IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. JACKELIN GONZALEZ-VALENZUELA, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court No. C100316CR CA A146278 SC S061751

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 STEVEN L. PRICE, Judge

Opinion Filed: August 21, 2013
Author of Opinion: Sercombe, J.
Author of Concurring Opinion: Haselton, C.J.
Before: Ortega, P.J., Haselton, C.J., and Sercombe, J.

PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
DAVID SHERBO HUGGINS #105016
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: David.Sherbo-Huggins@opds.state.or.us

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
ERIN K. GALLI #952696
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: Erin.K.Galli@doj.state.or.us
Attorneys for Respondent on Review

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STATEMENT OF THE CASE

A person commits the crime of endangering the welfare of a minor under ORS 163.575(1)(b) when the person permits a child to be in a "place where unlawful activity involving controlled substances is maintained or conducted." At issue here is whether the legislature intended a car in which an individual possesses controlled substances to be a "place" where unlawful activity involving controlled substances is "maintained or conducted." The answer to that question should undoubtedly be "yes."

The text, context, and legislative history of ORS 163.575(1)(b) demonstrate that the legislature intended to shield children from places where drug possession occurs. Therefore, when defendant possessed methadone, heroin, and methamphetamine in her purse while she accompanied her two minor daughters on a car ride to school, she committed the crime of endangering the welfare of a minor.

Question Presented

For ORS 163.575(1)(b)'s purposes, is a car in which a passenger presently possesses controlled substances "a place where unlawful activity involving controlled substances is maintained or conducted"?

Proposed Rule of Law

Yes. A "place where an unlawful activity involving controlled substances is maintained or conducted" is one that lends itself to the unlawful activity and one where a minor would be endangered by being present. Under ORS 163.575(1)(b), whether a car is such a place will depend on the circumstances of the case. If someone in the car illegally possesses controlled substances, the car is a place where unlawful activity involving controlled substances is maintained and conducted because the minor would be endangered by being present.

Summary of Argument

To convict a person of endangering the welfare of a minor under ORS 163.575(1)(b), the state must prove that the person permitted a child to "enter or remain in a *place* where *unlawful activity* involving controlled substances *is maintained or conducted*." (Emphasis added.) A car is unquestionably a "place." The question then becomes whether a car in which an individual possesses drugs in the presence of children is a place where unlawful activity is maintained or conducted. In light of the text, context, and legislative history of ORS 163.575(1)(b), possession and transportation of controlled substances are unlawful activities that can be "maintained or conducted." Therefore, a car where a person carries methadone, heroin, and methamphetamine is a place where unlawful drug activity is maintained or conducted.

That construction does not, as defendant contends, mean that virtually any place where drugs are located could be a "place where unlawful activity involving controlled substances is maintained or conducted" for the purposes of ORS 163.575(1)(b). Whether a location is a "place where unlawful activity involving controlled substances is maintained or conducted" will depend on the situation and on whether the activity is proximate enough to pose specific harm to a child. Based on that construction, the car carrying defendant and her daughters was a place where unlawful drug activity was maintained and conducted. Consequently, a rational trier of fact could find that defendant's conduct constituted endangering the welfare of a minor.

ARGUMENT

The state charged defendant with two counts of endangering the welfare of a minor in violation of ORS 163.575(1)(b). That statute provides, "A person commits the crime of endangering the welfare of a minor if the person knowingly: * * * [p]ermits a person under 18 years of age to enter or remain in a place where unlawful activity involving controlled substances is maintained or conducted[.]" As noted, the question in this case is whether a rational finder of fact could conclude that the car carrying defendant and her children—while defendant carried three controlled substances in her open purse—was "a place where unlawful

activity involving controlled substances was maintained or conducted."[1] In answering that question, this court employs the familiar analysis set forth in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-12, 859 P2d 1143 (1993), as discussed below.

A. A car is a "place."

To determine the legislature's intent behind ORS 163.575(1)(b), this court first considers the statute's text and context, giving terms their plain and ordinary meanings. *Gaines*, 346 Or at 171-72; *PGE*, 317 Or at 611. With respect to the term "place," that task can be, as this court has noted in other contexts, a difficult one given the breadth of the definition of "place." *See, e.g.*, *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) (discussing the difficulty of determining what the legislature meant in using the phrase "from one place to another" in the kidnapping statutes). Neither ORS 163.575 nor any other part of the criminal code defines the term "place." But the plain meaning of "place" is "physical environment **:** SPACE" and "an indefinite region or expanse **:** AREA." *Webster's Third New Int'l Dictionary* 1727 (unabridged ed 2002). From those very broad dictionary definitions, it is apparent that a car can be a "place" for the purposes of ORS 163.575(1)(b).

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[1] Defendant does not dispute that her daughters were minors or that she permitted them to be in the car with her.

That said, the term "place" is not used in the statute without qualification. It is not sufficient that a car can be a place in the abstract sense. Instead, ORS 163.575(1)(b) requires proof that the car was a place "where unlawful activity involving controlled substances was maintained or conducted." As explained below, an activity is "maintained" if it is continued. It is "conducted" if it is directed by a person. Therefore, when a person in a car continues or directs an unlawful drug activity, the car is a "place where an unlawful activity involving controlled substances is maintained or conducted."

B. Possessing and transporting controlled substances constitutes maintaining or conducting illegal drug activity.

1. ORS 163.575(1)(b)'s text reflects that, when the legislature used the terms "maintained," and "conducted," it intended those terms to cover situations in which a child was exposed to the possession or transportation of illegal controlled substances.

The legislature did not define the terms "maintained" and "conducted" but their meanings are straightforward. The word "activity" means "an occupation, pursuit, or recreation in which a person is active—often used in pl. <business *activities*> <social *activities* >." *Webster's* at 22 (italics in original). Other relevant definitions include, "the quality or state of being active" and "physical motion or exercise of force: * * * vigorous or energetic action **:** LIVELINESS." *Id.*

"Maintain" means "to persevere in **:** carry on **:** keep up **:** CONTINUE." *Id.* at 1362. Another relevant definition is "to keep in a state of repair, efficiency, or

validity **:** preserve from failure or decline." *Id.* "Conduct" means "to have the direction of **:** RUN, MANAGE, DIRECT." *Id.* at 474. It also means "to bring by or as if by leading **:** LEAD, GUIDE, ESCORT," "TREAT, HANDLE, EXECUTE," and "to direct as leader the performance or execution of (as a musical work or group of musicians)." *Id.* Thus, and in the Court of Appeals' words, "unlawful activity in a place can be 'maintained' through a continuation of the status of an unlawful act or 'conducted' if the unlawful activity is immediately occurring under the direction of a person." *State v. Gonzalez-Valenzuela*, 258 Or App 263, 268, 308 P3d 1096 (2013).

Applying that textual analysis to the facts of this case, it is evident that possessing and transporting illegal controlled substances—actions which defendant does not deny are unlawful acts in and of themselves—constitutes maintaining and conducting an unlawful drug activity. Because an unlawful drug activity can be maintained by being continued, defendant's continued possession of unlawful drugs—which resulted from her decision to take those drugs with her on the car ride—amounted to her "maintaining" an unlawful activity involving controlled substances. Similarly, her transportation of the drugs in a car constituted "conducting" an unlawful drug activity because the transport of those drugs was an activity occurring under her direction. Thus, defendant's conduct is covered under ORS 163.575(1)(b).

2. The context of ORS 163.575 demonstrates that the legislature considered possession and transportation of controlled substances to be activities that could be maintained or conducted.

The legislature's intent becomes more evident in light of other provisions enacted at the same time as ORS 163.575(1)(b). *See PGE*, 317 Or at 611 (the court considers the context of the statutory provision at issue, which includes "other provisions of the same statute and other related statutes"); *Gaines*, 346 Or at 171 (same). That context demonstrates that the legislature considered possession and transportation of controlled substances to be unlawful activities that could be maintained or conducted.

a. The 1971 criminal code described possession and transportation as criminal drug activities that could be maintained or conducted.

An examination of the session laws accompanying the enactment of ORS 163.575 shows that the legislature considered what activities would be unlawful drug activities. *See Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004) (context includes "the session laws, and related statutes"). ORS 163.575 was passed as a part of the 1971 criminal code revision.[2] Or Laws 1971, ch 743, § 177. The original version provided, in pertinent part:

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[2] The law that became ORS 163.575 was proposed by the Criminal Law Revision Commission as a part of the 1971 Criminal Code Revision and was eventually adopted without amendment by the legislature. Or Laws 1971, ch 743, § 177.

> A person commits the crime of endangering the welfare of a minor if he knowingly:
>
> * * * * *
>
> (b) Permits a person under 21 years of age to enter or remain in a place where unlawful narcotic or dangerous drug activity is maintained or conducted[.]

ORS 163.575(1)(b) (1971).[3] Although that statute did not define what types of "narcotic or dangerous drug activity" the legislature deemed "unlawful," another part of the criminal code did. ORS 167.207 (1971), *repealed by* Or Laws 1977, ch 745, § 54,[4] provided, in part:

> (1) A person commits the offense of criminal activity in drugs if he knowingly and unlawfully manufactures, cultivates, *transports, possesses,* furnishes, prescribes, administers, dispenses or compounds a narcotic or dangerous drug.

(Emphasis added.)

Thus, when ORS 163.575(1)(b) (1971) is read in context with ORS 167.207 (1971), which was enacted in the same legislation, it is apparent that the "criminal

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[3] Since 1971, ORS 163.575(1)(b) has been amended twice. In 1973, the legislature lowered the applicable age from 21 to 18. Or Laws 1973, ch 827, § 20. In 1979 the word "he" was changed to "the person" and the phrase "unlawful narcotic or dangerous drug activity" was changed to "unlawful activity involving controlled substances." Or Laws 1979, ch 744, § 8.

[4] ORS 167.207 (1971) was enacted by Senate Bill 40. Or Laws 1971, ch 743, § 274.

activity" of transporting or possessing drugs is an activity that can be "maintained or conducted" for purposes of ORS 163.575(1)(b) (1971).

b. ORS 163.575's other provisions support the conclusion that the legislature did not intend—as defendant suggests—to require that a child participate in or witness the unlawful drug activity.

Defendant contends that the legislature could not have intended to capture conduct that "the minor never observes or experiences" because ORS 163.575 is concerned with "the harm that exposure to or participation in certain kinds of conduct can have on a child's prospects for a healthy and successful future." (App Br 17-18). But ORS 163.575(1)'s other subsections show that the legislature intentionally omitted from subsection (1)(b) the requirement that the child witness or participate in the activity. And the omission of that requirement—when every other subsection of ORS 163.575(1) expressly requires a child to affirmatively participate in or witness the activity—reflects that when the legislature wanted to require a child's direct involvement, it said so explicitly.

ORS 163.575(1) describes five ways that a person can criminally endanger the welfare of a child. (App 1). The concern common to each of those subsections is the need to protect children from circumstances that could harm them. Yet, with the exception of subsection (1)(b), each of the subsections requires that the child have direct contact with the activity. For example, under ORS 163.575(1)(a), the harm to the child is *witnessing* an act of sexual conduct or sado-masochistic abuse.

The statute is not violated by a person permitting a child to be at a place where that conduct is occurring. The child must witness—and therefore actually be aware of—the conduct. Under ORS 163.575(1)(c), the harm is the child *participating* in gambling. Permitting a child's *presence* at a place where gambling occurs would not violate the statute. Further, under ORS 163.575(1)(d) and (e), the harm is a child *acquiring* tobacco or a smoking device because, ostensibly, the child could then ingest tobacco or controlled substances.

The legislature did not include any such requirement in ORS 163.575(1)(b). Under that subsection, no involvement other than the child's presence is required. The context therefore suggests that the legislature saw a greater potential harm to a child's welfare from exposure to drug activity than from exposure to gambling, sexual activity, or smoking. That is not surprising. Exposing a child to drug activity often results in the child being around unsafe people and unsafe places. That exposure increases the risks that the child will be neglected or abused, that the child will ingest and possibly overdose on a drug, and that the child will be exposed to violence. Also, exposure to the drug culture makes it more likely that the child will become inured to it, increasing the chance that the child will himself or herself become an illegal drug user.

In sum, the context of ORS 163.575(1)(b) demonstrates that the intent of the statute is to protect children from harm, which, in the case of unlawful drug

activity, means preventing them from being at the place where the activity is being maintained or conducted.

3. The legislative history confirms that the legislature intended that unlawful transportation and possession of a drug would constitute maintaining and conducting an unlawful drug activity.

The legislative history of ORS 163.575 supports two conclusions about the legislature's intent. First, the legislature's goal was to address specific acts harmful to the welfare of minors. Second, the legislature intentionally omitted a requirement that the minor personally participate in maintaining or conducting the unlawful drug activity. Hence, the legislature intended the unlawful transportation and possession of a drug to constitute maintaining and conducting an unlawful drug activity.

First, the legislature intended ORS 163.575 to criminalize specific acts injurious to the welfare of minors. As noted, ORS 163.575 was enacted as part of the 1971 revision to the criminal code. Its creation was part of an attempt to revise *former* ORS 167.210 (1969), *repealed by* Or Laws 1971, ch 743, § 432 (contributing to the delinquency of a minor),[5] which this court determined was

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[5] *Former* ORS 167.210 (1969) provided,

> When a child is a delinquent child as defined by any statute of this state, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, or any person who by threats, command or persuasion, endeavors to induce any child to perform any act or follow any course of conduct which would

Footnote continued…

unconstitutionally vague. *State v. Hodges*, 254 Or 21, 457 P2d 491 (1969); Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 177, 178 (July 1970) ("Commentary"). The Criminal Law Revision Commission ("Commission") proposed several statutes to address conduct that had been covered under *former* ORS 167.210. *Id*. The commentary to section 177, which became ORS 163.575, states, "Section 177 is designed to provide coverage for *specific acts injurious to the welfare of minors* not specifically prohibited elsewhere in the proposed Code." *Id*. (emphasis added). Thus, the legislature intended ORS 163.575 to protect minors from specific acts harmful to their welfare.

Second, the legislative history shows that the Commission intentionally omitted from ORS 163.575 a requirement that the minor personally participate in maintaining or conducting the unlawful drug activity. The commentary to the preliminary drafts of section 177 states, "The age limit of 18 is applied here since *no active participation by the minor is contemplated*." Criminal Law Revision Commission, Preliminary Draft No. 1, Feb 1970, Art 20, § 8, 28; Criminal Law

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(…continued)

> cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child, shall be punished upon conviction by a fine of not more than $1,000, or by imprisonment in the county jail for a period not exceeding one year, or both, or by imprisonment in the penitentiary for a period not exceeding five years.

Revision Commission, Preliminary Draft No. 2, Mar 1970, Art 20, § 8, 25 (emphasis added). That sentence does not appear in the commentary to the final draft, but the omission of the sentence is attributable to the fact that the Commission changed ORS 163.575(1)(b)'s age limit—which had been 18 in the preliminary drafts—to 21.

The minutes from the Commission's discussion of the second preliminary draft of section 177 show that the Commission was particularly concerned about the ages it set in the various subsections of the statute. For example, the minutes show the following:

> Mr. Chandler noted that subsection (2) established 18 as the minimum age for one entering or remaining "in a place where unlawful narcotic or dangerous drug activity is maintained or conducted" while subsection (3) set 21 as the minimum age for one participating in an unlawful gambling activity." It seemed to him the ages should be reversed.
>
> Mr. Wallingford acknowledged the inconsistency inasmuch as a minor was defined as being under the age of 18 throughout the criminal code. However, the subsections relating to gambling and liquor were bound by the regulatory codes which set the age of majority at 21.

Minutes, Criminal Law Revision Commission, Apr 3, 1970, 18. After that, the members discussed changing all of the ages in ORS 163.575 to either 18 or 21. *Id.* at 18-19. Ultimately, Mr. Johnson moved to change the age in only subsection (1)(b) to 21, and that motion carried. *Id.* at 19. The Commission never discussed whether the subsection required active participation by the minor. Hence, the fact

that the statement "The age limit of 18 is applied here since no active participation by the minor is contemplated" does not appear in the final commentary is most likely the result of the change of the applicable age and does not denote a change in the Commission's understanding of what the offense required.

Thus, the legislature intended that endangering the welfare of a minor could be committed even if the minor did not witness or participate in maintaining or conducting the drug activity. That intent is consistent with the context of ORS 163.575, which, as discussed above, suggests that the legislature believed drug activity to pose a more serious threat to the welfare of minors than the other activities listed in that statute.

From the text, context, and legislative history, it follows, therefore, that possessing and transporting a controlled substance constitutes maintaining and conducting an unlawful drug activity. And, when a person permits a child to be in a car while someone in the car possesses illegal drugs, the person has permitted the child to be in a place where unlawful activity involving controlled substances is maintained or conducted in violation of ORS 163.575(1)(b).

4. ORS 163.575, while potentially encompassing a broad swath of activities, is not limitless.

Admittedly, the universe of actions that could meet the definition of "place" is large, a concern expressed by Chief Judge Haselton in his concurring opinion to the Court of Appeals' decision:

> [I]f a person who possesses drugs walks into a school, a supermarket, a church, or a synagogue—or, for that matter, our courtroom, Reser Stadium, or the Rose Festival Fun Center—that "place" becomes one in which "unlawful activity involving controlled substances is being maintained or conducted." By extension, to the extent that a parent knows of that possession by some third party (even a stranger) and, nevertheless, permits his or her child (or some child under his or her control) to remain in that place, the parent violates ORS 163.575(1)(b).

Gonzalez-Valenzuela, 258 Or App at 273-74 (Hasleton C.J., concurring) (footnote omitted). Respectfully, that concern is misplaced. Just because the definition of "place" is elastic does not mean that it is unduly susceptible to expansive applications such as in the scenarios identified by Chief Judge Haselton.

This court considered a similar problem in the context of what it means to move a person from "one place to another" for the purposes of kidnapping. In *Murray*, the court noted that resorting to the dictionary was unavailing because the most apt definition of "place" was "an indefinite region or expanse," and that definition "hardly can be said to clarify the issue." 340 Or at 604. After considering the legislative history, the court determined that the word "place" is "situational and contextual" and is "a function of the object to be moved, as well as a function of the area in which the movement occurs." *Id*. at 606.

The court expanded on that understanding in *State v. Walch*, 346 Or 463, 473, 213 P3d 1201 (2009). There, it explained, "The legislature intended the word 'place' to have some meaning; that is, a kidnapping does not occur by moving the victim *any* distance * * *. Rather, the movement must be such that it can be said

that the victim was moved from "one place" to "another [place]." *Id*. at 473-74. (emphasis in original). The court noted also that the drafter's primary concern in enacting the kidnapping statute was protecting the victim's freedom of movement. *Id*. at 475. As a result, an important factor in determining whether a defendant moved a victim "from one place to another" is "whether the movement served to limit the victim's freedom of movement or increase the victim's isolation." *Id*. Thus, the meaning of the word "place" in the kidnapping statutes depends on the circumstances of the case and on whether the proposed meaning serves the legislative purpose of the offense.

This court should employ a similar analysis here. Like the kidnapping statutes, the legislature used the same broad word "place." But unlike those statutes, the legislature qualified that word. As noted above, ORS 163.575(1)(b) applies not just to *any* place but *only* to those in which an illegal drug activity is maintained or conducted. Still much like the kidnapping statutes, ORS 163.575(1)(b)'s meaning of "place where an unlawful activity involving controlled substances is maintained or conducted" will depend on factors such as the type of activity and the nature of location where it occurs. That is, to be a "place where unlawful [drug] activity" occurs, the location must lend itself to the unlawful activity. As a result, the place must be such that it can be said that the minor is endangered by being there.

As discussed above, the intent of ORS 163.575 was to protect minors from specific harmful acts, and the statute recognizes that drug activity is inherently dangerous. To serve that purpose, a location will be a "place where unlawful activity involving controlled substances is maintained or conducted" if the activity is proximate enough to pose a threat to the welfare of the child. Thus, if an individual possesses cocaine while attending a college football game, the football stadium is not necessarily a "place" within the meaning of ORS 163.575(1)(b) because, in that situation and context—a multitude of strangers spread out over a large area for the purpose of attending a public event—the children present are not endangered by the individual's activity. In contrast, if a person knows that the individual sitting next to them at the college football game is a chronic drug user and dealer and is always in possession of drugs, that person may commit the offense of endangering the welfare of a minor. Because "place" is defined situationally and contextually, it is not the case that virtually any place could be a "place where unlawful activity involving controlled substances is maintained or conducted."

In any event, the facts of this case do not raise the concerns identified by Chief Judge Haselton. Here, the place was a car—an easily defined physical space—in which a passenger carried on an unlawful drug activity.

C. Defendant's arguments to the contrary are without merit.

Defendant contends that the activity contemplated by ORS 163.575(1)(b) requires something more than mere possession of a drug. To support that contention she asserts (1) that the text of the statute requires that defendant maintain or conduct a more regular, prolonged activity; (2) that the intent of ORS 163.575 was to curb juvenile delinquency—a goal that, she argues, would not be served by criminalizing something as passive as drug possession; and (3) that New York cases construing the word "maintain" are relevant to this court's construction of ORS 163.575. Defendant is wrong on all points.

1. ORS 163.575 is not limited to places characterized by regular, long-term drug activity.

Defendant asserts that the text of ORS 163.575(1)(b) suggests that, in order to be "maintained" or "conducted," an unlawful drug activity must be "characterized by regular drug sales, use, or manufacture over a protracted duration." (App Br 8). Defendant is incorrect. Nothing in the statute's text or context indicates that the drug activity must be "regular" or "protracted" before it could pose a threat to a child. Defendant's argument inserts words into the statute that are not there and that which could have been inserted by the legislature had the legislature so desired. *See* ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what

has been inserted"). Moreover, defendant's construction would lead to inconsistent enforcement. For example, a person who allows a child to be present during a drug sale could not, under defendant's construction, be guilty of endangering the welfare of the child unless the drug sales had been occurring at that place for a protracted period of time. In other words, the first time that a person permits a child to be present at a drug sale, the person has not endangered the welfare of the child because the drug sales are not, at that point, a regular activity. Under defendant's construction, the same result might also follow the second, third, or fourth time the person exposed the child to the illegal drug transactions. Thus, although the threat of harm to the welfare of the child is the same in each incident, only the latter incidents—in defendant's view—would constitute crimes. Nothing in the textual or contextual analysis of ORS 163.575(1)(b) indicates that the legislature intended such an outcome. Defendant is incorrect that the activity must be characterized by regular drug sales, use, or manufacture over a protracted duration.

2. The purpose of ORS 163.575 was to protect children from specific harmful acts.

Defendant's narrow definition is not only inconsistent with the text but also inconsistent with the statute's purpose. Defendant contends that the legislature's intent in enacting ORS 163.575 was to "protect children's welfare by shielding them from observing behaviors that could cause them to become delinquents."

(App Br 6). Defendant also contends that ORS 163.575(1) "was designed to preserve minors' moral and physical development." (App Br 14). Given those purposes, defendant argues, the legislature could not have intended that a child's mere presence in a place where a person possesses drugs in a purse would affect the child's moral development or cause the child to become delinquent. Defendant relies on an incorrect premise.

Nothing in ORS 163.575 or its legislative history indicates that the legislature's primary concern was preventing juvenile delinquency. Rather, as discussed above, the commentary expressly states that the purpose was to "provide coverage for specific acts injurious to the welfare of minors[.]" Commentary § 177, 178.[6] Further, the fact that the commentary to ORS 163.575 discusses *former* ORS 167.210 (1969) (prohibiting contributing to the delinquency of a minor) does not mean the legislature viewed ORS 163.575 as taking the place of *former* ORS 167.210 (1969). Indeed, the commentary demonstrates that the legislature intended that other statutes would serve the purpose previously served by *former* ORS 167.210. The commentary states, "An examination of the cases prosecuted under ORS 167.210 * * * reveals that in almost every instance the same conduct

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[6] The state acknowledges that, during a subcommittee meeting, Roger Wallingford, told the committee, "[Section 177] is a 'contributing' statute set out in specific language." Minutes, Criminal Law Revision Commission, Mar 6, 1970, 10. That comment should be given little weight because it is inconsistent with the commentary to the final draft and with the context of the statute.

could be prosecuted under one of the sections noted above." Commentary § 177, 178. The phrase "sections noted above" refers to a list of statutes covering offenses such as recklessly endangering another person, compelling prostitution, rape, sodomy, sexual abuse, and contributing to the sexual delinquency of a minor. *Id*. Because the legislature understood that most of the offenses previously covered by *former* ORS 167.210 (1969) would be covered by other statutes in the proposed revised criminal code, it could not have intended ORS 163.575 to address those same concerns. Thus, contrary to defendant's contention, the purpose of ORS 163.575 was not to curb delinquency but to protect minors from specific harm, and that purpose is served by prohibiting a child from being at a place where unlawful drug activity is occurring.

3. ORS 163.575 was not derived from the New York Penal Law, and defendant's comparisons to New York law are unavailing.

Defendant also purports to find support for her narrow reading of ORS 163.575 in the legislative history of a New York Penal Law provision. (App Br 25-27). That history, she contends, shows that a single incident of unlawful conduct cannot constitute "maintaining" an unlawful activity. But ORS 163.575 was not derived from the New York Penal Law.

ORS 163.575 (1971) was a new law. Commentary, § 177, 178. The commentary to the final draft does not discuss the statute's derivation other than to note that several of the sections, including section (1)(b), were new. *Id*. Although

the preliminary drafts of the code contain, as supplemental reference material, excerpts from the model penal code and statutes from other states,[7] there is no indication that the legislature intended to model ORS 163.575's substantive content on any New York statute. Indeed, the commentary to the preliminary drafts states that the "*title* of the offense is derived from New York Revised Penal Law section 260.10" but that subsections (a), (b), and (c) "are new." Criminal Law Revision Commission, Preliminary Draft No. 2, Mar 1970, § 8, 25-26 (emphasis added). As a result, defendant's reliance on New York Penal Law is misplaced. The relevant history lies instead in the issues considered and decided by Oregon lawmakers, and, as discussed above, that history shows that the legislature understood that drug possession was an unlawful drug activity.

In sum, contrary to defendant's assertions, the legislature did not intend to limit the application of ORS 163.575 to situations where the state could prove that the defendant maintained or conducted the unlawful drug activity as a long-standing or protracted enterprise.

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[7] The preliminary drafts of Article 20, which includes the section that became ORS 163.575, contain a section at the end of the article entitled "Text of Revisions of Other States." Criminal Law Revision Commission, Preliminary Draft No. 1, Feb 1970, Art 20, 36; Criminal Law Revision Commission, Preliminary Draft No. 2, Mar 1970, Art 20, 32. The section includes samples of statutes from New York, Michigan, and Connecticut.

D. The trial court correctly denied defendant's motion for a judgment of acquittal because a rational trier of fact could find each element of endangering the welfare of a minor beyond a reasonable doubt.

With the foregoing in mind, the record here contains sufficient evidence, in the light most favorable to the state, to support each of the elements of endangering the welfare of a minor. Defendant was found in the back seat of a car with three types of controlled substances—methadone, heroine, and methamphetamine—in her purse. (Tr 31-32, 154-55). The purse was open on the seat beside defendant, and one of the drug containers was visible from the arresting officer's vantage point outside the car. (Tr 20). Prior to the stop, the car had been transporting defendant's children to school. (Tr 25). There was no dispute that defendant illegally possessed all three of the controlled substances or that she permitted her children to be in the car with her.

A trier of fact could reasonably infer that defendant brought the drugs into the car with the intent to continue her possession of the drugs—possession that commenced even before she entered the car—during the car ride and with the intent to transport the drugs from one place to another. The trier of fact could find that, by those actions, defendant maintained and conducted an illegal drug activity. Thus, the state submitted sufficient evidence from which a rational trier of fact could find that defendant permitted her daughters to enter and remain in a "place where unlawful activity involving controlled substances was maintained and

conducted." The trial court properly denied defendant's motion for a judgment of acquittal.

CONCLUSION

This court should affirm the decision of the Court of Appeals and the trial court's judgment convicting defendant of two counts of endangering the welfare of a minor.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Erin K. Galli
ERIN K. GALLI #952696
Senior Assistant Attorney General
Erin.K.Galli@doj.state.or.us

Attorneys for Respondent on Review
State of Oregon

EG2:kak/5130297

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 27, 2014, 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 Peter Gartlan and David Sherbo Huggins, 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 5616 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).

/s/ Erin K. Galli
ERIN K. GALLI #952696
Senior Assistant Attorney General
Erin.K.Galli@doj.state.or.us

Attorneys for Respondent on Review
State of Oregon

EG2:kak/5130297