IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ROBERT LEE WEST,
Defendant-Appellant.

Multnomah County Circuit Court
15CR25032; A164919

Bronson D. James, Judge. (Judgment)

Christopher J. Marshall, Judge. (Corrected Judgment)

Argued and submitted March 18, 2019.

Sarah De La Cruz, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Peenesh Shah, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Powers, Presiding Judge, and Armstrong, Presiding Judge, and Kistler, Senior Judge.

KISTLER, S. J.

Conviction for interfering with a police officer reversed; otherwise affirmed.

KISTLER, S. J.

Defendant was convicted of two counts of second-degree disorderly conduct for obstructing traffic and one count of interfering with a police officer for refusing to comply with an officer's order. On appeal, defendant argues that his disorderly conduct convictions should be reversed because the state failed to allege and the jury failed to find that he "intentionally" obstructed traffic. Additionally, defendant argues, and the state concedes, that the trial court should have entered a judgment of acquittal on the charge of interfering with a police officer. For the reasons explained below, we affirm defendant's convictions for disorderly conduct and reverse his conviction for interfering with a police officer.

On March 10, 2015, defendant was involved in a demonstration in downtown Portland. Defendant, along with other protestors, stood in a public street blocking traffic and preventing at least one car from going forward. Sergeant Price told the group, "Get out of the street or you're going to be arrested." Another car pulled up and was blocked by the protestors. Defendant walked directly in front of the second car and was, at that point, the only person blocking its path. Price "asked [defendant] to move *** out of the way." Defendant did not comply with Price's order, and Price "eventually escorted [defendant away] by *** grabbing his arm and moving him out of the way."

Approximately one month later, on April 15, defendant took part in a second demonstration that blocked traffic on the Hawthorne Bridge in Portland. That demonstration stopped several cars from driving on the bridge. Defendant walked "right in the middle of traffic, right in the middle of two lanes of road," blocking five or ten cars.

Defendant was charged with two counts of disorderly conduct for obstructing traffic during those two demonstrations and one count of interfering with a police officer for refusing to obey the officer's order to "move out of the way" of the vehicle during the first demonstration. Regarding the two disorderly conduct charges,[1] the information initially

[1] As noted above, the state concedes on appeal that the trial court should have granted a judgment of acquittal on the charge of interfering with a police

alleged that "[d]efendant *** did unlawfully and recklessly create a risk of public inconvenience, annoyance and alarm by obstructing vehicular and pedestrian traffic on a public way." Before trial, defendant filed a demurrer challenging the information. He argued that the disorderly conduct charges were unconstitutionally vague, not definite and certain, and failed to state an offense because they did not allege that he had "intentionally" obstructed traffic.[2]

The state responded that, at most, it only had to allege that defendant "knowingly obstruct[ed] traffic and in doing so recklessly create[d] a risk of public inconvenience, annoyance or alarm." The state disagreed with defendant that it had to allege that he had intentionally obstructed traffic. The trial court ruled in the state's favor. It reasoned that it would

> "allow the case to proceed on a reckless mental state. I find that—I guess it's not a finding of fact—it's a holding of law—that the reckless mental state with respect to Disorderly Conduct is not unconstitutionally vague, and that is based on [*State v.*] *Marker*, [21 Or App 671, 536 P2d 740 (1975),] which is still good law and the combination of the reckless mental state in creating the risk combined with the specified conduct that is engaged in."

At trial, in response to defendant's arguments, the state asked the trial court to instruct the jury that the state had to prove that defendant knowingly obstructed traffic. Defendant continued to argue, however, that more was required. He argued that the jury should be instructed that the state had to prove that he "intentionally" obstructed traffic. The trial court disagreed and, consistently with its ruling on defendant's demurrer, instructed the jury as follows on the first disorderly conduct charge:

> "In this case, to establish the crime of Disorderly Conduct in the Second Degree, the State must prove

officer, and we agree with that concession. In describing the issues raised at trial, we accordingly focus on the issues surrounding the disorderly conduct charges.

[2] Before the trial court ruled on defendant's demurrer, the state filed an amended information that alleged that defendant "intentionally cause[d] and recklessly create[d] a risk of public inconvenience, annoyance and alarm." The information, however, did not specifically allege that defendant had intentionally obstructed traffic.

> beyond a reasonable doubt the following elements: One, the act occurred on or about March 10th, 2015; two [defendant] intended to cause or recklessly created a risk of causing public inconvenience, annoyance or alarm; by, three, knowingly obstructing vehicular or pedestrian traffic on a public way."

Except for the date on which the charged act allegedly occurred, the trial court gave an identical instruction on the disorderly conduct charge arising from the April 15, 2015, demonstration. The jury convicted defendant of both disorderly conduct charges, and it also convicted him of interfering with a police officer.

On appeal, defendant assigns error to the trial court's ruling on his demurrer to the disorderly conduct counts and also to the court's instructions on those counts.[3] As both parties recognize, those assignments of error all turn on a single question of statutory construction—whether the second-degree disorderly conduct statute, ORS 166.025, required the state to plead and prove that defendant intentionally obstructed traffic in addition to proving the mental state of "recklessly creating a risk" of public inconvenience, annoyance, or alarm.[4]

On that issue, defendant argues that the alternative mental states set out in ORS 166.025(1)—"intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof"—do not apply to the act (obstructing traffic) that the state had to prove to establish second-degree disorderly conduct. Rather, he views those alternative mental states as a stand-alone element. It follows, he reasons,

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[3] Defendant assigns error to the trial court's refusal to give his requested instruction and to the instruction that the court gave. Both assignments are premised on defendant's contention that the jury had to find that he intentionally obstructed traffic.

[4] We quote the statute at greater length below. However, we set out the relevant part of the second-degree disorderly conduct statute in this footnote to put our summary of the parties' arguments in context. Specifically, ORS 166.025 provides, in part:

> "(1) A person commits the crime of disorderly conduct in the second degree if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:
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> "* * * * *
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> "(d) Obstructs vehicular or pedestrian traffic on a public way."

that the disorderly conduct statute does not specify which mental state applies to the act of obstructing traffic, and he looks to ORS 161.085 and *State v. Simonov*, 358 Or 531, 368 P3d 11 (2016), to determine the applicable mental state. He concludes that, although a knowing or intentional mental state applies to conduct elements, such as obstructing traffic, one of our cases and the legislative history of the second-degree disorderly conduct statute make clear that only an intentional mental state will suffice.

The state, for its part, argues that our decision in *Marker* is dispositive. Alternatively, it notes that the disorderly conduct statute specifies a mental state that applies to a series of specific acts. It follows, the state reasons, that, if it proves that defendant committed one of the specified acts, such as obstructing traffic, and that he did so with the statutorily prescribed mental state, ORS 166.025 requires no more. Finally, the state argues that, at most, the jury had to find that defendant recklessly obstructed traffic. The state observes that, in this case, the jury's finding that defendant knowingly obstructed traffic necessarily included a finding that he recklessly did so. For those reasons, it concludes, we should affirm the trial court's judgment on the disorderly conduct charges.

As we explain below, we are not persuaded that this court's decision in *Marker* is dispositive. That decision did not consider the specific issue that this case presents, and we hesitate to treat a statement made in a different context in *Marker* as a binding holding in this case. That is not to say that we give no weight to the general understanding of the disorderly conduct statute that *Marker* and our later decisions reflect. Rather, the point is that we cannot rely solely on *Marker*. We accordingly follow the Oregon courts' usual methodology for resolving statutory construction issues. "We examine the statutory text in context, along with its legislative history[.]" *Lake Oswego Preservation Society v. City of Lake Oswego*, 360 Or 115, 124, 379 P3d 462 (2016). In construing the statutory context, we look to *Marker* and our other cases construing the second-degree disorderly conduct statute. *Davis v. O'Brien*, 320 Or 729, 741, 891 P2d 1307 (1995). We begin, however, with the text of that statute.

ORS 166.025 provides, in part:

> "(1) A person commits the crime of disorderly conduct in the second degree if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:
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> "(a) Engages in fighting or in violent, tumultuous or threatening behavior;
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> "(b) Makes unreasonable noise;
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> "(c) Disturbs any lawful assembly of persons without lawful authority;
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> "(d) Obstructs vehicular or pedestrian traffic on a public way;
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> "(e) Initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency; or
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> "(f) Creates a hazardous or physically offensive condition by any act which the person is not licensed or privileged to do."

ORS 166.025(1) defines the mental state that must be proved to establish the crime of second-degree disorderly conduct: It provides that the state must prove that a person acted either "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." ORS 166.025(1)(a) to (f) then set out a series of acts that, if done with one of the alternative mental states (with intent or recklessly) specified in ORS 166.025(1), will establish the crime of disorderly conduct.

Structurally, ORS 166.025 is not a statute that requires proof of multiple acts but only specifies a mental state for one of those acts, nor is it a statute that omits any mention of a required mental state. Rather, ORS 166.025 provides that proof of one of the acts specified in ORS 166.025(1)(a) to (f) coupled with proof of one of the alternative mental states specified in ORS 166.025(1) will establish the crime of second-degree disorderly conduct. By its terms, ORS 166.025 implies that no additional mental state is required.

The grammatical construction that the legislature used leads to the same conclusion. As noted, ORS 166.025(1) provides for proof of alternative mental states. The state may prove that a defendant took a specified act, such as obstructing traffic, either "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." We consider each alternative mental state separately.

The first alternative mental state is expressed as a prepositional phrase. It specifies the mental state "with" which a defendant must obstruct traffic to commit the crime of second-degree disorderly conduct. Beyond that, the prepositional phrase requires proof of a specific mental state. It does not make every intentional obstruction of traffic a crime. Rather, it makes the act a crime only if a defendant obstructs traffic "with intent to cause public inconvenience, annoyance or alarm."[5] By stating that a person will commit the crime of second-degree disorderly conduct if he or she obstructs traffic "with" a specific intent, the legislature identified the mental state with which a person must act. No more is required.

The second alternative mental state specified in ORS 166.025(1) functions in the same way, although the legislature used a different grammatical construct. While the legislature used a prepositional phrase—"with intent to cause public inconvenience, annoyance or alarm"—to describe the first alternative mental state, it used a participial phrase—"recklessly creating a risk [of public inconvenience, annoyance, or alarm]"—to describe the second. That is, a person will commit the crime of second-degree disorderly conduct if, "recklessly creating a risk [of public

[5] The legislature could have proscribed a general mental state, such as intentionally obstructing traffic. However, specifying a general mental state could result in the statute sweeping too broadly. *See State v. Horn*, 57 Or App 124, 127-28, 643 P2d 1338 (1982) (recognizing that problem). Accordingly, in proscribing the first alternative mental state, the legislature chose to prohibit obstructing traffic with a specific intent—the intent to create public inconvenience, annoyance, or alarm. The fact that the legislature chose to require proof that a defendant acted with a specific intent does not mean that the statute did not require the jury to find the mental state with which the defendant acted. A statute that prohibits obstructing traffic with a specific intent to cause public inconvenience, annoyance, or alarm is simply a subset of a statute that prohibits intentionally obstructing traffic.

inconvenience, annoyance, or alarm]," the person obstructs traffic.

In both instances, the legislature described the mental state with which the person must act to commit the crime. And, in both instances, the legislature required proof of a specific mental state rather than a general one. The fact that a person acts recklessly is not enough. A person must act with a reckless disregard of creating a risk of public inconvenience, annoyance, or alarm. As we read the text of ORS 166.025, proof of either mental state specified in ORS 166.025(1) coupled with proof of one of the acts specified in ORS 166.025(1)(a) to (f) is sufficient, without more, to establish the crime of second-degree disorderly conduct.

In addition to advancing textual arguments, both defendant and the state rely on our case law to support their reading of the text. Although we do not view our cases as dispositive, we find that they are consistent with and ultimately lend support to the state's position. We begin with *Marker*, the case on which the state relies. The issue in that case was whether the disorderly conduct statute was unconstitutionally vague. 21 Or App at 673. In deciding that issue, the court began by noting that the "requisite mental element of disorderly conduct is the '*** intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof.'" *Id.* at 674 (ellipsis in original). After observing that the "mental element *** is precisely defined," we turned to the primary issue that the defendant had raised: whether the act charged in that case "mak[ing] unreasonable noise" was unconstitutionally vague or overbroad. *Id.* at 675-78.

It is true, as the state notes, that we observed in *Marker* that ORS 166.025(1) specifies the "requisite" mental element of the second-degree disorderly conduct statute, and our use of the word "requisite" could imply that no other mental state was required. However, the defendant in *Marker* did not argue, as defendant does here, that the alternative mental states specified in ORS 166.025(1) are standalone elements and, as a result, do not define the mental state required to prove the prohibited conduct. Accordingly, although *Marker*'s reasoning is consistent with the state's

position in this case, we hesitate to treat the statement from *Marker* as a definitive ruling on the issue. *Cf. Coast Range Conifers v. Board of Forestry*, 339 Or 136, 149, 117 P3d 990 (2005) (declining to accept as binding precedent a statement from a previous case regarding an issue that had not been litigated).

Our other decisions addressing the second-degree disorderly conduct statute follow a similar pattern. In the course of considering vagueness and other constitutional challenges, those decisions describe the disorderly conduct statute as requiring proof of a prohibited act coupled with proof of one of the alternative mental states specified in ORS 166.025(1). *See, e.g.*, *State v. Higley*, 236 Or App 570, 574, 237 P3d 875 (2010) (describing the disorderly conduct statute as "contain[ing] a *mens rea* requirement ('intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof')" that applied to the conduct proscribed by ORS 166.025(1)(a) to (f)); *State v. Cantwell*, 66 Or App 848, 853, 676 P2d 353, *rev den*, 297 Or 124 (1984) (holding that the prohibited act, when read in light of the mental state specified in ORS 166.025(1), was not unconstitutionally vague); *State v. Donahue*, 39 Or App 79, 82-83, 591 P2d 394 (1979) (holding that the prohibition on abusive language when read in light of the mental state specified in the statute was not unconstitutionally vague). As with *Marker*, those decisions assume that the only required mental state is specified in ORS 166.025(1), but they did not consider and thus did not resolve the specific issue that defendant raises here.

Defendant, on the other hand, finds support for his position in *State v. Horn*, 57 Or App 124, 643 P2d 1338 (1982), although he recognizes that the reasoning in that case can also be read as supporting the state's position. In *Horn*, the defendants were charged with disorderly conduct under ORS 166.025(1)(d)[6] for obstructing traffic. The complaint alleged that "the above named defendant[s] *** did unlawfully and recklessly create a risk of public inconvenience, annoyance and alarm by obstructing vehicular traffic on a public way

[6] ORS 166.025 has been renumbered since it was first enacted. We cite the current version of the statute for ease of reference. Substantively, ORS 166.025 (1)(d) has not changed since it was first enacted.

*** by passing out leaflets and attempting to sell newspapers." *Id.* at 126. The defendants were convicted as charged.

On appeal, the defendants relied on the fact that the complaint charged them with violating ORS 166.025 (1)(d) for engaging in expressive activity. *Id.* They argued that applying ORS 166.025 to their expressive activity ran afoul of state and federal free speech guarantees and that, as a result, the trial court should have sustained their demurrer. In analyzing that issue, we noted that the commentary to the 1971 Proposed Criminal Code explained that ORS 166.025(1)(d) "'covers the intentional obstruction of vehicular or pedestrian traffic. It is not intended to prohibit persons gathering to hear a speech or otherwise communicate.'" *Id.* at 127. Relying on that comment, we focused on the *mens rea* requirement in ORS 166.025(1). We explained that the "comment [quoted above] stands as a cautionary remark to those seeking to enforce [ORS 166.025(1)(d)] that a specific intent to obstruct traffic, or a reckless disregard of the danger that traffic will be obstructed, is a necessary element of the offense defined in subsection ([d])." *Id.* Because the state had alleged that the defendants acted with one of those mental states, we upheld the trial court's decision overruling the demurrer. *Id.* at 127-28.

To the extent that defendant argues that *Horn* requires the state to plead and prove intentional obstruction of traffic, his argument is at odds with both *Horn*'s reasoning and its holding. Not only did we expressly recognize in *Horn* that the state could plead and prove that a defendant either intentionally or recklessly obstructed traffic, but we upheld against a demurrer a complaint that alleged that "the above named defendant[s] *** did unlawfully and recklessly create a risk of public inconvenience, annoyance and alarm by obstructing vehicular traffic on a public way." *Id.* at 126-27. If defendant were correct that ORS 166.025 always requires the state to plead and prove that he intentionally obstructed traffic, then we should have reversed the trial court's ruling on the demurrer in *Horn*. We did not do so, however.

To the extent that defendant argues that *Horn* establishes that the act of obstructing traffic requires proof of some mental state beyond one of the two alternative

mental states specified in ORS 166.025(1), that argument is difficult to reconcile with our decisions, in which we have consistently described the requisite mental state for second-degree disorderly conduct as one of the two alternatives specified in ORS 166.025(1). Moreover, as discussed above, the text of the statute makes clear that the state has to plead and prove only that a defendant obstructed traffic with either a specific intent to cause or a reckless disregard for creating a risk of public inconvenience, annoyance, or alarm. Textually, the statute does not require proof of an additional mental state.

We also consider the legislative history of the second-degree disorderly conduct statute in determining what the legislature most likely intended. ORS 166.025 was drafted by the Criminal Law Revision Commission. Roger Wallingford, Research Counsel for the commission, introduced the proposed disorderly conduct legislation for discussion at hearings for both Subcommittee Three and the full commission by explaining that the "seven [paragraphs] of specific acts of conduct" are "tied in with" the intent prescribed in subsection (1). Tape Recording, Criminal Law Revision Commission, Subcommittee Three, Preliminary Draft One, Oct 24, 1969, Tape 86, Side 1; Tape Recording, Criminal Law Revision Commission, Preliminary Draft Two, Jan 9, 1970, Tape 43, Side 1.

Moreover, the commentary to the proposed statute states that, "[b]efore specified conduct may be viewed as 'disorderly,' the actor must intend to cause, or recklessly create a risk of, public inconvenience, annoyance or alarm. *A strict liability offense is thereby avoided.*" Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report 220, at 214 (July 1971) (emphasis added). That comment demonstrates that the commission did not intend for a separate mental state requirement to attach to each of the enumerated acts in the statute. Rather, it understood that one of the alternative mental states set out in ORS 166.025(1) would define the mental state with which a person committed one of the proscribed acts. The legislature ultimately adopted the proposed legislation unamended, and we are unaware of any contrary understanding by the legislature when it examined and adopted

what would become ORS 166.025. Or Laws 1971, ch 743, § 220.

Considering the text, context, and legislative history of ORS 166.025, we conclude that the state need only plead and prove one of the acts specified in ORS 166.025 (1)(a) to (f) and one of the alternative mental states specified in ORS 166.025(1) to establish second-degree disorderly conduct. Because the state did that much (and more) in this case, the trial court correctly overruled defendant's demurrer. It also did not err in instructing the jury for the reasons that defendant has identified on appeal.[7] We accordingly affirm the court's judgment as to the two counts of second-degree disorderly conduct.

Defendant also appeals from his conviction for interfering with a police officer. He argues that the trial court erred in failing to (1) enter a judgment of acquittal because he was engaged in passive resistance; (2) instruct the jury to that effect; and (3) instruct the jury that it had to find that he intentionally refused to comply with an officer's order. The state concedes that the trial court should have entered a judgment of acquittal on the charge of interfering with a police officer, and we accept its concession.[8]

As relevant here, ORS 162.247 provides:

> "(1) A person commits the crime of interfering with a peace officer or parole and probation officer if the person, knowing that another person is a peace officer or a parole and probation officer ***:

[7] The trial court properly declined to give defendant's requested instruction because it incorrectly required the jury to find that defendant "intentionally" obstructed traffic. Moreover, defendant's argument that the instruction that the trial court gave erroneously failed to tell the jury that it had to find that defendant "intentionally" obstructed traffic is not well taken. On appeal, defendant does not raise any other objection to the instruction that the trial court gave, and we express no opinion on whether some other objection could have been raised to that instruction.

[8] Defendant did not specifically argue below that the trial court should have entered a judgment of acquittal on the charge of interfering with a police officer. However, *State v. McNally*, 361 Or 314, 392 P3d 721 (2017), was not decided until after the defendant had been convicted, and the state concedes that, in light of *McNally*, defendant's conviction is based on an incorrect legal principle. Given that sequence of events, the state's concession, and gravity of the error, we exercise our discretion to review that unpreserved issue. *See* ORAP 5.45(1) (authorizing an appellate court to consider a plain error).

> "*****
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> "(b) Refuses to obey a lawful order by the peace officer or parole and probation officer."

ORS 162.247(3) carves out an exception to that prohibition. It provides that "[t]his section does not apply in situations in which the person is engaging in *** [p]assive resistance."

We accept the state's concession that defendant engaged in passive resistance during the first demonstration and thus could not be convicted of interfering with a police officer. *See State v. McNally*, 361 Or 314, 339, 392 P3d 721 (2017) (defining passive resistance); *State v. Washington*, 286 Or App 650, 658, 401 P3d 297 (2017) (following *McNally*). Having accepted the state's concession, we need not consider the other, more specific challenges that defendant raises to that conviction.

Conviction for interfering with a police officer reversed; otherwise affirmed.