

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

STATE OF OREGON,  
*Plaintiff-Respondent,*

*v.*

JOHN FRANCIS STABENOW, JR.,  
*Defendant-Appellant.*

Clackamas County Circuit Court  
17CR70267; A167135

Thomas J. Rastetter, Judge.

Submitted August 1, 2019.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Stacy M. Du Clos, Deputy Public Defender, Office of Public Defense Services, filed the opening brief for appellant. John Stabenow filed the reply and supplemental briefs *pro se*.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jennifer S. Lloyd, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Mooney, Judge.

PER CURIAM

Judgment of conviction for unlawful use of a weapon reversed; remanded for resentencing; otherwise affirmed.

## PER CURIAM

Defendant appeals a judgment of conviction after a bench trial for unlawful use of a weapon (UW), ORS 166.220, and menacing, ORS 163.190. The charges arose out of an incident in which defendant used a DeWalt pocket knife to threaten the alleged victim, T, who had confronted defendant based on his belief that defendant had stolen cigarettes from a 7-Eleven market. Defendant assigns error to the trial court's denial of his motion for judgment of acquittal for UW, contending, as he did below, that the state failed to prove that he used a "deadly weapon," as charged in the indictment.<sup>1</sup> The state concedes that the evidence in the record is insufficient to support a conviction for UW as alleged in this case. We agree.

A person commits UW if the person "[a]ttempts to use unlawfully against another, or carries or possesses with intent to use against another, any dangerous or deadly weapon as defined in ORS 161.015." ORS 166.220(1)(a). In this case, the indictment charged defendant with UW based on his alleged attempt to use unlawfully against T "a knife, a deadly weapon." ORS 161.015(2) defines "deadly weapon" as "any instrument, article or substance *specifically designed for* and presently capable of causing death or serious physical injury."<sup>2</sup> (Emphasis added.) Although the state presented evidence that a knife "could" cause death or serious physical injury, the record is devoid of evidence that the knife defendant allegedly attempted to use against T was "specifically designed" for that purpose. Therefore, the evidence was insufficient to establish that the knife was a deadly weapon, and the trial court erred in denying defendant's motion for judgment of acquittal on the UW charge.

Judgment of conviction for unlawful use of a weapon reversed; remanded for resentencing; otherwise affirmed.

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<sup>1</sup> In *pro se* supplemental and reply briefs, defendant raises additional arguments with respect to his conviction for menacing. We reject those arguments without discussion.

<sup>2</sup> By contrast, a "dangerous weapon" is defined to mean "any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury." ORS 161.015(1).