

**FILED: December 31, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

JESUS RODRIGUEZ-RODRIGUEZ aka Jesus Rodriguez,  
Defendant-Appellant.

Washington County Circuit Court  
C101778CR

A148435

Donald R. Letourneau, Judge.

Submitted on May 31, 2013.

Peter Gartlan, Chief Defender, and Eric Johansen, Senior Deputy Public Defender, Office of Public Defense Services filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and David B. Thompson, Senior Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

ARMSTRONG, P. J.

Affirmed.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent

- No costs allowed.
  - Costs allowed, payable by
  - Costs allowed, to abide the outcome on remand, payable by
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1                   ARMSTRONG, P. J.

2                   Defendant appeals a judgment of conviction for both second-degree assault,  
3   ORS 163.175, and third-degree assault, ORS 163.165, assigning error to the trial court's  
4   grant of the state's motion to amend the indictment in the case. Defendant contends that  
5   the trial court lacked authority to allow the amendment because the amendment added a  
6   missing element to the crime charged and was, therefore, a substantive amendment that  
7   was beyond the court's authority to allow. We conclude that the amendment was not a  
8   substantive amendment--that is, one that added a missing element to the crime charged in  
9   the original indictment--and, hence, the trial court had authority to allow it. We also  
10  reject defendant's additional assignment of error without discussion. Accordingly, we  
11  affirm.

12                  The pertinent facts are undisputed. In early 2010, the victim, a 19-year-old  
13  man, was walking home when a car stopped next to him. Defendant jumped out of the  
14  car holding a baseball bat and rushed toward the victim, swinging the bat at the victim's  
15  head. The victim used his arm to block the blow and then ran home. Defendant chased  
16  the victim and hit him a second time as he reached his home. Once the victim was safely  
17  inside his home, defendant smashed a window in the home and fled. The victim later  
18  discovered that his arm was broken.

19                  A grand jury indicted defendant. Count 1 of the indictment alleged that  
20  "defendant on or about January 19, 2010, in Washington County, Oregon, did unlawfully  
21  and intentionally cause serious physical injury to [the victim] by means of a dangerous."

1 That allegation contained an obvious error: The prepositional phrase "by means of a  
2 dangerous" was incomplete, *viz.*, it contained a preposition, "of," and an adjective,  
3 "dangerous," that did not modify any other word in the indictment.

4 Count 1 also explicitly alleged that defendant had committed the crime of  
5 first-degree assault. That crime can be committed in four ways: (1) by causing serious  
6 physical injury by means of a deadly or dangerous weapon, (2) by causing serious  
7 physical injury to a child under six years of age, (3) by committing second-degree assault  
8 against a pregnant victim, or (4) by causing serious physical injury while driving under  
9 the influence of intoxicants. ORS 163.185(1).<sup>1</sup> Each of those theories of culpability  
10 requires the state to prove at least one fact not required by the other theories.

11 At the close of the state's case-in-chief, defendant moved for a judgment of

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<sup>1</sup> ORS 163.185(1) provides, as pertinent:

"A person commits the crime of assault in the first degree if the person:

"(a) Intentionally causes serious physical injury to another by means of a deadly or dangerous weapon;

"(b) Intentionally or knowingly causes serious physical injury to a child under six years of age;

"(c) Violates [the statute defining second-degree assault] knowing that the victim is pregnant; or

"(d) Intentionally, knowingly or recklessly causes serious physical injury to another while operating a motor vehicle under the influence of intoxicants in violation of ORS 813.010 \* \* \* ."

1 acquittal on Count 1. First, defendant argued that the indictment was legally insufficient  
2 because the failure to include the word "weapon" at the end of the phrase, "cause[d]  
3 serious physical injury to [the victim] by means of a dangerous," meant that the  
4 indictment failed to allege an essential element of the crime charged in Count 1, *viz.*,  
5 first-degree assault. In making that argument, defendant conceded that the original  
6 indictment had provided him with adequate notice of the charge notwithstanding the  
7 failure to include the word "weapon" in it. In response, the state moved to amend the  
8 indictment to add the word "weapon" after the word "dangerous" in Count 1. Second,  
9 defendant argued that the state had failed to present evidence from which a reasonable  
10 jury could find that the victim had suffered a serious physical injury, which the state was  
11 required to prove to convict defendant of first-degree assault.

12           The trial court granted the state's motion to amend the indictment, but it  
13 also granted defendant's motion to acquit him of first-degree assault based on the state's  
14 failure to prove that the victim had suffered a serious physical injury. However, the trial  
15 court allowed the state to proceed on a charge of second-degree assault as a lesser-  
16 included offense of the indicted crime of first-degree assault.<sup>2</sup> The jury found defendant

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<sup>2</sup> Second-degree assault is defined in ORS 163.175(1):

"A person commits the crime of assault in the second degree if the person:

"(a) Intentionally or knowingly causes serious physical injury to another;

"(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

1 guilty of second-degree assault, and defendant appeals the resulting judgment.

2 Article VII (Amended), section 5(3), of the Oregon Constitution provides  
3 that "a person shall be charged in a circuit court with the commission of any crime  
4 punishable as a felony only on indictment by a grand jury." Article VII (Amended),  
5 Section 5(6), of the Oregon Constitution provides, in turn, that the "district attorney may  
6 file an amended indictment or information whenever, by ruling of the court, an  
7 indictment or information is held to be defective in form." An amendment that adds a  
8 missing material element to a crime charged in an indictment is a substantive amendment  
9 and not an amendment that corrects a defect in the form of the indictment. Hence,  
10 whether the court properly allowed the state to amend the indictment depends on whether  
11 the amendment added a missing material element to the crime that the indictment  
12 purported to charge in Count 1. Predictably, the parties disagree on whether the  
13 amendment added a missing element, or whether it merely corrected a defect in form.

14 Generally, an indictment has alleged all of the elements of a charged crime  
15 if it tracks the wording of the statute that defines the crime. *See, e.g., State v. Lotches*,  
16 331 Or 455, 466, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001). If an indictment  
17 does not track the wording of the statute, the indictment is nonetheless sufficient to  
18 inform the defendant of the charge if it states "the acts constituting the offense in ordinary  
19 and concise language \* \* \* in such a manner as to enable a person of common

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"(c) Recklessly causes serious physical injury to another by means  
of a deadly or dangerous weapon under circumstances manifesting extreme  
indifference to the value of human life."

1 understanding to know what is intended." ORS 132.550(7). To determine what an  
2 indictment communicates, we examine the indictment as a whole. *State v. Jennings*, 131  
3 Or 455, 461, 282 P 560 (1929). Accordingly, an indictment can be sustained even if an  
4 essential element or fact was communicated only by implication or context.

5           For example, in *State v. Crampton*, 176 Or App 62, 65, 31 P3d 430 (2001),  
6 *overruled on other grounds by State v. Caldwell*, 187 Or App 720, 69 P3d 830 (2003), we  
7 concluded that an indictment alleging that the defendant "did unlawfully and knowingly  
8 carry concealed \* \* \* a handgun" implicitly included the allegation that the defendant  
9 lacked a permit or license to carry the concealed handgun. In that case, an officer  
10 stopped the defendant for driving with a suspended license and found several guns  
11 concealed in the defendant's car. The defendant was charged with, and convicted of,  
12 unlawful possession of a weapon, ORS 166.250. On appeal, the defendant challenged the  
13 adequacy of the indictment to charge that crime because the indictment did not explicitly  
14 allege that the defendant did not have a concealed-weapons permit. We rejected that  
15 argument because we concluded that the word "unlawfully," meant "without legal  
16 authorization or justification," and, when read in context, that word necessarily conveyed  
17 the idea that the defendant did not have a concealed-weapons permit. *Crampton*, 176 Or  
18 App at 68. In other words, even though the original indictment did not expressly allege  
19 that the defendant did not have a permit, it was sufficient that the allegation was  
20 implicitly communicated by the word "unlawfully."

21           Similarly, in *State v. Reynolds*, 229 Or 167, 169, 366 P2d 524 (1961), the

1 Oregon Supreme Court concluded that an indictment alleging that the defendant "did  
2 then and there unlawfully and feloniously fail to immediately stop [his] motor vehicle at  
3 the scene of [an] accident," adequately alleged, in context, that the defendant had acted  
4 with a knowing mental state. There, the state charged the defendant with leaving the  
5 scene of an accident that had caused injury or death to another person without providing  
6 reasonable aid and assistance, *former* ORS 483.602 (1959), *repealed by* Or Laws 1983,  
7 ch 338, § 978. The defendant appealed his conviction, arguing that the state was  
8 required, but had failed, to allege in the indictment that the defendant knew that he was  
9 involved in an accident involving injury or death. The Supreme Court disagreed,  
10 reasoning that "an indictment which charges that a person 'unlawfully and feloniously'  
11 performed an act is equivalent to alleging that he knowingly did so, and thus supplies the  
12 element of knowledge where that element is necessary for averment in the indictment."  
13 *Reynolds*, 229 Or at 172. The court held that, in the context of the balance of the  
14 indictment, the phrase "unlawfully and feloniously" communicated the allegation that the  
15 defendant claimed was missing. *Id.* at 172-73; *see also State v. Jim/White*, 13 Or App  
16 201, 220, 508 P2d 462 (1973) ("Where the words used in the indictment necessarily  
17 imply other words those words need not be used in the indictment.").

18           Here, we conclude that the original indictment, when read in its entirety,  
19 alleged that defendant had assaulted the victim with a dangerous weapon, because the  
20 phrase "cause[d] serious physical injury to [the victim] by means of a dangerous"  
21 necessarily communicated, albeit imperfectly, that defendant had used a dangerous

1 weapon to injure the victim. Count 1 of the indictment explicitly alleged that defendant  
2 had committed first-degree assault. As noted earlier, \_\_\_ Or App at \_\_\_ n 2 (slip op at 2  
3 n 2), there are four statutorily defined ways to commit first-degree assault, and each  
4 requires the state to prove a fact that is not present in the others. The original indictment  
5 did *not* allege the factual predicates of three of the four theories of culpability for first-  
6 degree assault--*viz.*, that defendant had assaulted a child less than six years of age or a  
7 pregnant person or that defendant was driving while intoxicated--and the factual  
8 predicate for the fourth theory is the use of a deadly or dangerous weapon to inflict  
9 serious physical injury. Further, the indictment was obviously missing a word. As  
10 previously indicated, it contained a prepositional phrase, "by means of a dangerous," that  
11 contained the preposition "of," and an adjective, "dangerous," that did not modify any  
12 other word in the indictment. In context, the incomplete prepositional phrase "by means  
13 of a dangerous" in the indictment had to be understood to communicate that the grand  
14 jury had charged defendant with first-degree assault for causing serious physical injury to  
15 the victim by means of a dangerous weapon.

16           Moreover, even a reader who was unaware that there are four distinct ways  
17 to commit first-degree assault would have read the indictment to allege that defendant  
18 had injured the victim by means of a dangerous weapon. The incomplete prepositional  
19 phrase "by means of a dangerous" was preceded by the allegation that defendant had  
20 "intentionally" caused "serious physical injury to [the victim]." When a person uses an  
21 object to "intentionally cause serious physical injury," by definition, that object becomes



1 a weapon. *See Webster's Third New Int'l Dictionary* 2589 (unabridged ed 2002)  
2 (defining the word "weapon" as "something \* \* \* used in destroying, defeating, or  
3 physically injuring an enemy"). Therefore, when read with the words immediately  
4 preceding the incomplete prepositional phrase, it becomes evident that the missing word  
5 that the incomplete prepositional phrase was intended to modify had to be a word for  
6 something that is used to cause "serious physical injury," *viz.*, the missing word had to be  
7 "weapon" or a term for a weapon. If the missing word were anything other than  
8 "weapon," then it could not be the "means by which" the defendant had "intentionally"  
9 caused the "serious physical injury." In essence, the amendment merely made explicit an  
10 allegation that was already adequately, though implicitly, expressed in the original  
11 indictment, and the court had the authority to grant the amendment to add the missing  
12 word.

13           In summary, Count 1 of the original indictment alleged that defendant had  
14 assaulted the victim by means of a dangerous weapon notwithstanding the failure to  
15 include the word "weapon" in the indictment. Therefore, the defect in the original  
16 indictment, *viz.*, the omission of the word "weapon," was one of form only, and the trial  
17 court did not err in granting the state's motion to amend the indictment to add the word  
18 "weapon" to Count 1.

19           Affirmed.