

**FILED: March 14, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

JAMES WILLARD DURST,  
Defendant-Appellant.

Washington County Circuit Court  
C062841CR

A138259

Gayle Ann Nachtigal, Judge.

Argued and submitted on August 13, 2010.

Matthew McHenry argued the cause for appellant. With him on the briefs was Michael R. Levine.

Jennifer S. Lloyd, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Jerome Lidz, Solicitor General.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

DUNCAN, J.

Affirmed.

1 DUNCAN, J.

2 Defendant appeals a judgment convicting him of one count of unlawful use  
3 of a weapon, ORS 166.220, one count of menacing, ORS 163.190, and one count of  
4 assault in the fourth degree, ORS 163.160, arguing that the trial court erred in instructing  
5 the jury. For the reasons explained below, we affirm defendant's convictions.

6 The relevant facts are as follows. Defendant was riding a bicycle on a road  
7 encircling a mall parking lot when he collided with a van driven by the victim. The  
8 victim stopped and got out of the van to make sure that defendant was not injured, but  
9 defendant pedaled away from the scene. The victim drove around the mall parking lot  
10 looking for defendant in order to ascertain defendant's name. He soon located defendant,  
11 stopped his vehicle nearby, and got out. When the victim asked defendant's name,  
12 defendant aimed his bicycle at him and started pedaling hard. Defendant rode into the  
13 victim, who put his hands out to block the impact. The victim's thumb was injured in the  
14 collision. Then defendant walked back toward the victim, holding a knife. The victim  
15 saw a police officer nearby and shouted for help. The officer came over and called for  
16 backup, and, eventually, defendant was arrested.

17 Defendant was later charged with one count of unlawful use of a weapon,  
18 one count of menacing, and one count of assault in the fourth degree. During his jury  
19 trial, defendant asked the trial court to give the following jury instructions relating to the  
20 required culpable mental states for unlawful use of a weapon, as alleged in Count 1, and  
21 menacing, as alleged in Count 2:

1                   "Intentionally," as it applies to Count 1, means that [defendant] acted  
2                   intentionally when he acted with a conscious objective unlawfully to  
3                   attempt to use the weapon against [the victim] by \_\_\_\_\_ [to be specified  
4                   by the state].

5                   "Intentionally," as it applies to Count 2, means that [defendant] acted  
6                   intentionally when he acted with a conscious objective unlawfully to  
7                   attempt to place [the victim] in fear of imminent serious injury by  
8                   \_\_\_\_\_ [to be specified by the state]."

9                   The trial court declined to give defendant's proposed instructions and  
10                  instead instructed the jury on the definition of "intentionally" and the elements of each  
11                  crime. Regarding the term "intentionally," the court gave an instruction based on the  
12                  then-current uniform criminal jury instruction:<sup>1</sup>

13                  "A person acts 'intentionally' or 'with intent' when that person acts  
14                  with a conscious objective either:

15                  "(1) To cause a particular result; or

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<sup>1</sup>                  The Uniform Criminal Jury Instructions were amended in 2007, a few months  
                        after the trial in this case. The uniform instruction on "Intentionally and with Intent" now  
                        provides:

                        "A person acts 'intentionally' or 'with intent' when that person acts  
                        with a conscious objective to 1A [cause a particular result]/1B [engage in  
                        particular conduct].

                        "When used in the phrase [quote material element from definition of  
                        relevant offense], 'intentionally' or 'with intent' means that a person acts  
                        with a conscious objective to 2A [cause [specify result]]/2B [specify  
                        conduct]."

UCrJI 1035 (italics and third brackets in original).

The goal of the amendment was to "correctly categoriz[e] the material element(s) of the underlying offense(s) and correctly link[] the mental state to the material element(s)." Comment to UCrJI 1035. As a result of the amendment, the current uniform instruction is akin to defendant's requested instructions.

"(2) To engage in particular conduct."

2 Regarding the elements of the crime of unlawful use of a weapon, the court instructed the  
3 jury:

"Oregon law provides that a person commits the crime of unlawful use of a weapon if the person attempts to use unlawfully against another any dangerous weapon.

"In this case, to establish the crime of unlawful use of a weapon, the state must prove beyond a reasonable doubt the following three elements:

"(1) The act occurred in Washington County, Oregon;

"(2) The act occurred on or about October 7, 2006; and

"(3) [Defendant] intentionally attempted to use unlawfully against [the victim] any dangerous weapon."

13 And, regarding the elements of menacing, the court instructed the jury:

"Oregon law provides that a person commits the crime of menacing if, by word or conduct, the person intentionally attempts to place another person in fear of imminent serious physical injury.

"In this case, to establish the crime of menacing, the state must prove beyond a reasonable doubt the following three elements:

"(1) The act occurred in Washington County, Oregon;

"(2) The act occurred on or about October 7, 2006; and

"(3) [Defendant] intentionally attempted to place another person, [the victim], in fear of imminent serious physical injury by words and conduct."

24 The jury found defendant guilty on all three counts.

25 Defendant appeals the resulting judgment, assigning error to the trial court's  
26 instruction of the jury. He makes three arguments. First, he argues that neither unlawful

1 use of a weapon nor menacing requires the state to prove that a defendant intended to  
2 cause a result; that is, both of those charges require the state to prove only that a  
3 defendant intended to engage in particular conduct. Therefore, he contends, under State  
4 v. Crosby, 342 Or 419, 154 P3d 97 (2007), the court erred in instructing the jury that "[a]  
5 person acts 'intentionally' or 'with intent' when that person acts with a conscious objective  
6 either: (1) [t]o cause a particular result; *or* (2) [t]o engage in particular conduct"  
7 (emphasis added), because no "particular result" applies in this case. Next, defendant  
8 argues that, even if his first argument is unavailing, the trial court's jury instructions were  
9 insufficient under the Supreme Court's holding in *Crosby* because "the mental state  
10 instructions fail[ed] to specify the particular conduct required by the underlying criminal  
11 offense." Finally, defendant contends that the instructional error with regard to the  
12 counts for unlawful use of a weapon and menacing had a "spillover effect" that requires  
13 reversal of his conviction for fourth-degree assault.

14 As explained below, with respect to defendant's first argument, we  
15 conclude that the menacing charge required proof of defendant's intent to engage in  
16 particular conduct and his intent to cause a particular result. Therefore, his comparison of  
17 this case to *Crosby* is inapposite. Furthermore, in accord with State v. Woodman, 341 Or  
18 105, 107, 138 P3d 1 (2006), the jury would not have been misled by the instructions that  
19 the court gave. As to defendant's second argument, this court has rejected the  
20 interpretation of *Crosby* that he advances. State v. Pedersen, 242 Or App 305, 319-20,  
21 255 P3d 556, *rev den*, 351 Or 254 (2011). In light of our disposition of defendant's

1 arguments regarding the trial court's instruction of the jury, we do not address defendant's  
2 third argument. Accordingly, we affirm.

3 We address each of defendant's arguments in turn, beginning with his  
4 argument that neither menacing nor unlawful use of a weapon requires proof of intent  
5 with regard to a result, and, consequently, the trial court's instruction regarding intent was  
6 improper.<sup>2</sup> "In order to determine the specific material element to which a requisite  
7 mental state relates, we look to the substantive criminal statute defining the offense at  
8 issue." *Pedersen*, 242 Or App at 317 (citing *Crosby*, 342 Or at 428-30). The statute  
9 defining menacing, ORS 163.190(1), provides:

10 "A person commits the crime of menacing if by word or conduct the  
11 person intentionally attempts to place another person in fear of imminent  
12 serious physical injury."

13 As noted, defendant argues that that statute requires the state to prove that a  
14 defendant had a culpable mental state--*viz.*, intent--with regard to conduct but not with  
15 regard to any result. The text of the statute, however, belies that assertion. The statute  
16 requires proof that a defendant "intentionally attempt[ed] to place another person in fear  
17 of imminent serious physical injury." In order to show that a defendant intentionally  
18 attempted to place another person in fear of imminent serious physical injury, the state

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<sup>2</sup> We address the culpable mental state requirements for menacing, ORS 163.190, immediately below. Because we conclude that that statute requires intent with regard to a result as well as with regard to conduct, and, therefore, that the use of the generic definition of "intentionally," which refers to both conduct and result, was not error, we do not evaluate the culpable mental state requirement for unlawful use of a weapon, ORS 166.220.

1 has to show not only that the defendant intended to engage in particular conduct but also  
2 that he or she intended to achieve a particular result. *See Pedersen*, 242 Or App at 317-  
3 18 (crime requiring that the defendant "intentionally attempted to cause the death of [the  
4 victim]" required the jury to find "that [the defendant] intentionally engaged in a  
5 substantial step (shooting at [the victim]) with intent to cause a particular result ([the  
6 victim]'s death)"). Thus, for the crime of menacing, the state had to prove defendant's  
7 intent with regard to both conduct and a result in order to secure a conviction, and,  
8 therefore, the trial court's use of the general definition of "intentionally," which referred  
9 to both conduct and result, was not error. *Cf. Crosby*, 342 Or at 434 (instructional error  
10 existed where clarifying instruction indicated that the defendant could have been reckless  
11 with regard to a circumstance although the defendant's recklessness with regard to a  
12 circumstance was not adequate for conviction of the charged crime).

13 Moreover, the Supreme Court's holding in *Woodman* demonstrates that the  
14 trial court did not err in instructing the jury because the instructions correctly informed  
15 the jury of the elements to which the intent element applied. "In determining whether it  
16 was error to give a particular instruction, we read the instructions as a whole to determine  
17 whether they state the law accurately." *Woodman*, 341 Or at 118. In *Woodman*, the  
18 defendant, who had been convicted of murder, argued that the trial court's instruction on  
19 the meaning of intent, which explained that meaning with regard to conduct and with  
20 regard to result, had misled the jury. The trial court had instructed the jury as follows:

21           ""To establish the lesser included crime of Murder[,] the State must  
22 prove beyond a reasonable doubt each of the following three material

1 elements: First, that the act occurred in Linn County, Oregon; second, that  
2 the act occurred on or between June 5 and June 8th, 2001; and finally, that  
3 [defendant] intentionally caused the death of [the victim], another human  
4 being.

5         ""As used in the phrase "intentionally caused the death of [the  
6 victim]," a person acts intentionally or with intent when a person acts with a  
7 conscious objective either to cause a particular result, or to engage in  
8 particular conduct.""

9         *Id.* at 116-17 (brackets in original). The defendant argued that the intent instruction  
10 allowed the jury to convict him based on his intentional conduct, which included  
11 providing a knife to his codefendant, even if the jury was not convinced that he had  
12 intended that conduct to result in the death of the victim. The Supreme Court rejected  
13 that argument and concluded that the jury instructions accurately informed the jury of the  
14 factual predicates for a guilty verdict:

15         "In our view, reading the instructions as a whole, rather than  
16 examining the intent instruction standing alone, the instructions accurately  
17 reflected the statutory requirements. In the context of the intentional  
18 murder charge, the jury would have understood the words 'particular  
19 conduct' in the phrase 'conscious objective to \* \* \* engage in particular  
20 conduct' to mean conduct intended to cause the death of another. So  
21 understood, the 'engage in particular conduct' part of the instruction  
22 conveyed the same meaning as the 'cause a particular result' part of the  
23 instruction because both parts required the jury, to convict [the] defendant  
24 of intentional murder, to find that [the] defendant acted 'with a conscious  
25 objective' that his actions would result in the death of [the victim]. Here,  
26 the trial court first told the jury that 'the State must prove beyond a  
27 reasonable doubt \* \* \* that [the defendant] intentionally caused the death of  
28 [the victim].' The court then stated that the phrase 'intentionally caused the  
29 death' of [the victim] means that 'the person acts with a conscious objective  
30 either to cause a particular result, or to engage in particular conduct.' Those  
31 instructions correctly told the jury that the prohibited conduct to which the  
32 intent element applied was 'caus[ing] the death of [the victim].'"

33         *Id.* at 119 (seventh brackets and omissions in original).

1                   Here, the trial court instructed the jury as follows:

2                   "A person acts 'intentionally' or 'with intent' when that person acts  
3                   with a conscious objective either:

4                   "(1) To cause a particular result; or

5                   "(2) To engage in particular conduct."

6                   Then it instructed the jury that the state had to prove that "[defendant] intentionally  
7                   attempted to use unlawfully against [the victim] any dangerous weapon" and that  
8                   "[defendant] intentionally attempted to place another person, [the victim], in fear of  
9                   imminent serious physical injury by words and conduct." As in *Woodman*, here, any  
10                  confusion on the part of the jury as to which elements constituted conduct and which  
11                  constituted results would not have affected its understanding of what the state was  
12                  required to prove. Even if it erroneously believed that to "place another person \* \* \* in  
13                  fear of imminent serious physical injury" was conduct, rather than a result, it would have  
14                  understood, from the definition of "intentionally," that defendant had to "act with a  
15                  conscious objective \* \* \* to" "place another person, [the victim], in fear of imminent  
16                  serious physical injury."

17                  The only possibility of jury confusion that defendant advances is that he  
18                  might have been convicted on the menacing charge for causing the victim, subjectively,  
19                  to be afraid, even if defendant did not intend to put him in fear. In order to arrive at that  
20                  conclusion, however, the jury would have had to omit the word "intentional" from its  
21                  reading of the definition of menacing, which we presume that it did not do. Wallach v.  
22                  Allstate Ins. Co., 344 Or 314, 326, 180 P3d 19 (2008) ("We presume that a jury follows a

1 trial court's instructions."). Thus, the instructions accurately stated the law, and the jury  
2 would not have been confused.

3 Defendant's second argument is that, despite our conclusion regarding his  
4 first argument, *Crosby* requires "the mental state instructions \* \* \* to specify the  
5 particular conduct required by the underlying criminal offense." In *Pedersen*, we rejected  
6 that argument.

7 In *Pedersen*, 242 Or App at 315, the defendant argued that "his proposed  
8 instruction, which provided definitions tailored to the material elements of each offense,  
9 was mandated by *Crosby*."<sup>3</sup> In particular, the defendant relied on a passage in *Crosby*  
10 that stated:

11        "The bare terms "particular result" and "particular circumstance" do  
12 not adequately convey to a jury the required link between reckless  
13 conduct and the results or circumstances specified in the underlying  
14 criminal statute. Furthermore, a trial court should not instruct the  
15 jury that the mental state relates to both a result and a circumstance,  
16 unless that is accurate in the context of the particular crimes that  
17 have been charged. As this opinion demonstrates, a defendant's  
18 objection in a similar context to the [original instruction] defining  
19 "recklessly" would be well taken."

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<sup>3</sup> In *Crosby*, the trial court's general instruction regarding the required mental state--recklessness--referred to two types of elements: "particular result" and "particular circumstance." 342 Or at 422. The charged crime required recklessness with regard to a result; recklessness with regard to a circumstance was not enough for a conviction. *Id.* at 431. The trial court's clarifying instruction, given in response to a question from the jury, indicated that recklessness with regard to any of multiple circumstances would permit conviction. *Id.* at 432. Based on that error, the Supreme Court reversed the conviction. *Id.* at 435. The reversal did not depend on any error in the original instruction. The court noted that, "[i]f the [general] instruction was defective at all, it was because it was ambiguous about what 'particular result' and 'particular circumstance' meant." *Id.* (emphasis added).

1    *Pedersen*, 242 Or App at 319 (quoting *Crosby*, 342 Or at 435 n 12) (second insertion in  
2    *Pedersen*). Defendant in this case makes the same argument, relying on the same passage  
3    from *Crosby*.

4                After noting that the passage from *Crosby* that the defendant relied on was  
5    *dicta*, the *Pedersen* court explained that the passage from *Crosby*

6                "does not demonstrate that a tailored instruction is unequivocally required  
7    regardless of the circumstances of the case. Rather, those statements  
8    simply demonstrate that, in the context of that case, a general instruction  
9    would have been inappropriate because there were no 'circumstances' to  
10    which a mental state could have related. Here, as noted, it was correct to  
11    instruct the jury that the mental state related to a result or conduct \* \* \*.  
12    The statements in *Crosby* cited by [the] defendant do not suggest that an  
13    instruction must go further and link the definition of intent to the material  
14    elements of each offense."

15    *Id.* at 319-20. The same is true here, where, as noted, the mental state applies to conduct  
16    and to result. *Crosby* did not mandate defendant's requested instruction.<sup>4</sup>

17                We conclude that the instructions that the court gave accurately stated the  
18    law and that *Crosby* did not require a more specific instruction. Therefore, we affirm.

19                Affirmed.

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<sup>4</sup>                We note, however, that, after *Crosby* was decided--and after the trial in this case--the Uniform Criminal Jury Instructions were modified to limit definitions of culpable mental states to the types of elements at issue in a case and to link the definitions of culpable mental states to the material elements of the offenses at issue. *See* \_\_\_ Or App at \_\_\_ n \_\_\_ (slip op at 2 n 1). That change was in accord with the portion of *Crosby* that defendant cites. However, here, where one of the charged crimes required proof of intent with regard to both conduct and result and where there was no risk of jury confusion, the lack of specific instructions did not amount to reversible error. *See Pedersen*, 242 Or App at 320 ("Defendant is not entitled to reversal merely because he believes that his proffered instruction stated the law more clearly than did the trial court's instructions, if the instructions given correctly and completely addressed the issues." (Quoting *State v. Barnes*, 329 Or 327, 334, 986 P2d 1160 (1999))).