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 No. 18CR07005 CA A169564 SC S067880

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 Multnomah County
Honorable ERIC L. DAHLIN, Judge

Opinion Filed: June 17, 2020
Per Curiam
Before: Ortega, Presiding Judge, and Shorr, Judge, and Powers, Judge

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Continued…

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INTRODUCTION

Defendant groped a stranger on the street, tearing the victim's bra down to her waist and then grabbing her breast. For that conduct, defendant was charged and convicted of the lowest degree of sexual abuse, sexual abuse in the third degree, ORS 163.415(1)(a)(A), a misdemeanor committed when a person subjects another to sexual contact and the victim does not consent. The issue in this case is the culpable mental state that applies to the victim's lack of consent for that offense. Is the state required to prove that the defendant *knew* the victim did not consent to the contact, or is it sufficient for the state to prove that the defendant was at least criminally negligent in failing to be aware of an obvious risk that the victim did not consent?

In *State v. Haltom*, 366 Or 791, 472 P3d 246 (2020), this court recently concluded that the legislature intended that the minimum culpable mental state with respect to the victim's lack of consent for purposes of second-degree sexual abuse is knowingly. Here, defendant urges this court to extend *Haltom* by holding that the same mental state applies to third-degree sexual abuse and that, in this case, the state was required to prove that defendant *knew* the victim did not consent when he groped her. But that is not what the legislature intended.

The legislature understood and intended misdemeanor sexual abuse to be a fundamentally different kind of offense than first- or second-degree sexual abuse, both of which are felonies. The legislature enacted the third-degree abuse statute in 1971 to codify a long-recognized common-law misdemeanor assault-and-battery committed by subjecting a person who has not consented to offensive sexual touching. At common law, proof of that misdemeanor did not require knowledge of lack of consent, nor would requiring such a proof make sense. The offense includes conduct—like the groping here—done by a person who does not give any thought at all to whether the victim consents, or who believes or just hopes, however outrageously, that the victim does consent.

Further, under defendant's proposed rule of law, even a person who subjects a petrified or unwilling victim to much more invasive contact—including sexual intercourse—while consciously ignoring or inexplicably failing to be aware of signs that would make it obvious to any reasonable person that the contact is not consensual would avoid liability altogether—not just for second-degree sexual abuse but for *any* offense, even a misdemeanor. That is not consistent with the harm that the legislature and the common law recognized was caused by nonconsensual sexual contact.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

For the crime of third-degree sexual abuse by subjecting a victim to sexual contact to which the victim does not consent, what is the minimum culpable mental state that applies to the victim's lack of consent?

Proposed Rule of Law

The minimum culpable mental state that applies to the victim's lack of consent for third-degree sexual abuse is criminal negligence.

MATERIAL FACTS

Defendant was charged with third-degree sexual abuse and harassment based on incident that took place outside a bar in Portland. On the night of the incident, the victim, went to bar with her boyfriend and some other friends. (Tr 498-499). Before going into the bar, and her companions had a brief interaction with a man—later identified as defendant—who was standing outside the bar. The group mistakenly believed defendant was acting as a bouncer for the bar, and they gave him their identification, which he accepted and then returned before revealing that he did not actually work there and joking about the misunderstanding. (Tr 500).

The group left the bar about 90 minutes later. While was standing outside and looking at her phone, she felt a touch under her armpit. (Tr 503-504). She initially assumed that her friend was adjusting her clothing. Within

seconds, however, she felt the band of her bra being ripped down and a hand on her breast. (Tr 504-505). Turning around, she saw defendant, recognizing him as the man the group had met outside the bar earlier. (Tr 505). Defendant stared at and said something to the effect of, "Those eyes." (Tr 505-506). was in shock and went back to her friends. (Tr 122).

immediately told her boyfriend what happened. (Tr 467). Later, after and her boyfriend were able to determine defendant's identity, she reported the incident to police. (Tr 130-31). Following an investigation, the state charged defendant with harassment and third-degree sexual abuse.

At trial, the victim and her boyfriend testified for the state. The victim identified defendant as her assailant and described what had happened. (Tr 504-507). Her boyfriend also identified defendant. (Tr 466).

For his part, defendant did not deny at trial that had been assaulted in the manner she claimed, but he argued that the state had failed to prove that he was the person who did it. He argued that the victim's eyewitness identification was not reliable, and that the police officers investigating the case had failed to obtain video surveillance footage from the area that would have shown the attack and the identity of the attacker. (Tr 521; 638-39).

In discussing jury instructions, defendant argued that under this court's decision in *State v. Simonov*, 358 Or 531, 368 P3d 11 (2016), the state was required to prove that defendant *knew* that the victim did not consent the

touching. Defendant acknowledged that the Court of Appeals previously had held that criminal negligence was the minimum culpable mental state, but defendant argued that decision had been overruled by *Simonov*. (Tr 570). The trial court rejected defendant's argument, concluding that that the minimum culpable mental state applicable to the victim's lack of consent was criminal negligence. The court instructed the jury that it could convict defendant of third-degree sexual abuse only if it found as follows:

> One, the act occurred on or about September 26th, 2017; two, [defendant] knowingly subjected [to sexual contact; three, [did not consent to the sexual contact; four, [defendant] was criminally negligent with respect to whether [did not consent.
>
> * * * * *
>
> When used in the phrase, '[defendant] was criminally negligent with respect to [consent,' criminally negligent means that [defendant] is charged with failing to be aware of a substantial and unjustifiable risk that [did not consent. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in a situation.

(Tr 615-16).

The jury unanimously found defendant guilty of both offenses. (Tr 658). At sentencing, the victim explained that the incident "affected [her] deeply" and asked for restitution to cover the costs of the counseling she had been through. (Tr 672). The court suspended imposition of sentence and imposed three years of probation, and also imposed restitution. (Tr 684-85).

Defendant appealed, renewing his argument that, under *Simonov*, a "knowing" mental state applied to the victim's lack of consent. The Court of Appeals issued a *per curiam* opinion affirming defendant's convictions. *State v. Carlisle*, 304 Or App 872, 872, 466 P3d 1069 (2020), *rev allowed*, 367 Or 535 (2021).

SUMMARY OF ARGUMENT

At issue in this case is the minimal culpable mental state that applies to the "victim does not consent" element in ORS 163.415(1)(a)(A). As this court explained in *Haltom*, that is a question of legislative intent, which requires this court to examine the statutory text, context, and history, including the nature of the punishment. Applying that analysis in *Haltom*, this court concluded that for second-degree sexual abuse, the victim's lack of consent was an essential part of the proscribed conduct, and an element for which the culpable mental state of knowing applies. But applying the same analysis to ORS 163.415 leads to a different conclusion.

First, the text of ORS 163.415, while admittedly similar to that in ORS 163.425, is different in important respects. In ORS 163.415, the legislature set forth the conduct element—subjecting a person to sexual contact—and then listed, in two separate paragraphs what appear to be circumstances: that the victim actually did not consent, and that the victim's age was such that the victim could not consent. The latter of the two—the victim's age—is

indisputably a "circumstance" element. In that context, the most natural reasoning of the statute as a whole is that it identifies a conduct element along with two circumstances elements, neither of which is "essential" to the conduct proscribed by the statue but at least one of which must be present.

Second, unlike the history of ORS 163.425—which showed that the legislature had been repeatedly assured that the minimum culpable mental state for that felony offense was knowingly—the legislative history of ORS 163.415 demonstrates that the legislature intended that a lesser culpable mental state would apply. More specifically, the history shows that the legislature intended third-degree sexual abuse to codify a common-law misdemeanor for which the state was not required to prove a knowing mental state as to the victim's lack of consent. That common-law misdemeanor, for offensive sexual touching, reflected a longstanding understanding that subjecting a victim to sexual contact without consent results in a significant harm, and that a person who causes that harm recklessly or with criminal negligence should be criminally liable for doing so.

Third, the level of punishment that the legislature imposed for third-degree sexual assault is substantially less than for second-degree sexual abuse. Consistently with the common-law offense that the legislature was codifying, the legislature made third-degree sexual assault a misdemeanor. It makes sense that the legislature would intend a mental state less than knowingly for a

misdemeanor offense, and that is exactly what the legislature has done in analogous statutes. In the assault statutes, for example, the legislature has imposed criminal liability for reckless or criminally negligent conduct that results in a physical injury. The legislature understood—as the common law had long recognized—that the harm from subjecting someone to offensive sexual contact is often at least as serious as a physical injury, and it therefore would have imposed criminal liability for reckless or criminally negligent conduct that resulted in that harm. Conversely, given the comparatively low degree of the offense and the nature of the conduct it covers, it is implausible to think that the legislature would have intended a "knowing" mental state to apply as defendant insists.

The text, history, and purpose of ORS 163.415 demonstrate that the legislature intended the victim's lack of consent to be a circumstance for which the minimum culpable mental state is negligence. The trial court therefore correctly instructed the jury in this case. In any event, any error was harmless, because there is no possibility under the facts of this case that the jury could have found that defendant was not aware the victim did not consent. This court should affirm the judgment of conviction.

ARGUMENT

As *Haltom* instructs, the minimum culpable mental state for the victim's lack of consent is a question of legislative intent. For the reasons explained

below, the legislature intended that, for purposes of third-degree sexual abuse, the victim's lack of consent was a circumstance for which the minimum culpable mental state is criminal negligence. The trial court therefore correctly instructed the jury in this case.

A. Under *Haltom*, the minimum culpable mental state applicable to the victim's lack of consent is a question of legislative intent.

At issue in *Haltom* was the minimum culpable mental state with respect to the victim's lack of consent for the crime of second-degree sexual abuse. Under ORS 163.425(1), a person commits that offense if the person subjects another person to sexual intercourse "and the victim does not consent thereto." The question that this court confronted was whether, under the reasoning of *Simonov*, the victim's lack of consent was part of the "essential nature" of the conduct prohibited by ORS 163.425(1)(a) and thus the minimum culpable mental state was knowledge. *Haltom*, 366 Or at 794. This court concluded that it was.

This court explained that the "primary inquiry" under *Simonov* is an examination into the intended nature of the lack-of-consent element, and in particular the role that the legislature intended that element to play "vis à vis the central conduct element." 366 Or at 823. In that regard, this court agreed with the defendant's argument that it was "self-evident" that the victim's lack of consent was part of the essential nature of the conduct proscribed by the

second-degree sexual assault statute. *Id.* at 804. This court also emphasized that the proscribed conduct was to "*subject* another person to sexual intercourse," and noted the legislature's use of the verb "subjects" implied that the conduct was imposed on an unwilling victim. This court made an "initial determination" that the legislature intended the victim's nonconsent to be a conduct element for which the minimum culpable mental state was knowingly. *Id.* at 823-24.

Having made that initial determination, this court then considered other evidence of what the legislature understood the culpable mental state to be. In particular, this court considered, as it had in *Simonov*, the severity of the penalty and the fact that the offense at issue was a felony. *Id.* at 812 This court concluded that while under today's standards it may seem apparent that recklessly or negligently subjecting a person to nonconsensual intercourse might inflict a significant harm and be worthy of felony liability, "in all probability" that view would not have been held by the legislature in 1983, when the second-degree abuse statute was enacted. *Id.* at 813.

This court also turned to the legislative history of ORS 163.425. This court explained that the chief proponent of the law that became ORS 163.425 and the person trying to guide the bill through committee, a district attorney, had repeatedly told the committee members that under established legal principles the culpable mental state that would apply to the victim's lack of

consent would be "knowingly." *Id.* at 819-23. Confusingly, however, that witness's testimony was based on an erroneous understanding of the legal principles at issue. *Id*. On the whole, however, this court concluded that the history further supported the court's initial determination that the legislature intended that, for purposes of second-degree sexual abuse, the minimum culpable mental state for the victim's lack of consent was knowingly. *Id*. at 823.

B. The legislature intended that the victim's lack of consent to third-degree sexual abuse be a circumstance for which the minimum culpable mental state is criminal negligence.

Although the texts of the second- and third-degree sexual abuse statutes are similar, applying the full analysis from *Haltom* demonstrates that the legislature intended the lack-of-consent element to play a different role in ORS 163.415 than that element plays in ORS 163.425.

1. Textual differences between ORS 163.415 and ORS 163.425 suggest that the legislature intended the "victim does not consent" element to play a different role in the two statutes.

In *Haltom*, this court made its initial determination that the victim's lack of consent was intended to be a conduct element based in large part on an examination of the text and context of ORS 163.425. In particular, this court focused on what the text and context revealed about the role that the legislature intended the non-consent element to play "vis à vis the central conduct element." 366 Or at 803. The text of ORS 163.415, while similar to that of

ORS 163.425, is different in some key respects. Those differences support the conclusion that the legislature intended the victim's lack of consent would play a different role in the two statutes.

ORS 163.415(1)(a) provides that a person commits third-degree sexual abuse 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[.]

The term "sexual contact" in that statute refers to "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).

ORS 163.425 provides, in relevant part:

> (1)A person commits the crime of sexual abuse in the second degree when:
>
> (a)The person subjects another person to sexual intercourse, oral or anal sexual intercourse or, except as provided in ORS 163.412 (Exceptions to unlawful sexual penetration prohibition), penetration of the vagina, anus or penis with any object other than the penis or mouth of the actor and the victim does not consent thereto.

Unlike in ORS 163.425, ORS 163.415 identifies the conduct element—subjecting a person to sexual contact—and then lists, in two separately numbered paragraphs, two alternative elements, one of which also must be

present. Thus, to prove third-degree sexual abuse, the state must show that the defendant subjected the victim to sexual contact and, in addition, either of two things: that the victim actually did not consent, or that the victim's age was such that the victim could not consent. Unlike the conduct element, which describes the act of the person committing the offense, the additional alternative elements describe the victim. The latter of those two elements—the victim's age—is a circumstance that the state is not required to prove that defendant knew. *See* ORS 163.325(1) (providing that lack of awareness regarding victim's age is "no defense" for purposes of sexual offenses where criminality depends on victim being younger than 16); ORS 163.325(2) (creating affirmative defense for defendant who "reasonably believed" victim was older than 16). In that context, the most natural reasoning of the statute as a whole is that it identifies a conduct element along with two alternative circumstance elements, neither one of which is "essential" to the conduct proscribed by the statue but at least one of which must be present.[1]

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[1] In *Haltom*, this court concluded that *Simonov* had overstated the importance of grammar in the analysis, and in particular overstated the importance of the fact that, in the UUV statute, "without the consent of the owner" was an adverbial phrase that modified the conduct and not an independent clause. 366 Or at 807. To be clear, the state's point here is not about the *grammar* of ORS 163.415. Rather, the state's point is about the overall structure of ORS 163.415. Unlike ORS 163.425 (and also unlike UUV statute), ORS 163.415 identifies a conduct element and then lists in two paragraphs two alternative elements, only one of which must also be present.

Footnote continued…

For similar reasons, this court's reasoning about the implication of the word "subjects"—that it implies imposing contact on a person who is "unwilling"—also does not apply with the same force to ORS 163.415. Under ORS 163.415(1)(a)(B), a person can "subject" a person under the age of 18 to sexual contact. That minor cannot legally consent but can be a willing participant. That is precisely why ORS 163.415(1)(a)(B) is needed: If a minor is unwilling then conduct would be covered by ORS 163.415(1)(a)(A). In short, ORS 163.415(1) is most naturally understood to address a conduct element that is criminally culpable when either of two very different kinds of circumstances are present.

That conclusion is further supported by the fact that ORS 163.415, unlike ORS 163.425, applies to non-consensual "sexual contact." The definition of "sexual contact" does not refer to lack of consent, but it does require a specific intent. "Sexual contact" refers only to contact that is intended to gratify or arouse sexual desire. ORS 163.425, by contrast, has no such specific intent. By defining "sexual contact," the legislature chose to specifically define the conduct covered by ORS 163.415, and to identify the particular culpable mental

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(…continued)
That structure, while not definitive, suggests that the alternative elements were intended to be circumstance elements. *Simonov*, 358 Or at 547 n 5 (explaining if the legislature had wanted to separate the proscribed conduct element from circumstance elements, it might have signaled that separation through the structure and identifying ORS 163.415 as a possible example).

state that applied to that conduct. Yet the legislature did not include lack of consent in that definition. That makes it less likely that the legislature intended to include lack of consent as part of the proscribed conduct. If the legislature had intended that, it would have said so in the definition of "sexual contact."

In addition, "sexual contact" applies broadly to sexual touching, including the forms of sexual intercourse subject to ORS 163.425—yet where the two statutes overlap ORS 163.415 imposes only misdemeanor liability for what is felonious conduct under ORS 163.425. *Haltom* provides the conceptual framework for understanding why the two statutes impose such different punishments for what seems to be the same conduct. The role that the victim's lack of consent plays in ORS 163.425 is to define the very conduct that the statute proscribes, which is why this court held that a knowing mental state applies and why felony liability attaches. But the role that the victim's lack of consent or inability to consent plays in ORS 163.415(1)(a) is not to define the conduct proscribed. Rather, it identifies a circumstance that makes the conduct harmful, which is why a lesser culpable mental state applies and only misdemeanor liability attaches. If a person subjects another person to sexual to intercourse knowing that the victim does not consent, that is highly culpable behavior for which the legislature wanted to impose felony liability. ORS 163.425 addresses that conduct in particular. If a person subjects another person to sexual intercourse *not* knowing that the other person does not consent but

while being criminally negligent in failing to be aware of obvious signs that the victims does not consent, that also is culpable behavior, but less so. ORS 163.415 addresses that conduct, as well as myriad other forms of nonconsensual sexual contact.

For those reasons, the text of ORS 163.415 suggests that the victim's lack of consent to sexual contact—while obviously a necessary element—does not play the same role vis à vis the conduct element in ORS 163.415 as it does in ORS 163.425.

2. The legislative history supports that conclusion.

The legislative history of ORS 163.415 also supports the conclusion that the legislature intended a victim's lack of consent to sexual contact to be a "circumstance" element. The history of ORS 163.425, as noted, showed that the legislature, when considering the law, had been repeatedly assured that the minimum culpable mental state for that felony offense was knowingly. But for ORS 163.415, by contrast, nothing in the legislative history shows that a "knowing" mental state was contemplated for the victim's lack of consent. On the contrary, the legislative history of ORS 163.415 demonstrates that the legislature intended that a lesser culpable mental state would apply to the victim's lack of consent for purposes third-degree sexual abuse.

ORS 163.415 was enacted in 1971 as part of the Criminal Code Revision and was one of two sex abuse statutes in the new code. First-degree sexual

abuse was a felony offense, committed when the person subjects another to sexual contact and "the victim is less than 12 years of age," or the "the victim is subjected to forcible compulsion." What is now third-degree sexual abuse under ORS 163.415 was then second-degree sexual abuse.

The two sex abuse statutes added in the code revision were new to Oregon law. The drafters explained that the two new sexual abuse statutes were intended to cover "all unconsented acts of sexual contact which do not involve the element of genital penetration." Criminal Law Revision Commission, *Proposed Oregon Criminal Code, Final Draft and Report*, 122 (1970) ("*Commentary*"). The drafters further explained that the statutes were not based on any existing Oregon statute at the time, *id.* at 123, but were intended to codify a common law prohibition on conduct that, under the common law, "would have constituted an assault" and noted that "most states do not differentiate sexual from other assaults, except assaults with intent to rape or commit sodomy":

> Under the common law such conduct would have constituted an assault. Most state laws do not differentiate sexual assaults from other assaults, except assault with intent to commit rape or commit sodomy. 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.
>
> * * * An actual touching is required. Indecent proposals and obscene gestures are treated in the article relating to disorderly conduct.

Commentary §§ 115-16 at 122 (emphasis added).

At common law, a misdemeanor "assault"—which was also called "assault and battery" or just "battery"[2]—included any touching, however slight, that resulted in an injury. An injury might be a bodily one, but it also included

[2] The Commentary refers to the common law of "assault," but the term "assault" was frequently used to refer to two different things: either a common law "assault and battery" (or just "battery"), which involves physical contact, or an "assault" in the strict sense of creating an apprehension of injury without physical contact. An assault, in the strict sense, is an attempted or incomplete battery. The two terms have regularly been used interchangeably. *See* LaFave & Scott, at 603 ("[T]he word 'assault' is sometimes used loosely to include a battery...."); Perkins, at 119–20 ("It is not uncommon to detail the facts constituting a battery in speaking of an assault ...."). In context, the drafters were referring to common law assault and battery in the Commentary when they referred to "sexual assaults" and explained that the sex abuse statutes were intended to cover unconsented acts of sexual contact and that "under the common law such conduct would have constituted an assault." Under the common law, because the conduct involved touching it was, strictly speaking, a common law assault-and-battery. See *supra note* 3 (listing cases in which offensive sexual touching was variously referred to as "assault" or "assault and battery").

The drafters included a similar statement when describing the offense of harassment. That offense, the Commentary explains, codifies a "simple assault." *Commentary* at 218. But harassment—which involves offensive nonsexual touching—was strictly speaking, a common law "battery." In the same paragraph, the drafters also used the term "petty battery" to refer to a "simple assault," exemplifying how the terms were used interchangeably. *Id.*

In his discussion of the legislative history, defendant conflates these two uses of the word "assault." (App Br 39-40). Defendant mistakenly understands that the legislature intended the sexual abuse statutes to codify the common-law "assault" in the narrower sense that applied where a person put another in fear of injury without physical contact.

offensive sexual touching, such "as where a man puts his hands upon a girl's body or kisses a woman against her will." LaFave & Scott, Criminal Law 604 (1972). *See id*. at 604 n2 (identifying examples of cases involving such assaults); Rollin M. Perkins, *Non–Homicide Offenses Against the Person*, 26 BU L Rev 119, 126 (1946) ("It constitutes a battery for man to commit an act of indecent familiarity upon the person of a woman without her consent" and providing cases).[3] A simple assault and battery was a misdemeanor offense.

[3] Examples of criminal prosecutions involving common law assault and battery for offensive sexual touching date back to at least the early part of the 20th century and continued for decades. *See, e.g.*, *Levy v. State*, 69 Ga App 265, 25 SE2d 153, 153–54 (1943)(evidence sufficient to prove assault and battery where defendant placed his hands over "the private parts" of child victim, such contact was "offensive and harmful, at least to [victim's] feelings and self–respect," "contact was not made with consent," and the defendant was "motivated by lust and lasciviousness"); *Commonwealth v. Jaynes*, 137 Pa Super 511, 514, 10 A2d 90, 92 (1939) (jury should have been instructed on "simple assault and battery" based on evidence that "against the wishes and consent of the young woman he took unwarranted liberties with her person while driving his automobile into the country"); *Commonwealth. v. Smith*, 115 Pa Super 151, 153, 175 A 177, 178 (1934)(evidence showing that defendant "had taken unwarranted and indecent liberties with the prosecutrix, and had placed his hands upon her arm and dress in a manner so rude" was sufficient to "constitute, at least, the offense of simple assault and battery."); *Wood v. Commonwealth*, 149 Va 401, 140 SE 114 (1927)(defendant storekeeper convicted of assault and battery for reaching over counter putting his hand on 14-year-old girl's breast); *Weaver v. State*, 66 Tex Crim 366, 146 SW 927 (1912)(assault conviction for kissing victim reversed because jury should have been instructed that defendant was not guilty if he believed his "attempts to embrace or kiss prosecutrix would be agreeable"); *Chambless v. State*, 46 Tex Crim 1, 3, 79 SW 577, 578 (1904) (conviction for assault for kissing victim reversed because jury should have been instructed that was no assault if

Footnote continued…

See LaFave & Scott, Criminal Law at 604 (explaining that simple (as opposed to aggravated) assault and battery was a misdemeanor); *see also, Johnson v. United States*, 559 US 133, 141, 130 S Ct 1265, 176 L Ed 2d 1 (2010) (explaining that "at common law, battery—all battery, and not merely battery by the merest touching—was a misdemeanor, not a felony.").

The common-law recognition of a misdemeanor for offensive sexual touching was based on a recognition that the harm caused by subjecting a victim to nonconsensual sexual touching was significant. *See Guarro v. US*, 237 F2d 578 (DC Cir 1956) (discussing common law and recognizing that, "[N]on-violent actions involving sexual misconduct may constitute assaults. In such a case, threat or danger of physical suffering or injury in the ordinary sense is not necessary. The injury suffered by the innocent victim may be the fear, shame, humiliation, and mental anguish caused by the assault." (internal quotation marks omitted)); *see also Johnson*, 559 US at 146 (Alito, J., dissenting) ("[The common law] recognized that an offensive but nonviolent touching (for example, unwanted sexual contact) may be even more injurious than the use of force that is sufficient to inflict physical pain or injury."); *Goodrum v. State*, 60 Ga 509, 511 (1878)(for a defendant to twice put his arm

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(…continued)
defendant had not intended to compel but "reasonably believed, under the circumstances, that prosecutrix would allow him to kiss her").

around married woman without consent was "far greater outrage than to touch her in anger, and equally a breach of the peace. It is violence proceeding from lust, instead of violence proceeding from rage.")

The harassment statute, ORS 166.065, also provides useful historical context. Harassment also was a new offense added as part of the 1971 criminal code revision. Under the ORS 166.065(1)(a)(A), a person commits the crime of harassment if the person intentionally "harasses or annoys" another person by "subjecting such other person to offensive physical contact." Like the commentary to the sex abuse statutes, the commentary to the harassment statute indicates that it was intended to capture conduct that would have been punishable as an "assault" at common law. *Commentary* at 218. Thus, both harassment and second-degree (now third-degree) sexual abuse were misdemeanors that would have fallen under the umbrella of a common-law assault and battery for a form of offensive touching.

Harassment under ORS 166.065 and third-degree sexual abuse under ORS 163.415 are alike in that they both apply to offensive touching that constituted a common-law assault-and-battery But the statutory offenses differ in terms of the of kind of touching prohibited, the mental state required, and the punishment imposed. ORS 166.065 requires a specific intent to harass or annoy, and includes very broadly any offensive touching. It is a Class B Misdemeanor. ORS 163.415 requires the specific intent of "gratifying or

arousing * * * sexual desire," applies more narrowly to touching "sexual or intimate parts" of the victim, and requires the state to prove that the victim did not or could not consent. Second-degree (now third-degree) sexual abuse is Class A misdemeanor. The higher classification of sexual abuse three reflected the 1971 legislature's recognition that the particular conduct it covered is more harmful and blameworthy than harassment, although both are misdemeanors.[4]

Although the legislature included a specific intent element for both harassment and sexual abuse, that appears to be a departure from the common law. At common law, to prove a misdemeanor assault-and-battery for offensive touching, the state was not required to prove a defendant acted with knowing mental state. As one 1972 treatise explained, "Common-law battery did not require any specific intent either to injure or to touch offensively, but rather only a more general intent to commit the unlawful act or, indeed, mere recklessness or criminal negligence." LaFave & Scott, Criminal Law, at 605. *See also* Perkins, *supra*, at 126 ("[T]he word 'battery' is applied to every punishable application of force to the person of another.... [C]onviction of battery can be supported by harm to the person resulting from criminal negligence.");*United States v. Delis*, 558 F.3d 177, 180 (2d Cir 2009) (common

[4] In 1995, the legislature amended the harassment statute so that it is now a Class A misdemeanor if the person intentionally harasses or annoys the victim

Footnote continued…

law imposed criminal negligence standard for offensive touching); *United States v. Loera*, 923 F2d 725, 728 (9th Cir 1991) ("At common law a criminal battery was shown if the defendant's conduct was reckless.").

Thus, at common law, the state was not required to prove a knowing mental state with respect to the victim's lack of consent to prove an assault by offensive touching. A *reasonable* mistake of fact regarding consent could be raised as a *defense* to a charge of common law assault for offensive sexual touching. *See* Putkammer, *Consent in Criminal Assault*, 19 Ill L Rev 617, 628 n 40 (1925) (explaining that mistake as to consent was defense to common law assault, and noting that in some jurisdictions the mistaken belief must be honest and reasonable, in others merely honest.) In a 1904 case from Texas, for example, the defendant appealed a conviction for aggravated assault for kissing the victim without her consent. The appellate court reversed the conviction, agreeing that the trial court should have instructed the jury that the defendant was not guilty of assault if he "reasonably believed, under the circumstances," that the victim would not object. *Chambless*, 46 Tex Crim at 3. Long before the legislature adopted the revised criminal code, an *unreasonable* belief that one had consent was, at least in some jurisdictions, not a defense to the charge of

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by "touching the sexual or other intimate parts of the victim." ORS 166.065(4)(a)(A).

assault based on an offensive sexual touching. *Id. See also* Putkammer, *supra,* at 628 n 40.

In sum, the historical context suggests that the legislature would not have understood that the victim's lack of consent in ORS 163.415 to be a conduct element for which the culpable mental state was knowingly. The legislature was codifying a long-established common-law misdemeanor for simple assault and battery based on offensive touching. The law had long recognized that such conduct inflicts harm. By 1971, criminal negligence was widely recognized as the applicable culpable mental state that applied to that offense, and the legislature would have intended that to be the applicable culpable mental state that applied to the victim's lack of consent for purposes of ORS 163.415.

For his part, defendant argues that the history and in particular the common law conceptions of "consent" show that the legislature intended a "knowing" mental state would apply. In particular, defendant claims to find support from the fact that "the 1971 legislature was acting against a historical backdrop in which lack of consent required affirmative resistance." Defendant argues, that "[t]hat 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." (App Br 34). But that argument is without merit.

Although the state was required to prove "affirmative resistance" in rape cases, as well as for forcible compulsion, the state was not required to prove a culpable mental state with respect to the victim's lack of consent at all in such cases.[5] Since no culpable mental state requirement applied to the victim's lack of consent for the crime of rape at common law, the common law approach to rape sheds little light on the mental state that the legislature intended would apply to the victim's lack of consent to sexual abuse.[6]

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[5] *See* Susan Estrich, *Rape*, 95 Yale LJ 1087, 1096 (1986) (describing how American courts did not apply a *mens rea* requirement and instead required both proof of forcible compulsion and resistance). A mistake as to the victim's inability to consent was not recognized as a defense to rape until 1964. *See* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J Crim L & Criminology 815 (1996) (examining the development of mistake of fact as a defense to rape and discussing *People v. Hernandez*, 393 P2d 673 (1964)). Reasonable mistake as to *actual* consent was not recognized as a defense to rape in U.S. jurisdictions until 1975. *See id.* (discussing *People v. Mayberry*, 542 P2d 1337 (1975) and reaction to that case).

[6] The enactment of ORS 163.325 in this historical context also supports the conclusion that the legislature did not intend the state would be required to prove that defendant knew the victim did not consent to sexual contact. ORS 163.325, which was also adopted as part of the criminal code revision, created a lack-of-knowledge defense with respect to the victim's mental or physical *incapacity* to consent for all sexual offenses—but it did not provide any such a defense with respect to the victim's *actual* nonconsent. In 1971, the state would not have been required to prove a defendant's *mens rea* with respect to the victim's lack of consent in any kind of rape case. *See* Estrich, *supra note* 5, at 1096. In adopting ORS 163.325 in the new code, the Oregon legislature was essentially adopting the "reasonable mistake" defense that had been recognized in *Hernandez*, *supra* note 5, for cases in which the victim was incapable of consent. *Commentary* § 106 at 108-09. Importantly, however, even after *Hernandez*, there continued to be no "mistake" of fact defense that was applicable in cases involving *actual* consent in any jurisdiction. No such

Footnote continued…

Defendant is correct that, for purposes of rape, the earnest resistance requirement, coupled with the requirement of forcible compulsion, meant that the crime was committed in circumstances in which "for practical purposes" the defendant "likely" knew that the victim did not consent. But that says nothing about what culpable mental state applies. A criminal negligence standard is met only in circumstances when it is obvious that the victim did not consent and the defendant should have been aware of that. Thus, it is entirely consistent to have a resistance requirement for proof of nonconsent to sexual contact and still have a criminal negligence standard. If a victim earnestly resisted sexual contact and the defendant was not aware of the victim's non-consent, then the defendant was criminally negligent.

In any event, defendant's argument fails because it is based on common law forcible rape and it overlooks the common law regarding misdemeanor assault and battery for an offensive touching described above. The criminal code revision included two sex abuse statutes. First-degree sex abuse, which

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(…continued)
defense was recognized in any American jurisdiction until 1975. Cavallaro, *supra note* 5. Against that backdrop, the 1971 legislature would have understood that the exception in ORS 163.325 was limited to cases in which the victim was *incapable* of consent, and that in *actual* consent cases the status quo remained—*i.e.*, the state was still not required to prove that the defendant knew that the victim did not consent and no affirmative defense was available. *See* Commentary § 106 at 108 (noting that, in rape cases, "if in fact there was no consent, the crime would be committed"). *See also, Haltom*, 366 Or at 815-18 (discussing the import of ORS 163.325).

was a felony, involved nonconsensual sexual contact using forcible compulsion, and was akin to an aggravated felony assault or rape at common law. But ORS 163.415 is a misdemeanor requiring lack of consent but not forcible compulsion. By removing the forcible compulsion requirement for misdemeanor sexual abuse, and defining "sexual contact" broadly, the legislature understood that misdemeanor sexual abuse was fundamentally different than forcible rape. The legislature may have assumed that non-consent for purposes of ORS 163.415 would require some active conduct on the part of victim to communicate—explicitly or implicitly—his or her lack of consent. But even so, that does nothing to undermine the conclusion that the legislature would have intended a criminal negligence standard to apply. As explained, criminal negligence is a significant hurdle and it was widely understood as the applicable culpable mental state that applied to such an offense.

3. The seriousness of the punishment and gravity of the harm also supports that conclusion.

The nature the punishment that applies to third-degree sexual abuse also distinguishes it from second-degree sexual abuse and supports the conclusion that the legislature intended the culpable mental of criminal negligence. As explained, the offense at issue in *Haltom* was a felony. The same is true of the offense that was at issue in *Simonov*. But the offense here is misdemeanor. That difference matters to the analysis.

The three degrees of sexual abuse are, respectively, a Class A felony, a Class C felony, and a Class A misdemeanor. The different levels of crime seriousness for sexual offenses like sex abuse reflect different levels of culpability. As a misdemeanor, third-degree sexual abuse carries with it a significantly reduced punishment, and it is appropriate that the legislature would require a lower culpable mental state.

That is exactly what the legislature has done in analogous statutes. In the assault statutes, for example, the legislature has imposed misdemeanor liability for reckless or criminally negligent conduct that results in a physical injury. What is now fourth-degree assault statute, ORS 163.160, was a misdemeanor enacted as part of the criminal code revision. Under that statute, which was then third-degree assault, recklessness and criminal negligence are both potentially culpable mental states. By contrast, for the two felony assaults that were included in the revised criminal code, something more than criminal negligence is always required. *See Commentary*, §§ 93-94, at 94 (describing elements of first- and second-degree assault); *State v. Boone*, 294 Or 630, 634, 661 P2d 917 (1983) (noting assault statutes are divided into varying degrees depending in part on different level of culpable mental state involved).

That analogy to assault statutes is apt, both because the legislature intended the sex abuse statutes to codify misdemeanor assault-and-battery, and because the legislature understood that the harm from subjecting someone to

offensive sexual contact is often at least as serious as a physical injury. That is not a new idea or a modern sensibility. It is true, as this court recognized in *Haltom*, that our societal understanding of the gravity of the harm that results from "date rape" and other forms of non-consensual sexual contact has changed. (Tr 813-14). But, as explained above, the significant harm that can result from offensive sexual contact would not have been a concept foreign to the members of the Criminal Law Commission or the legislature in 1971; that harm had been recognized by the common law for a long time before the legislature enacted ORS 163.415.

In addition, although "criminal negligence" is a lower mental state, it still is significant hurdle for the state to prove. "Criminal negligence" requires "a *gross deviation* from the standard of care that a reasonable person would observe in the situation." ORS 161.085 (emphasis added). If a person subjects another to nonconsensual sexual contact while grossly deviating from the standard of care that should be observed to determine whether the person consented, that is behavior that is worthy of misdemeanor punishment.

Conversely, given the comparatively low degree of the offense and the nature of the conduct it covers, it is implausible to think that the legislature would have intended a "knowing" mental state to apply as defendant insists. If defendant were correct, a person—like the defendant in *Haltom*—who subjects a victim to sexual intercourse for defendant's own gratification while willfully

and recklessly ignoring obvious signs that the victim does not consent to sexual intercourse would not be guilty of *any* offense—even a misdemeanor—so long as the person did not actually know what would have been clear to any reasonable person.[7] That it is not consistent with the legislature's understanding of the severity of the harm attendant that kind of conduct, and it is not consistent with the culpable mental states applicable to other analogous offenses.

In addition, under defendant's proposed rule of law, other outrageous and offensive behavior would not be unlawful. A person who gropes a stranger on the street for the person's own gratification but who does so without considering whether the victim consents, or while being criminally negligent in believing the victim does consent, would not be guilty of any crime. A defendant who had a patently outrageous belief in the victim's consent—based on the victim's reputation or clothing, for example, or on the defendant's own sense of entitlement or arrogance, or indeed based on nothing at all—could

[7] If a defendant subjects another to an offensive sexual touching in order to harass or annoy the other person, then the defendant would be guilty of harassment. ORS 166.065(4)(a)(A). If the defendant's purpose was not to harass but was instead sexual arousal or gratification, however, then the harassment statute would not apply. It is possible, for a defendant at the same time to intend both to harass a victim and also arouse or gratify defendant's own sexual desires. In that instance, as this case shows, both statutes are implicated.

fondle the genitals of strangers with impunity.[8] Again, that is not consistent with the understanding of the harm attendant to such conduct, or the culpability that attaches to committing inflicting that harm recklessly or with criminal negligence. By creating the misdemeanor offense of third-degree sexual abuse, the legislature intended to impose some degree of criminal liability for what is manifestly harmful conduct.

C. Even if the trial court erred in instructing the jury, the error was harmless in this case.

For all the reasons described above, the victim's lack of consent is a circumstance element for ORS 163.415 for which the minimum culpable mental state is criminal negligence. It follows that the trial court did not err in instructing the jury in this case.

In any event, any error in the instruction was harmless under the circumstances of this case. *See State v. Davis*, 336 Or 19, 33-35, 77 P3d 1111 (2003) (reviewing court must affirm a judgment notwithstanding error if the error had little likelihood of affecting the verdict and, therefore, was harmless). At trial, defendant did not to claim or even suggest that victim consented to the

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[8] Again, if a criminally negligent defendant's purpose in groping a stranger was in fact to harass or annoy the person, then the defendant might be liable for harassment. But if the groping was instead done for the purpose of arousing or gratifying the sexual desires of himself or the victim, the defendant—even if consciously disregarding obvious signs that the victim does not consent—would not be guilty of any offense under defendant's rule of law.

attack or that anyone could believe that she had. Nor could he reasonably have pursued such a strategy: given the particular nature of the assault—a sudden groping by a stranger that occurred while the victim was looking at her phone and unaware of who was touching her—it would not have made sense to assert that the attack was an honest mistake and that the attacker mistakenly believed the victim consented to the contact. Defendant claimed instead that the victim's identification of him as the attacker was wrong—*i.e.*, his claim was that the police had arrested the wrong person. In his opening statement to the jury, defendant thus acknowledged that "maybe it's not in question what happened to [the victim]. However, it is in question who did that to her and it is for you to question who did that to her. (Tr 521). And in his closing, defendant similarly agued, "I'm not here to say that something terrible didn't happen to [the victim]. It's clear that something did. Somebody did something to her that night and she still wears it today and it's not fair. * * * I ask you find him not guilty because he did not do this thing * * *." (Tr 638-39).

Given the nature of the assault, and the arguments that defendant made to the jury, instructing the jury that to find defendant guilty they had to find that he knew the victim did not consent to the contact could not have changed the outcome. *See State v. Lopez–Minjarez,* 350 Or 576, 578, 260 P3d 439 (2011) (in assessing harm caused by an erroneous instruction, "it is important to describe both sides' respective evidence *and theories of the*

case" (emphasis added)). It was obvious that whoever committed the assault knew it was nonconsensual, and defendant did not suggest otherwise.[9] Although defendant argued that the jury should doubt the victim's identification of him as the perpetrator, the jury rejected that argument.

Furthermore, the jury also unanimously found defendant guilty of harassment. To reach that verdict, the jury must have concluded that defendant grabbed the victim intending to "harass or annoy" her. If the jury concluded that defendant intended to harass the victim by touching her breast, the jury also would have found that defendant knew the victim did not consent to the contact.[10] In those circumstances, any error in the court's instruction regarding the culpable mental state were harmless.

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[9] Defendant suggests that court's refusal give his requested was harmful because it prevented him from arguing about his culpable mental state to the jury. (App Br 42-43). But defendant's theory of the case—mistaken identity—was one he pursued from opening argument. There is no basis in this record to conclude that the trial court's subsequent ruling regarding jury instructions affected defendant's theory of the case.

[10] Defendant contends that the jury's verdict with respect to harassment is not definitive because "[l]ogically, a person can engage in rakish and intentionally provocative sexual behavior without actual awareness the person does not consent to that behavior." (App Br 48-49). While it may be logically or theoretically possible for a person to find that defendant was unaware of the victim's lack of consent and still find him guilty of harassment, that is not the test. The jury found that defendant intended to "harass or annoy" the victim. Given that, there is no practical possibility that the jury believed defendant was unaware of the victim's lack of consent, and therefore little likelihood that the alleged instructional error had any effect on the jury's verdict.

CONCLUSION

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

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 31, 2021, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Stacy M. Du Clos, attorneys for petitioner on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 8,617 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(3)(b).

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