous offenses:

> "The draft contains three ascending degrees of assault.[6] The basic offense, *aggravated by the following factors which, either singly or in combination*, raise the degree of the offense:
>
> "(1) The actor's culpability or motivation for the assault:
>
> "(2) The seriousness of the injury actually inflicted:
>
> "(3) The dangerousness of the means employed by the actor to inflict the injury."

Commentary, Proposed Oregon Criminal Code, 1970, sections 92-94, p. 120-123, reprinted by the Oregon District Attorney's Association, 1975 (emphasis added).

The commentary goes on to state: "The proposed draft embodies a reorientation of present Oregon law. *It limits assault as a concept to the infliction of actual physical injury.*" *Id.*, Section 94, page 123 (emphasis added.)

That is not directly applicable to this case, because ORS 163.160(3) was adopted in 1999. Nonetheless, it indicates the legislature's view of the assault statutes; in particular, that the gravamen of an assault is the injury to the assaulted person, and that additional factors would simply raise the seriousness of the underlying assault.

Accordingly, the legislative history suggests that the legislature intended that an assault be defined in terms of the injury to the direct victim. Other factors increase the

---

6 As adopted in 1971, there were three degrees of assault. Assault in the third degree was a class A misdemeanor in 1971, and became assault in the fourth degree in 1977.

seriousness of the offense, but do not change the underlying gravamen or create new, functionally independent offenses.

If this court determines that the legislative history does not answer the question, the third step of *PGE* analysis is consideration of maxims of statutory construction. 317 Or at 611-612.

V. Maxims of statutory construction suggest that an assault in front of multiple child-witnesses is a single assault.

Defendant identifies three maxims of statutory construction that may assist the court. The first, and most clearly applicable, is that this court construes statutes in order to avoid absurd results. *See State v. Vasquez-Rubio*, 323 Or 275, 283, 917 P2d 494 (1996) (applying that maxim).

If the legislature had intended that the child-witnesses be considered to be "victims" of a felony assault in the fourth degree, then for any violation of the statute, defendant would necessarily be guilty of two offenses, and the defendant in this case was actually guilty of three assaults, one misdemeanor for the direct victim, and one felony for each of the two child-witnesses. It would be impossible to commit a single child-witness felony assault; only if the defendant's child were the victim, and was also a witness under the statute, would there be exactly one victim, and even that would support two convictions. *State v. Crotsley*, 308 Or 272, 779 P2d 600 (1989). The defendant in *Crotsley* was convicted of violating, *inter alia*, ORS 163.355, rape in the third degree, for having sexual intercourse with a girl under the age of sixteen, and ORS 163.375(1)(a) rape in the first degree, for sexual intercourse by forcible compulsion. Although both charges arose from the same act, this court held that two convictions were proper, because the two statutes at issue reflected separate legislative concerns.

So, if the child-witness is a "victim" of a conviction under ORS 163.160(3)(c), it is not possible to commit that offense exactly one time. Any violation would involve the direct victim and the child-witness. Even if the direct victim and the child-witness are the same person, there are two legislative concerns implicated, and therefore, under *Crotsley*, two separate offenses. Further, because each offense has a different victim, each would support a consecutive sentence. ORS 137.123(5)(b).

Further, were that the correct interpretation, then a conviction under ORS 163.160(3)(c) would be punished twice as severely as a conviction under ORS 163.160(3)(a) or -(b), although those statutory subsections are adjacent to one another and were adopted at the same time.

Another maxim directs the courts to attempt to determine how the legislature would have intended the statute to be applied had it considered the issue. *Security State Bank v. Luebke*, 303 Or 418, 423, 737 P2d 586 (1987). In this case, the legislature would have intended that all three provisions of ORS 163.160(3) have the same effect. The legislature would also have intended that the aggravating factors in a felony assault in the fourth degree be treated similarly to other facts that increase the potential sentence, such as the factors that elevate murder to aggravated murder. The legislature was aware of this court's decision in *Barrett*, and would have expected that the similarity in structure between the felony assault in the fourth degree statute and the aggravated murder statute would result in a similar interpretation. *See State v. Waterhouse*, 209 Or 424, 426, 307 P2d 327 (1957) (noting the maxim of statutory construction that the legislature acted with knowledge "of such existing judicial decisions as have a direct bearing" on an issue).

Therefore, because none of those other aggravating factors support multiple convictions, neither should multiple child-witnesses give rise to multiple convictions.

If this court reaches the third level of *PGE* analysis, it support's defendant's position that his conduct constituted a single offense. Therefore, the trial court erred by entering separate judgments of conviction for the two counts of assault. This court should remand with direction that the trial court to merge the two counts into a single conviction.

CONCLUSION

For the foregoing reasons, defendant asks this court to vacate the judgment of conviction and remand this case to the trial court to enter a judgment of conviction for one count of felony assault in the fourth degree, and for resentencing.

Respectfully submitted,
PETER A. OZANNE #74246
Executive Director
Office of Public Defense Services

PETER GARTLAN #87046
Chief Defender

Attorneys for Petitioner on Review
JAMES LEWIS GLASPEY

JIV/gg