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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ZACHARY DEAN CARLISLE, Defendant-Appellant Petitioner on Review.	Multnomah County Circuit Court Case No. 18CR07005 CA A169564 S067880

PETITIONER'S BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Multnomah County Honorable Eric L. Dahlin, Judge

Affirmed Without Opinion: June 17, 2020
Before: Ortega, Presiding Judge, and Shorr, Judge, and Powers, Judge.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Defendant appeals a conviction for third-degree sexual abuse, an offense that is committed when "[t]he person subjects another person to sexual contact * * * and the victim does not consent to the sexual contact[.]" ORS 163.415(1)(a)(A). At trial, defendant requested an instruction that, to convict him of that offense, the jury must find that he knew that the victim did not consent. However, the court instead instructed the jury that it could vote to convict if it found that he was criminally negligent with respect to the victim's lack of consent.

The jury returned a guilty verdict.[1] The Court of Appeals affirmed the judgment, and this court allowed review.

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[1] Defendant was also found guilty and convicted of harassment based on the same physical act (touching the victim's breast). ORS 166.065 (1)(a)(A) (defining harassment as intentionally subjecting the victim to offensive physical contact); ORS 166.065(4)(a)(A) (elevating that offense to a Class A misdemeanor when it involves touching a sexual or intimate part). Although similar, the "conduct" for each count differs. *See* ORS 161.085(4) (" 'Conduct' means an act or omission and its accompanying mental state."). Whereas the "conduct elements" for harassment are intentionally subjecting another to offensive physical contact by knowingly touching a sexual or intimate part, the "conduct elements" for sexual abuse in the third degree are knowingly subjecting another to sexual contact (*i.e.*, touching the sexual or intimate part of another for the purpose of arousing or gratifying either person's sexual desire) with the awareness that the person does not consent. The arguments on review concern only the latter offense.

Question Presented and Proposed Rule of Law

Question Presented: A victim's lack of consent is the common element unifying the conduct prohibited by the statutes defining sexual offenses in the criminal code. Is a victim's lack of consent a conduct element of the crime of third-degree sexual abuse, such that a factfinder must find that a defendant *knew* of the victim's lack of consent in order to find the defendant guilty of that crime?

Proposed Rule of Law: In the context of third-degree sexual abuse, a victim's lack of consent is what transforms a legal, interpersonal act into a crime. Because it changes the nature of sexual contact, it is part of the essential character of the prohibited act. As such, performing the act *without consent* is a conduct element, and the state is required to prove that the defendant *knew* that the victim did not consent to find the defendant guilty of third-degree sexual abuse.

Summary of Argument

ORS 163.415 defines third-degree sexual abuse.[2] As charged in this case, a person commits the offense when, *inter alia*, "the person subjects another person to sexual contact," and "the victim does not consent to the sexual contact." ORS 163.415(1)(a)(A). The term, "sexual contact," "means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party." ORS 163.305(6).

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[2] In full, ORS 163.415 provides:

> "(1) A person commits the crime of sexual abuse in the third degree if:
>
> "(a) The person subjects another person to sexual contact and:
>
> "(A) The victim does not consent to the sexual contact; or
>
> "(B) The victim is incapable of consent by reason of being under 18 years of age; or
>
> "(b) For the purpose of arousing or gratifying the sexual desire of the person or another person, the person intentionally propels any dangerous substance at a victim without the consent of the victim.
>
> "(2) Sexual abuse in the third degree is a Class A misdemeanor.
>
> "(3) As used in this section, 'dangerous substance' means blood, urine, semen or feces."

In *State v. Haltom*, 366 Or 791, 824, 472 P3d 246 (2020), this court held that lack of consent is a conduct element in the related crime of second-degree sexual abuse, ORS 163.425. It reached that conclusion by looking at the role that the element plays, the text of the statute, and grammatical construction. It confirmed that conclusion by considering the severity of the consequences of conviction, related provisions, and indicators of legislative intent in the 1983 legislative history to that statute.

The factors that supported the conclusion that lack of consent is a conduct element for purposes of second-degree sexual abuse apply with equal force to third-degree sexual abuse. That is, the reasoning in *Haltom* extends to ORS 163.415, defining third-degree sexual abuse, because the element plays the same role in both statutes, and the legislature employed the same word choice and grammatical structure. In addition, the severity of the consequences and legislative history confirm that conclusion.

Summary of Historical and Procedural Facts

Historical Facts

On September 26, 2017, spent the evening with her boyfriend, (his sister (and two friends (and Tr 499. The group was celebrating birthday. Tr 499. They began their evening at a patisserie in southeast Portland, where they ate desserts

and shared champagne. Tr 499. drank a single glass of champagne. Tr 499-500. then drove the party across the river to a downtown bar called District. Tr 500.

When the group arrived, they noticed defendant, who stood outside the door where a bouncer would ordinarily check identifications. Tr 500. described him as "a light-skinned Black man or even more ethnic-looking in some way." Tr 501. Defendant is tall and has dark, curly hair. Tr 501. made note of his clothing and also saw that he had tattoos on the backs of his hands. Tr 501. The group took out their identifications. Tr 500. Defendant accepted one of the identification cards before telling the group that he was not the bouncer. Tr 500. They joked about the misunderstanding, and and her friends entered the bar. Tr 500.

About 90 minutes later, party began to leave District and planned to stop for pizza on their way home. Tr 502. As her friends began to leave to walk toward a pizzeria, stepped away from the crowd to wait for them and started looking at her cell phone. Tr 502.

As she looked at her cell phone, felt a slight touch under her armpit next to her right breast. Tr 504. did not react "right away" because she thought it was who is a "like a sister-in-law" to Tr 504. assumed that was adjusting her bra band for her. Tr 504. However, within seconds, the band of her bra was pulled down to her waist, and she felt a

heavy hand on her right breast. Tr 504. quickly turned and felt something sharp scrape across her nipple as she did so. Tr 505. turned and recognized the person who had touched her as defendant. Tr 505. Defendant looked "right into [eyes" and said something to the effect of, "those eyes." Tr 506. then walked away from him without responding. Tr 506.

later described what happened to and told him that the person who had touched her was the person that the group had mistaken for a bouncer. Tr 467. and identified defendant at trial. Tr 466, 507.

Procedural facts

The state charged defendant by information with third-degree sexual abuse, ORS 163.415(1)(a)(A) (Count 1) and harassment involving an intimate part, ORS 166.065(4)(a)(A) (Count 2).

Defendant proceeded to a jury trial. For third-degree sexual abuse, the court refused to instruct the jury that it must find that defendant acted knowingly with respect to the victim's lack of consent and instead instructed the jury to return a guilty verdict if it found that defendant acted with criminal negligence as to that element. Tr 577 (court's ruling); Tr 615 (instructions).

The jury found defendant guilty on both counts. Tr 658.

On appeal, defendant argued that the trial court erred in refusing to provide defendant's proposed jury instruction that included a knowing mental state. The Court of Appeals affirmed in a *per curiam* opinion that cited "*State*

v. Haltom, 298 Or App 533, 447 P3d 66, *rev allowed*, 365 Or 721 (2019)." *State v. Carlisle*, 304 Or App 872 (2020), *rev allowed*, 367 Or 535 (2021).

This court has since reversed the Court of Appeals decision in *Haltom*, holding that, for purposes of ORS 163.425(1)(a) (second-degree sexual abuse), the element that the victim "does not consent" "is an integral part of the conduct that the statute proscribes, and that proof of a minimum mental state of 'knowingly,' as defined in ORS 161.085(8), is required with respect to that element." *Haltom*, 366 Or at 824.

This court then allowed review in this case.

Argument

I. The Oregon Criminal Code of 1971, as interpreted in this court's case law, sets out core principles that determine which culpable mental state applies to an element of a criminal offense.

The Oregon Criminal Code of 1971 (the Criminal Code) sets out default rules that set the minimum culpable mental states that apply to material elements for offenses defined within the Criminal Code. The legislature intended that "knowingly" or "with knowledge" would be the minimum culpable mental state for a conduct element of an offense within the Criminal Code. Whether an element is a "conduct element" depends on the legislature's intent. This court has interpreted two statutes that include lack of consent as an element—unlawful use of a vehicle (UUV) and second-degree sexual abuse.

For each, this court concluded that the legislature intended to treat the lack of consent element as a conduct element.

A. Knowledge is the minimum culpable mental state for a conduct element of an offense within the Criminal Code.

To determine which mental state applies to an element of an offense, the first step is to determine whether the offense is within the Criminal Code. ORS 161.005 lays out which of the Oregon Revised Statutes "shall be known and may be cited as the 'Oregon Criminal Code of 1971.' " *State v. Rainoldi*, 351 Or 486, 491, 268 P3d 568 (2011). Because ORS 163.415 is within the Criminal Code, *see* ORS 161.005, the ensuing discussion concerns interpretation of statutes within the Criminal Code.

For offenses within the Criminal Code, a person must act with a culpable mental state as to each "material element." ORS 161.095(2). An element is a material element "unless it relates 'solely to the statute of limitations, jurisdiction, venue' or similar matters." *State v. Simonov*, 358 Or 531, 537, 368 P3d 11 (2016) (quoting *State v. Blanton*, 284 Or 591, 595, 588 P2d 28 (1978)). "In practice, then, most elements of offenses set out in the Criminal Code require proof of a culpable mental state." *Simonov*, 358 Or at 538. When the statute defining the offense does not proscribe which culpable mental state applies to a material element, "culpability is nonetheless required" for that

element "and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence." ORS 161.115(2).

Except where context requires otherwise, each mental state corresponds only to particular types of material elements. *Simonov*, 358 Or at 538-39. The definition of each culpable mental state specifies the types of material elements to which the mental state applies, unless specifically provided otherwise in the statute defining the offense:

- "Conduct" elements require an intentional or knowing mental state;
- "Result" elements require an intentional, reckless, or criminally negligent mental state; and
- "Circumstance" elements require a knowing, reckless, or criminally negligent mental state.

Id. at 539 (citing ORS 161.085(7)-(10)). "As a result, the minimum culpable mental state for elements that constitute conduct is knowledge, and the minimum culpable mental state for result and circumstance elements is criminal negligence." *Simonov*, 358 Or at 540.

B. Whether an element is a conduct element that requires a knowing mental state turns on whether the legislature viewed the element as essential to the proscribed conduct; other indicators of legislative intent may rebut or confirm that conclusion.

Under the statutory scheme described above, determining which mental state applies to a material element involves a two-part inquiry: First, did the legislature view the element as essential to the conduct as opposed to a result of

an act or a circumstance that attended the act? Second, if so, did the legislature otherwise indicate that it intended to depart from the default rule that applies to conduct elements—*i.e.*, did the legislature otherwise indicate that it did not intend for a knowing mental state to apply? *Haltom*, 366 Or at 802. To determine the legislature's intent with respect to those questions, this court applies the interpretive framework set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) and modified in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). *Haltom*, 366 Or at 800.

This court has identified several relevant factors to consider in determining whether an element is essential to the criminal conduct. The first and most important consideration is the role that the element plays "vis-à-vis the central conduct element," which is a matter of context. *Id.* at 803. When the element at issue changes an essentially lawful act into criminal conduct, it is integral to the conduct that the statute proscribes. *Id.* at 804. In contrast, an element that merely *accompanies* what is already criminal conduct is not a conduct element. *Simonov*, 358 Or at 541-42 (citing the value of property in a theft prosecution as an example of an element that accompanies but does not modify the nature of the conduct). In addition, an element that merely establishes a particular "status" "generally is not part of the essential character of a proscribed act" because "the defendant's mental state usually has nothing to do with whether the status exists." *Id.* at 543 (citing felon in possession of a

weapon and driving under the influence as examples of offenses that include status elements).

The text, including word choice, may indicate a legislative intent to treat an element as a conduct element. That is, when the legislature selects verbs that imply that the element is part of the conduct, that choice signals that the legislature viewed the element as essential to the nature of the offense. *Haltom*, 366 Or at 803-05 (explaining that "subjecting" a person to a sexual act is a word that implies unwillingness on the part of the victim); *see Simonov*, 358 Or at 548 (considering commentary to UUV that described "joyriding," which implies lack of consent of the owner). In addition, the grammatical structure of the statute—*e.g.*, the use of a particular syntax—may lend support to one construction or another. *Haltom*, 366 Or at 804. When the element is expressed as an adverbial phrase that modifies the *act* that the defendant undertakes, it is likely the legislature viewed the element as essential to the conduct. *Simonov*, 358 Or at 547.

After reaching a tentative conclusion on the type of element that is at issue, this court then considers any "[e]vidence directed at determining which mental state the legislature might have intended to attach to the element at issue" in order to either confirm or rebut that conclusion under the default rule analysis. *Haltom*, 366 Or at 803. Evidence relevant to that question includes

the severity of the penalty for a conviction, related statutes, and legislative history. *Id.* at 812-23.

C. The lack of consent elements of unlawful use of a vehicle and second-degree sexual abuse are conduct elements that require a knowing mental state.

This court has interpreted two statutes that include lack of consent as an element. In each case, it has determined that the element is a conduct element under the framework describe above.

In *Simonov*, 358 Or at 548, this court determined that, for purposes of UUV, the owner's lack of consent is a conduct element; therefore, a defendant may be convicted of that crime only if the defendant knew that the owner did not consent to the vehicle's use. There were three reasons for that conclusion. First, as to the "role" of the element, this court noted that lack of permission is essential to the "nature of joyriding," which is how the legislature described the UUV offense in the commentary. *Id.* Second, grammatically, the legislature had cast "without consent" as an adverbial phrase *modifying* the relevant act—that is, a person commits the crime of UUV when "[t]he person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat, or aircraft *without the consent* of the owner." *Id.* at 547 (emphasis added). Finally, classification of UUV as a felony offense was consistent with that interpretation, because "[t]he severity of that consequence suggests that the

legislature did not contemplate that mere criminal negligence would suffice to establish criminal liability for UUV." *Id.* at 548.

In *Haltom*, 366 Or 791, this court interpreted the lack of consent element in the second-degree sexual abuse statute, ORS 163.425(1)(a). A person commits second-degree sexual abuse by "subject[ing] another person to sexual intercourse" or certain other sexual acts when "the victim does not consent thereto." ORS 163.425. The text does not plainly indicate whether lack of consent is part of the essential character of second-degree sexual abuse. *Haltom*, 366 Or at 803. To answer that question, this court turned to other context regarding the role of the lack of consent element—including the nature of the act, the legislature's word choice, and grammatical construction. *Id.* at 804.

First, as with joyriding, a person's lack of consent changes the essential nature of the sexual conduct from an otherwise legal act into a criminal offense, and thus it "border[s] on the axiomatic that the lack of consent element" is part of the essential character of the conduct proscribed by ORS 163.425(1)(a). *Haltom*, 366 Or at 804 (internal quotations omitted). In other words, the "role" of the lack of consent element suggests that it is an essential part of the criminal conduct because it is the single fact that converts what typically is a legal act into *illegal* conduct. *Id.*

Second, the legislature's choice of the verb "subjects"—as in, "subjects another person to sexual intercourse," ORS 163.425, strongly suggests that the legislature viewed consent to be part of the essential character of the offense. *Haltom*, 366 Or at 804. The ordinary meaning of the verb "subject" is:

> " '1 a **:** to bring under control or dominion **:** SUBJUGATE * * * b **:** to reduce to subservience or submission **:** make (as oneself) amenable to the discipline and control of a superior * * * 4 **:** to cause to undergo or submit to **:** make submit to a particular action or effect **:** EXPOSE.' "

Id. (quoting *Webster's Third New Int'l Dictionary* 2275 (unabridged ed 2002)). Thus, the legislature's word choice conveyed that the lack of consent changed the essential nature of the act:

> " 'Subject[ing]' another person to a sexual act thus conveys that the sexual act is imposed on a person who merely submits to the imposition. *The wording thus carries at least an implication of unwillingness on the part of the other person*—which implication is clarified and confirmed by the requirement in ORS 163.425(1)(a) that 'the victim does not consent.' "

Id. at 804-05 (emphasis added).

Third, this court addressed the grammatical construction of the statute as part of its initial analysis. In that regard, this court "continue[d] to recognize that grammatical construction *may* be suggestive of its understanding of the typology of that element," but it clarified that "the diagnostic value of the choice between the two grammatical constructions discussed in *Simonov*" is "fairly weak." *Id.* at 807. This court noted that the adverbial phrase "without consent" and the independent clause "does not consent" are interchangeable in

common parlance. *Id.* For that reason, it was "less likely that there was anything purposive or meaningful in the legislature's choice to use one construction rather than the other." *Id.*[3]

In summary, the role of the element and legislature's word choice supported a tentative conclusion that the lack of consent element in the definition of second-degree sexual abuse is a conduct element. *Id.* at 811. And departing slightly from *Simonov*, this court viewed the legislature's choice to employ an independent clause when modifying an act element as less significant to the analysis. *Id.*

Having reached that tentative conclusion, this court then turned to other indicators of legislative intent as to the mental state that should apply to either confirm or rebut that conclusion. *Id.* at 811-12. First, it held that the severity of felony liability was consistent with the view that the legislature intended for a knowing mental state to apply, as it did in *Simonov*. *Id.* at 812. As to the state's contrary arguments regarding the seriousness of the sexual conduct

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[3] By rejecting a categorical distinction between alternative grammatical constructions, *Haltom* rejected one of the central propositions underlying the Court of Appeals construction of ORS 163.415 in *State v. Wier*, 260 Or App 341, 354, 317 P3d 330 (2013); namely, that the legislature's use of an independent clause demonstrated that the lack of consent was *not* part of the conduct element. It also rejected the state's argument that *Simonov*'s acknowledgement of *Wier* in a footnote had all but confirmed the correctness of that court's interpretation. *Haltom*, 366 Or at 806.

regardless of whether the actor knew that the act was consensual, "they ascribe views about sexual crimes to the 1983 legislature that, in all probability, were not ascendant." *Id.* at 813. For that reason, this court rejected those arguments. *Id.*

Second, this court considered and rejected the state's arguments premised on the 1971 Criminal Law Commission's intent in passing the original sexual offense statutes. Specifically, the state had pointed to ORS 163.325, which expressly provides the circumstances in which a defendant's ignorance of the victim's age or mental or physical incapacity to give consent is an affirmative defense. *Id.* at 814. The state had argued that, when the legislature provided a defense with respect to *incapacity* to consent without also providing such a defense with respect to *actual* lack of consent, the legislature must have intended that a defendant's awareness of a victim's *actual* lack of consent would play no role in determining a defendant's guilt. *Id.* at 815. The defendant countered that ORS 163.325 supported his construction—that is, he argued that the exceptions proved that the general rule is to require proof of knowledge. *Id.* The court agreed that ORS 163.325 evinced the legislature's intent to depart from the general rule requiring knowledge of lack of consent *only* with respect to offenses that typically carried strict liability, such as statutory rape. *Id.* at 816-18.

Third, this court considered legislative history pertaining to the 1983 second-degree sexual abuse statute. *Id.* at 820-23. Ultimately, that history indicated that the proponents of the bill and the legislature viewed lack of consent as an element to which a knowing mental state *already* applied under the existing sexual abuse statutes. *Id.* at 823. Therefore, *Haltom* rejected the notion that the 1983 legislature's decision not to include a similar defense as to mistake of factual consent indicated a policy decision rejecting that view of the law. *Id.* In conclusion, the lack of consent element in ORS 163.425(1)(a) is an "integral part of the conduct that the statute proscribes," and it requires, at minimum, a knowing culpable mental state. *Id.* at 824. The text, context, and legislative history of that statute support that conclusion.

In review, in both the UUV and the sexual abuse statutes, the lack of consent element is a conduct element that requires a knowing mental state. Taken together, *Simonov* and *Haltom* demonstrate that a person's lack of consent is a conduct element when the legislature viewed the lack of consent element as transforming the nature of a noncriminal activity into criminal conduct. The legislature may manifest that intent through word choice, grammatical structure, and related statutes; and the severity of the consequences and legislative history may confirm or rebut that conclusion.

II. The victim's lack of consent to sexual contact as used in the third-degree sexual abuse statute is a conduct element that requires a knowing mental state.

ORS 163.415 defines third-degree sexual abuse.[4] A person commits the offense when, *inter alia*, "the person subjects another person to sexual contact," and "the victim does not consent to the sexual contact." ORS 163.415(1)(a)(A). ORS 163.415 falls within the Criminal Code. ORS 161.005. The victim's lack of consent is a material element because it does not relate to matters such as

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[4] In full, ORS 163.415 provides:

> "(1) A person commits the crime of sexual abuse in the third degree if:
>
> "(a) The person subjects another person to sexual contact and:
>
> "(A) The victim does not consent to the sexual contact; or
>
> "(B) The victim is incapable of consent by reason of being under 18 years of age; or
>
> "(b) For the purpose of arousing or gratifying the sexual desire of the person or another person, the person intentionally propels any dangerous substance at a victim without the consent of the victim.
>
> "(2) Sexual abuse in the third degree is a Class A misdemeanor.
>
> "(3) As used in this section, 'dangerous substance' means blood, urine, semen or feces."

ORS 163.415. The term, "sexual contact," "means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party." ORS 163.305(6).

jurisdiction or venue. *Simonov*, 358 Or at 537. Therefore, a culpable mental state is required if, as in *Haltom*, the legislature viewed the lack of consent element as essential to the proscribed conduct of nonconsensual sexual touching.

The factors that supported the conclusion that lack of consent is a conduct element for purposes of second-degree sexual abuse apply directly to third-degree sexual abuse. The lack of consent element plays the same role in both statutes, and the legislature employed the same word choice and grammatical structure. Those indicators favor defendant's construction. In addition, the severity of the consequences of conviction and legislative history confirm that conclusion. Both demonstrate that the legislature anticipated the statute to apply in circumstances in which a defendant was aware of the victim's lack of consent.

A. The lack of consent element in third-degree sexual abuse is a conduct element because it is essential to the criminal culpability of the conduct that the statute describes.

The lack of consent element in third-degree sexual abuse is a conduct element under *Haltom*. Each of the factors identified in *Haltom* requires the same result with respect to ORS 163.415 because the statutes are structured in largely the same way, distinguished only by the degree of sexual contact. First, the role that the element plays relative to the central conduct element is the same. Second, the legislature's word choice is the same in ORS 163.415 as in

ORS 163.425. Third, the grammatical structure in ORS 163.415 is the same as in ORS 163.425 and does not persuasively demonstrate that the legislature intended to treat lack of consent as an attendant circumstance.

The role of lack of consent is the same under the third-degree sexual abuse statute as it is for second-degree sexual abuse. As in that context, it borders on self-evident that it is only the victim's lack of consent that converts a sexual touch into a crime. Moreover, the 1971 Criminal Law Revision Commission shared that view, noting that, "Lack of consent is the common denominator for all the crimes proscribed in [Article 13, Sexual Offenses]." Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report, § 105, 106 (July 1970). *See Haltom*, 366 Or at 809 ("When evaluating statutes developed by the Criminal Law Revision Commission, we look to both the commentary and the discussions that preceded the adoption of the final draft as legislative history for the resulting laws."). In other words, the victim's lack of consent is essential to the nature of sexual *abuse* as opposed to ordinary sexual activity. *Haltom*, 366 Or at 804.[1]

As in *Haltom*, the legislature's word choice also supports that conclusion. Here, as in the second-degree sexual abuse statute, the legislature used the phrase "subjects another person to sexual contact" to describe the conduct element. ORS 163.415(1)(a). The word "subjects" connotes domination or control and suggests that the person receiving the touch is unwilling, in contrast

to a consenting coparticipant. *Haltom*, 366 Or at 804-05. By using the word "subject," the legislature signaled that the "does not consent" element is an integral part of the conduct that the statute proscribes as opposed to a fact that merely accompanies the conduct. *Id.* at 805.

In addition, this court rejected the state's argument in *Haltom* that the legislature's grammatical choice of an independent clause ("and the victim does not consent") rather than as an adverbial phrase ("without the consent of …") indicates that lack of consent is a circumstance element. *Haltom* concluded that the legislature's choice between those alternatives, "is not helpful in determining whether the viewed that element as a circumstance or part of the proscribed conduct." *Id.* at 807. Therefore, the legislature's grammatical construction is also a neutral factor in the analysis here.

In summary, the prevailing considerations in *Haltom* lead one to conclude that the lack of consent element in third-degree sexual abuse is a conduct element. The reasoning in *Haltom* regarding the second-degree sexual abuse statute, ORS 163.425, applies the same way to the third-degree sexual abuse statute, ORS 163.415, because the statutes are textually and structurally the same and cover the same subject matter.

Turning to the second stage of the inquiry, two additional indicators of legislative intent are consistent with that conclusion. First, the severity of the consequences of a conviction for third-degree sexual abuse is consistent with

that legislative intent. Although the legislature classified what now exists as third-degree sexual abuse as a misdemeanor, its severity reflects a seriousness that is inconsistent with mere criminal negligence. Second, the legislative history to ORS 163.415 confirms that conclusion because it demonstrates that the legislature envisioned the statute would apply in circumstances in which a defendant was aware that the victim did not consent to the sexual contact.

B. The legislature's classification of third-degree sexual abuse as a Class A misdemeanor is consistent with the conclusion that the legislature intended to apply a knowing mental state.

The severity of the consequences of a felony conviction is a factor that makes it unlikely that the legislature intended for a criminal negligence mental state to apply to a material element. *Simonov*, 358 Or at 548. In both *Simonov* and *Haltom*, the legislature's classification of the offense as a felony supported the conclusion that the legislature intended to apply a knowing mental state. *Simonov*, 358 Or at 548; *Haltom*, 366 Or at 812. Unlike second-degree sexual abuse and UUV, third-degree sexual abuse is a Class A misdemeanor. ORS 163.415(2). However, as a general rule, the legislature's classification of an offense in the Criminal Code as a misdemeanor does not *rebut* the conclusion that the legislature intended a knowing mental state. In addition, as to this specific statute, the legislature's classification of the offense as a Class A misdemeanor tends to support the conclusion that the legislature intended to

apply a knowing mental state when viewed in the context of related sexual offense provisions.

As a general rule, the legislature's classification of an offense as a Class A misdemeanor does not logically rebut the conclusion that a knowing mental state applies to a conduct element. That is, while felony liability makes it more likely that the legislature intended to apply a knowing mental state, the converse is not also true. A Class A misdemeanor may be punished by up to 364 days' incarceration, ORS 161.615, and it constitutes a serious offense for purposes of the Sixth Amendment. *See Baldwin v. New York*, 399 US 66, 73-74, 90 S Ct 1886, 26 L Ed 2d 437 (1970) (setting the dividing line between 'petty' and 'serious' offenses for purposes of the Sixth Amendment right to a jury trial at six months' imprisonment). Those consequences imply that the legislature intended to include a knowing mental state.

In addition, the general culpability provisions, ORS 161.085 to ORS 161.115, apply equally to felony and misdemeanor offenses in the Criminal Code. *Simonov*, 358 Or at 537. The legislature expressly provided an exception to the default mental state provisions in ORS 161.095 for *violation*-level offenses but not for misdemeanors. ORS 161.105(1)(a). Thus, the legislature's express policy decision was not to enact different rules when construing misdemeanor offenses, even though the consequences of conviction are less severe than those for felony convictions. On the contrary, the default

rules demonstrate that misdemeanor and felony offenses should be construed under the same methodology.

Moreover, the legislature enacted what is now third-degree sexual abuse within a sentencing classification system that explains why the legislature chose to designate the offense as a misdemeanor for reasons unrelated to the applicable culpable mental state. The legislature's classification system identified six descending degrees of seriousness: Class A felonies; Class B felonies; Class C felonies; Class A misdemeanors; Class B misdemeanors; and Class C misdemeanors. *See* ORS 161.535 (classifying felony offenses); ORS 161.545 (defining misdemeanor offenses); ORS 161.605 (identifying indeterminate maximum sentences for classifications of felonies); ORS 161.615 (identifying indeterminate maximum sentences for classifications of misdemeanor offenses). The classification system reflects a considered policy decision to graduate the severity of offenses and their attendant maximum punishments:

> "The technique of classifying felonies and misdemeanors into separate categories for grading and sentencing purposes follows the approach recommended by the Model Penal Code, New York Revised Penal Law, Michigan Revised Criminal Code and other recent state criminal law revisions. This method of classifying the crimes represents a departure from the traditional legislative technique of providing a separate and distinct penalty for each individual offense. The existing method results in unnecessary duplication of penalties, inconsistencies among penalties imposed for similar crimes and disparate sentences.

> "Each of the specific offenses defined by the proposed Code can be assigned to one of the felony or misdemeanor categories, with the sentencing and penalty options for each category set forth in Articles 8 and 9.
>
> "* * * * *
>
> "Classifying the crimes, assigning a range of penalties for each category of crimes and then assigning each specific offense to one of the categories is in accord with the ultimate objective of the revision project—a comprehensive and consistent criminal code."

Commentary § 73 at 71.

In keeping with that classification system, the legislature created a two-tiered, graduated scheme for the two degrees of sexual abuse in the 1971 Criminal Code. *State v. Parkins*, 346 Or 333, 352, 211 P3d 262 (2009) (describing the 1971 statutory scheme). The 'basic' offense (then second-degree sexual abuse) was elevated to first-degree sexual abuse "in two parallel circumstances: sexual contact through forcible compulsion and sexual contact with a person under 12 years of age." *Id.* at 352.

The legislature had classified the lowest degree of rape and the highest degree of sexual abuse as Class C felonies. Or Laws 1971, ch 743, § 109, *codified at* ORS 163.355 (1971)[5] (third-degree rape); Or Laws 1971, ch 743, § 116, *codified at* ORS 163.425 (1971)[6] (first-degree sexual abuse). In keeping with the overall classification system, the highest severity for the next lowest degree of sexual abuse was as a Class A misdemeanor. ORS 161.615 (classifying misdemeanor offenses); Or Laws 1971, Ch 743, § 115, *codified at* ORS 163.415 (1971)[7] (defining second-degree sexual abuse). The commentary reflects that decision:

> "The offense of sexual abuse is divided into two ascending degrees. Section 115 defines the basic offense. It should be noted that consensual sexual contacts between adults are not proscribed. * * * .

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[5] ORS 163.355 (1971) has since been amended to gender-neutral terms but remains otherwise unchanged since 1971. Or Laws 1991, ch 628, § 1.

[6] ORS 163.425 (1971) has been amended multiple times since 1971. Or Laws 1983, ch 564, § 1; Or Laws 1991, ch 386, § 14; Or Laws 1991, ch 830, § 2; Or Laws 2009, ch 876, § 2; Or Laws 2017, ch 318, § 6. In 1983, the legislature added the text that later became the crime of second-degree sexual abuse in 1991. Or Laws 1983, ch 564, §1; Or Laws 1991, ch 830, § 2.

[7] ORS 163.415 (1971) has been amended multiple times since 1971. Or Laws 1979, ch 489, § 1; Or Laws 1991, ch 830, § 1; Or Laws 1995, ch 657, § 11; Or Laws 1995, ch 671, § 9; Or Laws 2009, ch 616, § 1. In 1991, the legislature reclassified the offense as third-degree sexual abuse when it added a new second-degree sexual abuse statute and enhanced the penalty for first-degree sexual abuse. Or Laws 1991, ch 830, § § 1-2 (reclassifying offenses).

> "The offense is raised a degree if either of the following factors is present:
>
> "(1) The victim is under 12 years of age; or
>
> "(2) The victim was subjected to forcible compulsion by the actor."

Commentary § § 115-16 at 122-23.

That commentary demonstrates that the legislature did not classify the "basic" sexual abuse offense as a misdemeanor because it intended to require a lower mental state. Rather, the legislature distinguished the "basic" sexual abuse offense as less severe than felony sexual offenses based on other factors not related to the defendant's mental state—namely, the age of victim and use of forcible compulsion. Then, in keeping with the classification system in the Criminal Code, the legislature classified the offense as one crime category below those comparable offenses. The legislature's classification of the offense as a Class A misdemeanor is consistent with a knowing mental state.

C. Legislative history confirms that the legislature intended to apply a knowing mental state to the lack of consent element in ORS 163.415.

In *Haltom*, this court rejected the state's argument regarding the legislature's views on severity of nonconsensual sexual intercourse, stating that those arguments "ascribe views about sexual crimes to the 1983 legislature that, in all probability, were not ascendant." 366 Or at 813. This court also rejected the state's arguments drawn from a subcommittee discussion of the general

culpability provisions of the Criminal Code. *Id.* at 809. The state had "notably" failed to turn to the proceedings and commentary that relate to the sexual assault statutes in crafting its argument. *Id.* Defendant turns to those proceedings here.

As noted, in 1971, as part of the Sexual Offenses Chapter, the legislature enacted two sexual abuse provisions, codified as ORS 163.415 and ORS 163.425. The "basic offense" of sexual abuse was then classified as second-degree sexual abuse and occurred when there was sexual contact without consent. *Parkins*, 346 Or at 352. ORS 163.415 (1971) defined the "basic" offense of second-degree sexual abuse as follows:

> "(1) A person commits the crime of sexual abuse in the second degree if he *subjects* another person to sexual contact; and
>
> "(a) *The victim does not consent to the sexual contact*; or
>
> "(b) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless.
>
> "(2) In any prosecution under subsection (1) of this section it is an affirmative defense for the defendant to prove that:
>
> "(a) The victim's lack of consent was due solely to incapacity to consent by reason of being under 18 years of age; and
>
> "(b) The victim was more than 14 years of age; and
>
> "(c) The defendant was less than four years older than the victim.
>
> "(3) Sexual abuse in the second degree is a Class A misdemeanor."

(Emphasis added.)

To understand the legislature's specific intent regarding sexual abuse, it is necessary to start with the general intent regarding the definitions of "sexual consent," including legal lack of consent and "actual" lack of consent. As explained below, sexual lack of consent encompassed both legal lack of consent and actual lack of consent. However, both forms of lack of consent were largely incompatible with a criminally negligent mental state because they stemmed from a rule that equated lack of active resistance with actual consent. The commentary to the sexual abuse statutes confirms that view, as it demonstrates that the legislature primarily intended to reach forceful sexual assaults. That type of conduct is incompatible with a criminally negligent mental state. The legislative history therefore confirms that the legislature intended to apply a knowing mental state.

1. Lack of consent encompasses both legal and actual lack of consent.

As noted above, "lack of consent" is the "common denominator for all the crimes proscribed in [the article on sexual offenses]." Commentary §105 at 106. The legislature's views on sexual consent provide a backdrop for understanding all of the offenses covered in that chapter and specifically the role of the "lack of consent" element in a typical factual scenario. The

commentary related to sexual consent indicates that an "affirmative consent" model ("yes" means "yes")[8] was certainly not what the legislature had in mind.

As it does today, "without consent" encompassed several different circumstances laid out in the Criminal Code. *State v. Ofodrinwa*, 353 Or 507, 514-16, 300 P3d 154 (2013). To explain the concept of "lack of consent," the commentary provides as follows:

> "Generally speaking, a sexual act is committed on a person 'without his consent' in the following instances: (1) when the victim is forcibly compelled to submit; (2) when the victim is considered to be incapable of consenting as a matter of law; and (3) when the victim does not acquiesce in the actor's conduct."[9]

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[8] - *The Failure of Consent: Re-Conceptualizing Rape As Sexual Abuse of Power*, 18 Mich J Gender & L 147, 160 (2011) (describing the affirmative consent model in which the presumption is a lack of consent to a sexual act in the absence of express permission).

[9] Even use of the word "person" in this context is a misleading synopsis of the 1971 legislature's view of actors with or without sexual agency. For the rape offenses in the sexual offense chapter, only a "female" could be the victim of rape, and by definition, a "female" was limited to a woman not married to the actor. Commentary § 104(2) at 104. An affirmative defense applied when the defendant could show that the parties were cohabitating as if married. Commentary § 107 at 109. Men could not be victims of rape by women, although they could be victims of sexual abuse. *See* Commentary § 111 at 113 ("The substantive offense of rape is defined in terms of male aggression. While some states define rape to include female aggression, it seems more realistic to treat such conduct as sexual abuse rather than rape."). Men and boys could be the victims of sodomy if under age 16 or if forcibly compelled. *See* Commentary § 112-114 at 116-17. It was a defense to rape or sodomy that the participants were within three years of each other's ages provided that they both were over age 12. Commentary § 108 at 110. But both could be convicted of contributing to the delinquency of a minor. Commentary § 117 at 174. In summary, a person's ability to give or withhold consent also depended on age, gender, and marital status.

Commentary § 105 at 106. The first and third conditions constitute "actual" lack of consent, and the second condition describes "legal" lack of consent.

In general, "a victim who lacked the capacity to consent stood in the same position as a victim who did not actually consent." *Ofodrinwa*, 353 Or at 514. However, the form lack of consent determined the severity of the offense and the availability of defenses. That is, "[t]he 1971 legislature accordingly identified different circumstances that evidenced a lack of consent * * * to distinguish different degrees of a crime, all of which were premised on a lack of consent however evidenced." *Id.* at 516.

As explained below, the lack of consent element works differently across the statutory scheme but in a logically coherent way. For policy reasons, the drafters assigned the evidentiary burden differently depending on the type of consent at issue, but those policy considerations did not change the baseline understanding of sexual consent.

2. The 1971's legislature's views on actual lack of consent were incompatible with a criminally negligent mental state.

The 1971 legislature was acting against a historical backdrop in which lack of consent required affirmative resistance, and that backdrop informed the meaning of sexual consent in the Criminal Code. Pre-1971, Oregon's rape statutes did not proscribe "lack of consent" as an element of the offense. Rather, the courts read a lack of consent requirement into the rape statutes and

required the state to prove that the " 'act [had] been committed forcibly and without the consent of the woman.' " *Ofodrinwa*, 353 Or at 512 (quoting *State v. Risen*, 192 Or 557, 560, 235 P2d 764 (1951) and citing *State v. Gilson*, 113 Or 202, 206, 232 P 621 (1925)). Thus, "lack of consent" comes from a common law definition.

Under the common law standard, "lack of consent" did not mean that a person subjectively did not agree to sexual intercourse. *Risen*, 192 Or at 560; *Gilson*, 113 Or at 208-09 (distinguishing common law crime of "rape" form "fornication" on the basis of consent or lack of consent). Rather, to prove lack of consent, the state was required to prove that the victim showed "genuine resistance" during the act, even in the context of a forcible rape. *Ofodrinwa*, 353 Or at 513. If the state failed to do so, then the jury could infer that the person had consented and that no rape had occurred. *Id.*!

Risen explained that the degree of "genuine resistance" required to satisfy the lack of consent element varied depending on the facts and circumstances of the case:

> "The woman must resist by more than mere words. Her resistance must be reasonably proportionate to her strength and her opportunities. It must not be a mere pretended resistance, but in good faith and continued to the extent of the woman's ability until the act has been consummated. * * * Those are the law's requirements in the case of a woman '*in the normal condition, awake, mentally competent, and not in fear*.' * * * If the evidence does not show that the woman resisted *to the utmost extent of which she was* **** * **** *capable, the jury may infer that, at some time*

> *during the course of the act, it was not against her will*. Nevertheless, the phrase 'the utmost resistance' is a relative one; one woman's resistance may be more violent and prolonged than that of another. Moreover, the attending circumstances may modify the requirements of the rule."

192 Or at 560-61 (emphasis added) (citations omitted). Thus, a woman was obligated to physically resist the act to the utmost extent of which she was capable; otherwise, she "consented." Conversely, she was not required to physically resist if asleep, mentally incompetent, or in fear (presumably of assault).

The Commission expressly incorporated actual lack of consent into the provisions on sexual offenses, including forcible rape, and quoted from *Risen* to explain that term. Commentary § 105 at 106 (stating that lack of consent is an essential element and quoting *Risen* and *Gilson* for that proposition). If the Commission had intended for a different rule to apply, then it would have stated that it was *modifying* that definition or otherwise expressed disagreement with *Risen* and *Gilson*. Instead, it quoted those cases. Although the Criminal Code also expanded the categories of legal incapacity to consent as detailed below, the commentary strongly suggests that it intended to maintain the common law rule that lack of resistance amounted to consent.

That meaning is also consistent with the commentary stating that a victim did not consent when she did not "acquiesce" in the actor's conduct. Commentary § 105 at 106. To "acquiesce" commonly means "to accept or

comply tacitly or passively: accept as inevitable or indisputable." *Webster's* at 482.[10] In other words, a victim effectively "consented" by failing to actively reject sexual contact. Taken together with *Risen* and *Gilson*, the commentary suggests that actual lack of consent required, at a minimum, a responsive action on the victim's part to manifest her lack of consent.

From that commentary, it is clear that the legislature was acting against a historical backdrop in which actual lack of consent was a factual question for the jury but required affirmative resistance. The legislature did not diverge from that view; rather, the commentary cited those cases and described lack of consent as the absence of acquiescence. That view of sexual consent strongly suggests that the legislature envisioned circumstances in which a defendant, as a practical matter, likely *knew* of the victim's lack of consent. That is because lack of consent would be part and parcel of the acts constituting the offense: sexual contact with a physically resisting person is a fundamentally different type of act than sexual contact with a person who does not resist but subjectively does not agree to the contact.

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[10] The legislature later amended ORS 163.315 to add a provision, which states, "A lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact with all other relevant evidence." Or Laws 1999, ch 949, § 2 codified as ORS 163.315(2). Defendant is not arguing that a person is required to physically resist for the state to prove lack of consent under current law. Rather, he is simply arguing that that historical concept of lack of consent informs what the legislature intended as to the requisite mental state that would attach to lack of consent.

3. The 1971's legislature's views on legal lack of consent were also incompatible with a criminally negligent mental state.

Lack of consent also encompassed a victim's legal incapacity to consent. As described in *Haltom*, the legislature structured the sexual offenses around those bases for legal incapacity in a way that often allowed the defendant to raise a defense that he was not aware of the basis for the victim's incapacity to give consent. As explained below, the legislature's reason for doing so was that the legislature did not view such unknowing conduct to be morally blameworthy. That view underlies the 1971 legislature's general views on sexual consent in a way that is incompatible with a criminally negligent mental state.

A person was considered incapable of consent as a matter of law if the person was: "(1) Under 18 years of age; (2) Mentally defective; or (3) Mentally incapacitated; or (4) Physically helpless." ORS 163.315 (1971) *amended by* Or Laws 1999, ch 949, § 2; Or Laws 2001, ch 104, § 52. Aside from age, the remaining circumstances of legal incapacity in 1971 were further defined as follows:

> "As used in chapter 743, Or Laws 1971, unless the context requires otherwise:
>
> "* * * * *
>
> "(4) 'Mentally defective' means that a person suffers from a mental disease or defect that renders him incapable of appraising the nature of his conduct.

> "(5) 'Mentally incapacitated' means that a person is rendered incapable of appraising or controlling his conduct at the time of the alleged offense because of the influence of a narcotic or other intoxicating substance administered to him *without his consent* or because of any other act committed upon him *without his consent*.
>
> "(6) 'Physically helpless' means that a person is unconscious or for any other reason is *physically unable to communicate unwillingness* to act."

ORS 163.305 (1971) *amended by* Or Laws 1975, ch 461, § 1; Or Laws 1977, ch 844, § 1; Or Laws 1979, ch 744, § 7; Or Laws 1983, ch 500, § 1; Or Laws 1999, ch 949, § 1; Or Laws 2009, ch 770, § 1; Or Laws 2017, ch 318 § 2; Or Laws 2017, ch 634, § 17 (emphasis added).

Under ORS 163.305 (1971), an adult was legally incapable of consent in the narrow circumstances in which *communicating* lack of consent in the active manner described above was impossible for the victim.[11] However, if the victim was "incapacitated" by drugs or alcohol, such incapacity only amounted to legal lack of consent if the victim had become intoxicated *involuntarily* or was intoxicated to such a degree that she was physically helpless. *Id.* Those circumstances of legal incapacity suggest that the legislature assumed that an adult woman would ordinarily manifest her lack of consent by active resistance;

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[11] Notably, those exceptions to the active resistance rule were not a departure from the common law standard described in *Risen*—rather, they mirror the legal exceptions already described in that case. Under *Risen*, a woman was required to resist to the extent of which she was capable *unless* she was unconscious, mentally competent, or in fear. *Risen*, 192 Or at 561.

the state did not have to prove active resistance only if it could prove a condition that rendered the person incapable of such resistance.

In addition, the defenses that apply to legal lack of consent imply that, generally speaking, a defendant was considered not blameworthy when the defendant did not know of the basis for the victim's lack of consent. As to any victim who did not consent because of incapacity, it was an affirmative defense if the defendant "did not know" of the facts responsible for the victim's incapacity. ORS 163.325(3). In those circumstances, the defendant's mistaken belief did not have to be a reasonable one. *Id.*; *See* Commentary § 106 at 108.

The legislature provided similar defense to legal lack of consent because of age. As to any victim above the age of 16, the legislature provided an affirmative defense for mistake of age where the defendant could show that he "reasonably believed" the child to be above the statutory age at the time of the offense. ORS 163.325. The legislature expressed the view that the defense was necessary because:

> "A person who engages in a sexual act with a consenting adolescent, believing honestly and reasonably that such adolescent was of sufficient age to exercise discretion and judgment in the matter may be violating social conventions but such conduct does not betoken any abnormality nor does it exhibit a dangerous propensity to victimize the immature."

Commentary § 106 at 108. In other words, above the 16-year threshold, the legislature viewed the defendant's ignorance as to the victim's age to be a fact

that rendered the defendant's conduct not morally blameworthy or worthy of punishment. The availability of those defenses to legal lack of consent suggest that, generally speaking, the legislature did not view a defendant as blameworthy when the defendant was not aware of the victim's lack of consent.

The legislature did not provide a similar "defense" or "affirmative defense" for *actual* lack of consent, but that omission makes sense in light of its definition of actual lack of consent—earnest resistance. As this court concluded in *Haltom*, the defenses together with the commentary demonstrate that the legislature was carving out an exception to the "general rule" regarding sex crimes—that the state ordinarily must prove that the defendant *knew* that the victim in fact did not consent. *Haltom*, 366 Or at 817-18.

4. The 1971 legislature intended for sexual abuse to apply only to assaultive sexual contact.

The commentary to the sexual abuse provisions confirms that understanding of the "general rule" regarding the defendant's mental state as to lack of consent. There was no analogue to the sexual abuse statutes before 1971. *Ofodrinwa* 353 Or at 512 n 3. However, the drafters expressly considered sexual abuse to be similar to common law assault:

> "Under the common law such conduct would have constituted an assault. * * * Assault as defined in the draft requires the infliction of actual physical injury. It is contemplated that in many instances the conduct dealt with in the sexual abuse sections would not result

> in physical injury and, therefore, would not be covered by the assault article. When such sexual contacts do result in injury, the assault sections may also apply."

Commentary § § 115-16 at 112. That is, while there was no direct analogue, the 1971 legislature understood that sexual abuse would be akin to an assault without injury. The 1971 legislature's understanding of "assault" also informs what the legislature intended when it passed the sexual abuse statutes.

Prior to 1971, Oregon's assault statutes had remained essentially unchanged since their enactment in 1843, and criminal assault had an established legal meaning. *State v. Garcias*, 296 Or 688, 692, 679 P2d 1354 (1984) (citing General Laws of Oregon § § 531-537 (Deady & Lane 1874 and ORS 163.240-163.290 (1969))). At the time of the Criminal Code revision, assault encompassed two concepts: (1) '"an act which reasonably puts one in fear of corporal injury;" and (2) "an act intended to cause corporal injury by one who has the present ability to carry out such intent." *Garcias*, 296 Or at 693 (citing Commentary § 94 at 94).[12] Neither concept of assault encompassed non-forceful touching, even if offensive to the recipient.

The legislature's comparison of sexual abuse to assault fits together with the statutory context of the sexual abuse statute. That is, the legislature

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[12] The Criminal Code "reorient[ed]" those common law concepts as menacing, ORS 163.190(1) (intentionally attempting to place another person in fear of imminent serious physical injury), and assault or attempted assault, ORS 163.160(1) (causing physical injury to another). Commentary § 94 at 95.

envisioned that a defendant "subjected" a person to sexual contact by overcoming the victim's "resistance" or in circumstances where the defendant knew that the victim could not express her will by resisting. Culpable knowledge would necessarily accompany an act that reasonably places another person in fear of injury or intended to cause physical injury. That view of how the statute operates confirms that the 1971 legislature intended to apply at least a knowing mental state to the offense.

For the reasons explained above, the role of lack of consent in the third-degree sexual abuse statute is functionally the same as the second-degree sexual abuse statute at issue in *Haltom*. As with second-degree sexual abuse, a victim's lack of consent is what transforms a legal, interpersonal act into a crime. Because it changes the nature of sexual contact, it is part of the essential character of the prohibited act. As such, performing the act *without consent* is a conduct element, and the state is required to prove that the defendant *knew* that the victim did not consent to find the defendant guilty of third-degree sexual abuse. The severity of the offense is consistent with that conclusion. Finally, the legislative history leaves no doubt that the legislature intended to apply a knowing mental state.

III. The error was not harmless because the jury could have found defendant guilty of third-degree sexual abuse without finding that he acted with the requisite culpable mental state.

Under Article VII (Amended), section 3, of the Oregon Constitution,[13] the test for harmless error consists of a single inquiry: "Is there little likelihood that the particular error affected the verdict?" *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). The focus of that inquiry "is on the possible influence of the error on the verdict rendered, not whether this court, sitting as a fact-finder, would regard the evidence of guilt as substantial and compelling." *Id.* The harmless error standard "does not pretend to measure mathematical probabilities; rather, it assesses the extent to which an error skewed the odds against a legally correct result." *Purdy v. Deere & Co.*, 355 Or 204, 226, 324 P3d 455 (2014). Here, the question is whether omission of a jury instruction that would have required the jury to find that defendant knew did not consent could have skewed the odds against a legally correct verdict.

"Jury instructions matter; through instructions, the trial court tells the jury the law applicable to the case." *State v. Payne*, 366 Or 588, 611, 468 P3d

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[13] Article VII (Amended,), section 3, states:

> "If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial[.]"

445 (2020). *See Wallach v. Allstate Ins. Co.*, 344 Or 314, 326, 329, 180 P3d 19 (2008) (explaining that instructional error exists where the court's instructions give the jury "an incomplete and thus inaccurate legal rule" to apply to the facts). To obtain reversal for instructional error, the appellant must merely show "some likelihood that the jury reached a legally erroneous result," "when the instructions are considered as a whole in light of the evidence and the parties' theories of the case at trial." *Purdy*, 355 Or at 231–32. *See State v. Lopez–Minjarez,* 350 Or 576, 578, 260 P3d 439 (2011) (explaining that, to assess whether instructional error substantially affected the defendant's rights, "it is important to describe both sides' respective evidence and theories of the case").

However, "neither the sufficiency of the evidence nor the completeness of counsel's arguments concerning that evidence is a substitute for the sufficiency of the instructions." *State v. Brown*, 310 Or 347, 356, 800 P2d 259 (1990). Moreover, a party is not required to present an offer of proof on a defense that the court has ruled is unavailable as a matter of law. *Cf. State v. Olmstead,* 310 Or 455, 461, 800 P2d 277 (1990) ("When the trial court rules that a party may not present any evidence on a defense, on the ground that the defense is unavailable as a matter of law, [the purpose of preservation] is fulfilled without the need for an offer of proof."). By that same token, a defendant is not required to present a futile and legally foreclosed defense to

demonstrate harm, particularly when the party is legally prohibited from doing so. *See id.* (reversing the defendant's conviction when the trial court erroneously ruled that the defendant could not present an insanity defense although the defendant did not provide an offer of proof concerning the nature of his mental disease or defect).

A jury instruction that omits an essential element necessarily tends to "skew the odds" against a legally correct verdict because it permits the jury to convict the defendant without requiring the state to prove the defendant's guilt of the charged offense, which is a legally incorrect result. *See State v. Pine*, 336 Or 194, 210, 82 P3d 130 (2003) (holding that erroneous jury instruction required reversal because it permitted the jury to find the defendant guilty as a principal without determining his particular conduct produced the victim's injury); *State v. Hill*, 298 Or 270, 280, 692 P2d 100 (1984) (reversing the defendant's conviction for third-degree assault because the court had incorrectly provided a "gross negligence" standard rather than a "reckless" standard in defining the requisite culpable mental state). Therefore, when a criminal jury instruction misstates a theory of criminal liability, the test for harm is simply "whether the jury's guilty verdict on one or more of the charges could have been based on the theory of criminal responsibility contained in the erroneous instruction." *Lopez-Minjares*, 350 Or at 585.

Under that standard, there are only two circumstances in which a trial court's omission of a material element may nonetheless be harmless. The first circumstance in which instructional error may be harmless is when another instruction adequately conveys the same information. *See State v. Williams*, 313 Or 19, 38, 828 P2d 1006, *cert den*, 506 US 858 (1992) (holding that, for an instruction to constitute reversible error, it must have prejudiced the defendant when the instructions are viewed as a whole). For example, in *State v. Bowen*, 340 Or 487, 517, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007), the defendant was charged with aggravated murder and intentional murder, and the trial court erroneously declined to provide an instruction that manslaughter was a lesser-included offense of aggravated murder. However, the trial court instructed the jury on the elements of aggravated murder, intentional murder, and manslaughter, "albeit not in the order requested." *Id.* The defendant was not prejudiced by the error because the instructions as a whole "were sufficient to inform the jury of the possible verdicts it could return on the various charges, based on how it resolved the facts." *Id.*

The second circumstance in which the court's failure to instruct on a material element may be harmless is when the reviewing court can conclude that the jury found the facts necessary to resolve the issue against the appellant. *See State v. Rose*, 311 Or 274, 287-88, 810 P2d 839 (1991) (concluding that post-verdict special questions demonstrating the jury's factual findings rendered

erroneous instruction harmless). For example, if the jury's factual findings "either subsumed or were the same as" the factual findings that the omitted instruction would have required, then that may render the error harmless. *See State v. Phillips*, 354 Or 598, 613, 317 P3d 236 (2013) (concluding that error in failing to provide concurrence instruction was harmless when the factual findings necessary to find defendant liable on one theory "either subsumed or were the same as the factual findings on the other theory"); *State v. Hale*, 335 Or 612, 628–29, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004) (same; affirming some counts despite erroneously omitted concurrence instruction where the jury's verdicts on other counts necessarily demonstrated the jury's agreement on a single factual theory of liability).

In addition, an exception exists to the exception. When a jury's findings appear to "subsume" the findings necessary to an omitted instruction, if a correct instruction would have a disclosed a "legal distinction that is not otherwise patent and that would be particularly helpful to the jury in deciding whether the defendant is in fact guilty of the charged offense," the error may nevertheless be harmful. *State v. Zolotoff*, 354 Or 711, 719, 320 P3d 561 (2014). In *Zolotoff*, this court held that the trial court's failure to instruct on "attempt" as a lesser-included offense is not necessarily harmless when the jury finds the defendant guilty of the charged offense. *Id.* at 719-20. If an instruction on "attempt" would have allowed the jury to draw a legal distinction

that could support a conclusion that the defendant was guilty only of the lesser-included offense, the error is not harmless notwithstanding the jury's guilty verdict on the charged offense. *Id.* at 720. *Zolotoff* is an exception that proves the rule: the touchstone to evaluating the harm caused by instructional error is whether the error *could* have skewed the odds against a legally correct verdict.

In this case, the jury returned a guilty verdict on two counts. Both counts were based on the evidence that defendant had met earlier in the evening; later, he touched her under her armpit near her right breast; then pulled down bra band and touched her breast. Defendant then complimented her eyes before she walked away. On Count 1, third-degree sexual abuse, the jury found that defendant acted with a sexual purpose and that he was criminally negligent as to lack of consent. On Count 2, harassment, the jury found that defendant harassed or annoyed by subjecting to offensive physical contact; that the contact involved an intimate part; and that he intended to harass or annoy

In the Court of Appeals, the state argued that the error was harmless for two reasons: first, because defendant did not pursue a mental state defense and instead chose to attack the state's evidence of identity; second, because, in the state's view, it was "obvious" that defendant would have known that did not consent. Resp Br at 4. Those arguments fail because they are inconsistent

with the standard for evaluating the prejudice caused by an erroneous jury instruction.

The error was harmful because it omitted an essential element of a criminal offense, and the state bore the burden of proof on that element. Based on the evidence, a jury could have found that defendant "failed to be aware of a substantial and unjustifiable risk" that did not consent without necessarily *also* finding that defendant was aware that she did not consent. A jury could rationally conclude that defendant had committed the act negligently with respect to consent but not knowingly because did not react to defendant's initial touching of her bra band; and he appeared to believe the contact *was* consensual when he complimented her eyes. For that reason, this case falls under the general rule that the error requires reversal because the error skewed the odds against a legally correct result.

This case does not fall into either exception to the general rule. First, no other instruction informed the jury that it must find that defendant acted with awareness that did not consent to touching her breast. Therefore, this is not like a case like *Bowen* in which a different instruction adequately provided the same information to the jury.

Second, the finding that the jury instruction would have asked the jury to make—that defendant was aware that did not consent—was not *subsumed by* or *the same as* any other finding that the jury made. Specifically, on Count

2, the jury considered and found the defendant guilty of intentionally harassing or annoying by subjecting her to "offensive physical contact" in touching her breast.[14] *See* ORS 166.065 (1)(a)(A) (defining harassment); *State v. Keller*, 40 Or App 143, 145-46, 594 P2d 1250 (1979) (interpreting the phrase "offensive physical contact" to mean physical contact that a reasonable person would regard as offensive in the circumstances). Intending to harass or annoy someone is not "the same as" acting with an awareness that the person does not consent. Logically, a person can engage in rakish and intentionally provocative

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[14] The jury instruction on that count was as follows:

> "Oregon law provides that a person commits the crime of harassment if the person intentionally harasses or annoys a person by subjecting that person to offensive physical contact and the physical contact consists of touching the sexual or other intimate parts of the other person.
>
> "In this case, to establish the crime of harassment, the state must prove beyond a reasonable doubt the following elements:
>
> "(1) The act occurred on or about September, 26, 2017; and
>
> "(2) [Defendant] harassed or annoyed [by subjecting [to offensive physical contact;
>
> "(3) The contact consisted of touching the intimate parts of [and
>
> "(4) [Defendant] intended to harass or annoy [

Jury Instructions, TCF (as supplemented by motion filed in Court of Appeals).

sexual behavior without actual awareness that the other party does not consent to that behavior. *See* DUSTY SPRINGFIELD, *Son of a Preacher Man*, *on* DUSTY IN MEMPHIS (American Studios, 1968) (describing kisses "stolen on the sly"). That is, the verdict on Count 2 does not demonstrate that the jury necessarily found defendant that acted with awareness of lack of consent. A jury could find that defendant tried, and failed, to engage in consensual touching with although a reasonable person would view the contact as offensive in those circumstances.

Further, defendant was not required to argue to the jury that he should not be convicted because he was not aware of her lack of consent to demonstrate harm. Although the state's evidence presented that factual argument, defendant *could not* practically present that theory because it was foreclosed by the trial court's ruling on jury instructions and controlling Court of Appeals case law, *Wier*, 260 Or App 241. That is, by denying defendant the opportunity to present an argument that he was not aware that did not consent, the existing law hobbled defendant's to ability to more meaningfully challenge that element at trial. *See* RPC 3.3 (a)(1) (prohibiting lawyers from making a "false statement of fact or law to a tribunal"); UCrJI 1005 (informing the jury that it must follow the court's jury instructions on the law). Given that the then-controlling interpretation of the mental state requirements of sexual abuse in the

third degree presents such a low bar, it is hardly surprising that defense counsel pursued a defense theory of mistaken identity.

The error skewed the odds against a legally correct result because it relieved the state of its burden to prove an essential element of the offense. It is harmful and requires reversal.

CONCLUSION

For the above reasons, defendant respectfully asks this court to reverse his conviction for sexual abuse in the third degree and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 12,135 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on March 2, 2021.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

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