IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. LAWRENCE BEN ALLEN DICKERSON, Defendant-Appellant, Petitioner on Review.	Deschutes County Circuit Court No. MI092911 CA A147467 SC S062108

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 Deschutes County
Honorable BARBARA HASLINGER, Judge

Opinion Filed: December 18, 2013
Author of Opinion: Duncan. J.
Before: Schuman, Presiding Judge, and Nakamoto, Judge

Continued…

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INTRODUCTION

Defendant was convicted of criminal mischief after he and his son shot and damaged deer decoys owned by the state. He contends that the state's evidence was legally insufficient to prove that he intentionally damaged property of the state because he and his son were fooled by the decoys—they intended to shoot not decoys but wild deer. He thus urges this court to hold that, as a matter of law, wild deer do not belong to the state, and so cannot be "property of another" for purposes of the criminal mischief statute. But this court need not reach that issue.

Defendant does not dispute that he in fact damaged property of another—deer decoys belonging to the state—and so the only disputed issue is whether he had the requisite subjective mental state at the time of the incident. The answer to the *legal* question of whether deer are property of the state does not shed any light on the sufficiency of the state's evidence regarding defendant's subjective state of mind. Regardless of whether deer are or are not property of the state, a rational trier of fact could have found from the evidence presented that defendant acted with a culpable mental state. The court should therefore grant

the state's previously filed motion to dismiss the petition for review in this case as improvidently granted.[1]

However, even if the court does reach that question, the Court of Appeals correctly held that the state's interest in wild deer is at least a "legal interest," the kind of interest protected by the criminal mischief statute.

STATEMENT OF THE CASE

Defendant was charged with damaging property of the state, and a jury found defendant guilty of criminal mischief, based on evidence that he aided and abetted his son in shooting two deer decoys that belonged to the state.[2] At the close of the state's evidence, defendant moved for judgment of acquittal, contending that the state's evidence was legally insufficient to prove that he aided and abetted in damaging property of the state, because he and his son

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[1] On September 3, 2014, defendant responded to the state's motion to dismiss the petition as improvidently granted. By order dated September 4, 2014, this court deferred ruling on the motion until after briefing and oral argument, and ordered that the parties could address the issues raised in the motion in the state's response brief and defendant's reply brief.

[2] The information charged defendant as follows: "that the said defendant, on or about the 7th day of October, 2009, in Deschutes County, Oregon, did unlawfully and intentionally damage property of the State of Oregon, the said defendant having no right to do so nor reasonable grounds to believe that the defendant has such right." (ER 2). Although defendant testified that he was not the person who shot the decoys, the jury was instructed that he could be convicted if he aided and abetted another in violating the relevant laws. Throughout this brief, the actions of either defendant or his son may be described as the actions of defendant.

believed the decoys were wild deer, and the state does not own wild deer. Defendant contended that wild deer are not the "property of another" until they are reduced to physical possession. The Court of Appeals concluded that wild deer are property of the state and thus "property of another" for purposes of the criminal mischief statute, and affirmed. *State v. Dickerson*, 260 Or App 80, 317 P3d 902 (2013), *rev allowed*, 355 Or 567 (2014).

Summary of Facts

Oregon State Police fish and wildlife officers were investigating reports of after-hours illegal hunting activity in Deschutes County, including hunting after hours and the use of spotlights. (Tr 37-39.) To do so, they set up two state-owned deer decoys, with deer hide and antlers, ten to twenty yards off the roadway. (Tr 38-41, 47.) Trooper Bean watched the decoys from a hiding place on the opposite side of the road, while the other officer, Trooper Hayes, waited in a "chase vehicle" down the road. (Tr 42, 56-57.) Legal hunting hours concluded at 7:05 p.m. that day. (Tr 60.) Shortly before 7:45 p.m., Trooper Bean saw defendant's vehicle approach the decoys, brake, then turn to illuminate the decoys with its headlights. (Tr 43, 46, 61.) Trooper Bean heard two shots fired. (Tr 43-44.) Trooper Bean stepped out from his hiding place and the engine revved, then Trooper Bean shined his flashlight at defendant, the driver, and commanded him to stop. (Tr. 44- 45, Tr 59.) Defendant sped off. (Tr 45.) Trooper Bean radioed Trooper Hayes, who pursued the vehicle to a

place approximately one mile down the road from the decoys. (Tr 59.) When defendant's vehicle stopped, Trooper Hayes spoke with both defendant and the passenger, who was defendant's son. They told Trooper Hayes that defendant's son had fired both shots at the decoys, and defendant acknowledged that both rifles were his and showed the trooper his deer tag. (Tr. 59, 61-62, 64, 80.) Defendant apologized to Trooper Hayes for their actions, and acknowledged that "he knew that it was illegal to be – and what they had done, yes." (Tr. 62.) The decoys had been damaged by the shots. (Tr 46-47.)

Defendant was charged with, among other things, second-degree criminal mischief, for "unlawfully and intentionally [damaging] property of the State of Oregon, * * * having no right to do so nor reasonable grounds to believe that the defendant had such right," ORS 164.354. (ER 1-2.) [3]

Defendant opted for a jury trial. The state called Troopers Bean and Hayes in its case-in-chief. At the close of the state's case, defendant moved for

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[3] Defendant was also charged with: 1) "unlawfully and knowingly act[ing] in a manner toward a wildlife decoy consistent with the unlawful taking of wildlife * * *", ORS 496.996, 161.405; and 2) "unlawfully and knowingly assist[ing] another [to] hunt for any wildlife in violation of the wildlife laws * * * by hunting deer outside the prescribed hours;" ORS 498.002. Defendant was also initially charged with, "spotlighting," *i.e.*, "cast[ing] an artificial light from or near a motor vehicle, upon a game mammal or predatory animal, while in possession or immediate physical presence of a weapon with which the game mammal or predatory animal could be killed," ORS 498.146. That charge was dismissed before trial. (Tr 7.)

judgment of acquittal, on various bases. (Tr 81.) As to the criminal mischief count, defendant contended that no reasonable factfinder could find that defendant intended to damage a wildlife decoy. (*Motion for Judgment of Acquittal*, TCF 27). The court suggested that the state amend the charge to strike the reference to the decoy, and substitute the term "property of the state." (Tr 101-03.) Defendant then argued that deer were not property of the state, because they belonged to no one until reduced to possession. (Tr 103.) The court denied defendant's motion for judgment of acquittal. (Tr 117, 142.) The state moved to amend the charge, which was granted. (Tr 195-96.)[4]

Both defendant and his son testified for the defense. Defendant's son testified that, as he and his father were headed home after hunting, he thought he saw something and told his father to stop. (Tr 145.) He testified that he believed they were deer. (Tr 153.) According to defendant's son, it was getting dark, but not yet dark. (Tr 148.) When they stopped, the headlights were shining down the road, and the decoys were right outside the passenger window. (Tr 147.) Defendant's son took two shots from the passenger's seat, with two different rifles, then "we realized it wasn't real, and we * * * just drove off." (Tr 145-46.)

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[4] Defendant has not assigned error to the granting of that motion.

Defendant testified that he saw deer about 30 to 50 feet from the road. (Tr 158-59.) He said that it was getting dark, and he could see 25-30 yards. (Tr 159.) He denied that the headlights were on the decoys. (Tr 165.) After defendant's son fired his shots, they "realized that it might be decoys" and decided to leave. (Tr 160.)

The jury found defendant guilty as charged. Defendant appealed only the conviction for second-degree criminal mischief. The Court of Appeals affirmed the conviction, concluding that wild deer fell within the definition of "property of another" for purposes of the criminal mischief statute. *Dickerson*, 260 Or App at 86. The court reasoned that, because the state's sovereign interest in wildlife has its roots in English common law, where it was historically enforced in courts of law, the state's interest in wildlife is a "legal interest." As such, the Court of Appeals held that the state's interest falls within ORS 164.305(2), which defines "property of another" as "a legal or equitable interest that the actor has no right to defeat or impair * * *." *Id.* The Court of Appeals did not address the state's argument that the denial of the motion for judgment of acquittal should be affirmed because the evidence was legally sufficient for the jury to find that defendant intended to damage property of another, regardless whether deer are property of the state.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Under the standards applicable to review of denial of a motion for judgment of acquittal, was there was evidence from which a rational trier of fact could find that defendant intended to aid and abet in damaging "property of the State?"

First Proposed Rule of Law

Because the state presented evidence from which a rational trier of fact could have found that the state proved the essential elements of criminal mischief, including the requisite intent, the trial court correctly denied defendant's motion for judgment of acquittal.

Second Question Presented

ORS 164.305(2) defines the term "property of another," for purposes of the crime of criminal mischief, as "property in which anyone other than the actor has a legal or equitable interest that the actor has no right to defeat or impair, even though the actor may also have such an interest in the property." Does the state have a "legal or equitable interest" in wild deer?

Second Proposed Rule of Law

The state's sovereign interest in wildlife is an interest held in trust for the benefit of the citizens of the state and is enforceable at law through actions for damages. That interest, although not a proprietary or possessory interest, is

a "legal or equitable interest," and therefore wildlife are "property of another" for purposes of the crime of criminal mischief, ORS 164.354.

Summary of Argument

Defendant focuses his brief entirely on the question of whether wild deer are, as a matter of law, "property of the state." But this court need not reach that question to resolve this case. Instead, it should affirm the denial of the motion for judgment of acquittal on more mundane grounds—because the state presented sufficient evidence from which a rational trier of fact could infer that defendant committed the crime of criminal mischief. Regardless of whether wild deer are "property of the state," a rational trier of fact could have concluded that the state established the essential elements of criminal mischief beyond a reasonable doubt—that is, he intentionally damaged "property of another." Defendant does not dispute that he damaged the "property of another," *i.e.*, the state-owned decoys. The only question presented by defendant's motion for a judgment of acquittal was thus whether a rational juror could find from the evidence that defendant had the requisite subjective mental state when he damaged the state's property.

The state's evidence was sufficient in that regard, for either of two reasons. First, a rational trier of fact could have found from the evidence that defendant in fact intended to do exactly what he did, *i.e.*, shoot at two decoys, which were property of the state. Second, a rational trier of fact could have

found from the evidence that defendant intended to shoot at live deer, while believing that he had no right to do so. Either finding is enough to prove that defendant acted with the requisite *mens rea*. As a result, this court need not reach the question of the state's interest in wildlife in order to affirm the trial court's denial of the motion for judgment of acquittal.

Even if this court does reach the issue framed by defendant, it should nevertheless conclude that wild deer fall within the definition of "property of another" for purposes of the criminal mischief statute. "Property of another," for purposes of that statute, is "property in which anyone other than the actor has a legal or equitable interest that the actor has no right to defeat or impair[.]" ORS 164.305(2). By its plain terms, that is an exceptionally broad definition; it includes the state's sovereign interest in wildlife. The legislative history confirms that conclusion, because it shows that the legislature intended for the term "property of another" to be construed broadly. The legislature specifically amended the criminal mischief statute to expand the definition of "property of another" from a "proprietary or possessory" interest to any "legal or equitable" interest. Under this court's case law, the state holds its interest in wildlife "in its sovereign capacity in trust for all its citizens." Moreover, the legislature has declared wildlife to be the property of the state, and authorized the state to sue for damages for injury to wildlife. The state's interest in wildlife thus plainly

qualifies as a "legal or equitable interest," and falls within the scope of that broad definition.

ARGUMENT

Notwithstanding defendant's argument that wild deer are not the state's property, this court should affirm defendant's criminal mischief conviction for either of two reasons. First, irrespective of the state's legal interest in wild deer, the state's evidence was sufficient to allow a rational trier of fact to conclude that defendant damaged the state's property, and that he acted with a culpable mental state in doing so. Second, defendant's contention that the deer are not "property of another" is incorrect. For purposes of the criminal mischief statute, the legislature has broadly defined "property of another" to include not simply a proprietary or possessory interest, but *any* "legal or equitable" interest. The state's interest in wild deer falls well within the scope of that broad definition.

A. Irrespective of whether wild deer are property of the state, a rational trier of fact could have found that defendant intended to and did injure "property of another."

The first reason that the trial court correctly denied the motion for a judgment of acquittal is that—irrespective of whether deer are property of the state as a matter of state law—a rational trier of fact could have found that the state proved the essential elements of criminal mischief, including that defendant acted with the requisite intent.

Defendant does not dispute that he in fact aided and abetted his son in damaging of the property of another, two deer decoys belonging to the State of Oregon. The only issue on review of defendant's motion for judgment of acquittal is whether the state's evidence was sufficient to prove that defendant acted with the requisite intent. Defendant contends that he could not be convicted because he *intended* to shoot wild deer, and wild deer, as a matter of law, are not the property of the State of Oregon. But even assuming defendant's legal theory regarding the status of wild deer is correct, the trial court still correctly denied the motion for a judgment of acquittal for either of two reasons. First, as described in more detail below, based on the evidence, the trier of fact was not required to *believe* that defendant thought he was shooting wild deer, and instead could have concluded that defendant intended to do what he did—shoot at two decoys, which were property of the state. Second, even starting from the assumption that defendant *did* believe he was shooting a live deer and not a decoy, a rational trier of fact could nevertheless have found that defendant acted with the requisite criminal intent. Although defendant urges this court to conclude that deer are not property of the state, that *legal* argument, whatever its merits, does not shed any light on his subjective mental state at the time of the offense. Defendant does not claim that he believed that he had the legal right to shoot wild deer, and the evidence demonstrated just the opposite—that defendant and his son believed that they

were shooting at something that they had no right to shoot. Accordingly, irrespective of the nature of the state's legal interest in wild deer, a rational trier of fact could have found from the evidence that defendant damaged the state's property and did so with the required culpable mental state.

1. From the evidence presented, a rational trier of fact could have found that defendant intended to shoot decoys.

A rational trier of fact could have found from the evidence that defendant in fact intended to shoot the decoys that he shot, which are indisputably property of the state. That evidence thus sufficed to support the trial court's denial of defendant's motion for judgment of acquittal.

On review of a trial court's ruling on a motion for a judgment of acquittal, this court determines whether, "view[ing] the evidence in the light most favorable to the state, * * * a rational trier of fact * * * could have found the essential elements of the crime proved beyond a reasonable doubt." *State v. Hall*, 327 Or 568, 570, 966 P2d 208, 209 (1998). In making that determination, this court resolves any conflicts in the evidence in favor of the state and gives the state the benefit of all reasonable inferences that properly may be drawn. In addition, when analyzing the sufficiency of the evidence, this court makes no distinction between direct and circumstantial evidence as to the degree of proof required. *Hall*, 327 Or at 570.

Here, as noted, the only disputed element is defendant's intent. Under the standard of review applicable to denial of a motion for judgment of acquittal, the evidence sufficed to demonstrate the requisite intent. Because intent is "an operation of mind," it is seldom susceptible of direct proof and thus rarely proven by direct evidence. *State v. Rose*, 311 Or 274, 282, 810 P2d 839 (1991). Instead, the state proves a defendant's intent "through objective facts, and from these objective facts an ultimate conclusion is drawn." *Id.*

Here, the evidence from which intent could be inferred included the following. The decoys were damaged by the shots. (Tr 47.) Trooper Bean testified that defendant stopped his vehicle and illuminated the decoys. (Tr 43, 46.) Defendant testified that he concluded that the deer were not real and then drove away. (Tr 145-46.) The jury was not required to believe that defendant came to the conclusion that the decoys were decoys only *after* shooting them; a rational trier of fact could have inferred that defendant came to that conclusion earlier. *See State v. Cunningham*, 320 Or 47, 63-64, 880 P3d 431 (1994) (in evaluating a motion for judgment of acquittal circumstantial evidence is enough and the jury "was not required to accept defendant's version of what happened"). For example, because there was evidence that the decoys were illuminated, and because defendant's son testified that he concluded at some point that the decoys were not real deer, the jurors could reasonably infer that

defendant knew they were decoys when the shooting occurred, and thus in fact intended to shoot decoys.

Although, as defendant stresses, the decoys were intended to be realistic and to fool hunters, a rational trier of fact could nevertheless infer that these decoys did not fool defendant, at least by the time the decoys were illuminated and the shots were fired. A trier of fact could conclude that defendant and his son, frustrated after a fruitless day of hunting, shot at the decoys just for the sake of shooting (as do the many people who shoot at road signs, for example) or even that they determined to engage in some target practice. The denial of the motion for judgment of acquittal should be upheld on that basis.[5]

In making that argument, the state does not impermissibly raise a "new theory" of the case, as defendant suggests. (*Response to Motion to Dismiss* at 2-3). The case on which defendant relies is inapposite. In *State v. Burgess*, 352 Or 499, 287 P3d 1093 (2012), the case was tried on an accomplice liability theory—that defendant aided and abetted another person in an assault with steel-toed boots. *Id.* at 502-03. The state argued, for the first time on appeal,

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[5] The information initially alleged that defendant "did unlawfully and intentionally damage a wildlife decoy the property of the State of Oregon, by shooting the decoy in the head." (ER 2). The charge was amended to delete the references to the decoy, so that defendant was charged as follows: "defendant did unlawfully and intentionally damage property of the State of Oregon." (Tr 101- 03; ER 2). Regardless of the change in wording, the jury still could have found that defendant intended to shoot decoys.

that the evidence supported a conviction based on a principal liability theory, involving use of a different weapon. This court concluded that it would be "fundamentally unfair" to allow the state to rely on that theory on appeal, because the new theory differed both factually and legally from the theory pursued at trial, and it was "highly likely" that defendant could have developed the record differently had the state relied on principal liability rather than accomplice liability at trial. *Id.* at 505-07. Accordingly, this court declined to uphold the conviction on a "right for the wrong reason" principle. *Id*. at 506-08.

This case presents no such fairness concern. At issue in *Burgess* was the difference between accomplice liability and principal liability, which involve different elements of proof, *State v. Phillips*, 354 Or 598, 605-06, 317 P3d 236 (2013) (elements necessary to prove accomplice liability ordinarily will be separate and in addition to the elements necessary to prove principal's liability). Here, by contrast, the difference between the state's emphasis at trial and this argument on appeal lies not in what happened, or who did what. Rather, the difference lies in the state's point about what a trier of fact could have concluded about defendant's *belief* at the time of the actions, belief which can be inferred from the actions themselves. Defendant does not identify a way in which the record would have been developed differently had the state argued below that the evidence supported a finding that defendant and his son intended

to shoot decoys rather than live deer. Indeed, as discussed above, in his motion for judgment of acquittal, defendant argued that no rational juror could find that defendant intended to shoot decoys. (*Motion for Judgment of Acquittal*, TCF 27). In addition, defendant and his son testified that they believed the decoys were live deer at the time of the shooting. (Tr 160) (describing how defendant realized the "deer" might be decoys); (Tr 146-47, 153) (son's testimony about believing the decoys were real deer, and realizing the deer "wasn't real"). The unfairness concern presented in *Burgess* is simply not present here.

Defendant also inaccurately assumes that the state's position at trial was inconsistent with its argument now. In support of his argument, defendant cites three aspects of the state's presentation at trial that he contends prevent the state from contending now that the jury could have found defendant intended to shoot a decoy. None of them prevents the state's argument here.

First, defendant relies on the prosecutor's opening statement, in which he stated that "the vehicle illuminated these decoys, the decoys that were there were two what appeared to be bucks, deer." (Tr 32.) But that statement is a general description of the decoys, and does not amount to a stipulation of the state's theory of the case—nor does it constitute a stipulation regarding whether defendant believed the decoys to be deer.

Second, defendant contends that the state's theory had to be that defendant intended to shoot deer, to be consistent with the charge of unlawful

hunting. However, if defendant were correct, then the state could not have simultaneously charged defendant with "knowingly act[ing] in a manner toward a wildlife decoy consistent with the unlawful taking of wildlife," Count 1 (ER 1.) Defendant does not contend that those charges were impermissibly inconsistent. Further, the charge of unlawful hunting does not necessarily require that shots be fired at something in particular, but can be based on other activities.

Third, defendant contends that the state cannot now argue that a jury could find that he intended to shoot decoys, because of a disagreement between the defendant and the state at trial. (*Response to Motion to Dismiss* at 5.) At trial defendant contended that the state was required to prove that defendant knew that what he shot at was a decoy, and the state disagreed. That remains the state's position. The issue is not whether the state *was required* to prove that defendant knew that he and his son were shooting at decoys. Instead, the issue is what a rational trier of fact *could have found*. The evidence supported more than one possible finding, including a finding that defendant intended to shoot decoys. For that reason, this court should affirm the trial court's denial of the motion for judgment of acquittal.

2. Even if a rational trier of fact was required to find that defendant intended to shoot live deer, and even if deer are not property of the state, a rational trier of fact could nevertheless have found that defendant acted with the requisite intent.

Even if a rational trier of fact was required to find that defendant intended to shoot live deer rather than decoys, the trial court still correctly denied the motion for a judgment of acquittal. In arguing to the contrary, defendant urges this court to hold that as a matter of law deer are not the property of the state. As explained below, however, the legal status of wild deer has no bearing on whether defendant had the requisite culpable mental state for the crime of criminal mischief.

The state was required to prove that defendant acted "with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state." ORS 161.095; *see also* ORS 161.115(1) ("If a statute defining an offense prescribes a culpable mental state but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the offense that necessarily requires a culpable mental state").

The criminal mischief statute prescribes the culpable mental state that must be proved: "intentionally." ORS 164.365(1)(b). To act "intentionally" is to act "with a conscious objective to cause the result or to engage in the conduct so described"—here, to damage property. ORS 161.085(7). The second part of

the criminal mischief statute describes the act that the state must prove: "damag[ing] or destroy[ing] property of another [.]" ORS 164.365(1)(a). Thus, to be guilty of criminal mischief, a person must have the conscious objective to damage another's property (a culpable mental state) while damaging or destroying that property (an act). The plain text of the criminal mischief statute does not link the mental state—intentionally—with the identification of a specific owner of the property.

To survive a motion for judgment of acquittal, the state was required to put forward enough evidence to allow a reasonable trier of fact to conclude that that defendant intended to damage property of another—in other words, property that did not belong to him and that he believed he had no right to damage. The state was not required to prove whose property in particular defendant intended to damage. *See State v. Hull*, 286 Or 511, 595 P2d 1240 (1979) (identity of victim of theft not material element of second-degree theft); *cf. State v. Rainoldi*, 351 Or 486, 268 P2d 568 (2011) (state not required to prove culpable mental state as to defendant's status as a felon to prove intent with respect to felon in possession of a firearm).

The state's evidence in this case easily met that burden. As noted above, defendant fled the scene when ordered to stop and specifically acknowledged that he knew what he did was wrong. During his conversations with the troopers, defendant apologized for his actions and acknowledged that "he knew

that it was illegal to be—and what they had done, yes." (Tr 62.) Regardless of what exactly defendant believed he was shooting, and regardless of who as an abstract legal matter owns the thing that defendant believed he was shooting, the evidence sufficed to support an inference that defendant intentionally shot something that he knew was not his, and that he believed he had no right to shoot. That is all the state needed to prove. Accordingly, a rational trier of fact was entitled to find that the culpable mental state element was satisfied, regardless whether wild deer are as a matter of law "property of the state."

In arguing to the contrary, defendant argues that he intended to shoot live deer and, as a legal matter, deer are not the state's property. But that argument is beside the point. Defendant admitted that he committed the *actus reus* by damaging the state's property. Therefore, the only issue before the court on defendant's motion for a judgment of acquittal was whether defendant had a culpable mental state when he committed the act. If defendant *believed* he was shooting at deer that were not his property and that he had no right to shoot, then he had the requisite *mens rea*, regardless of the legal status of deer. Defendant does not claim to have had any particular beliefs regarding the legal status of deer, and the state presented evidence that he admitted that the shooting was illegal. Based on the evidence presented, a rational trier of fact could find that defendant intended to shoot at something he knew he was not supposed to shoot at. That is true even if the trier of fact believed that

defendant intended to shoot a live deer and not a decoy—the factfinder could still conclude that the defendant intended to damage the property of another. It follows that the trial court correctly denied the motion for a judgment of acquittal.

B. The state's interest in wildlife is protected by the criminal mischief statute.

In the event that this court decides that it must determine whether wild deer are "property of another" for purposes of the criminal mischief statute, this court should answer that question in the affirmative. Whether wild deer are "property of another" is a question of legislative intent, which this court determines by applying the familiar principles set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). As explained in more detail below, the plain text and legislative history of the definition of "property of another" in the criminal mischief statute demonstrate that the legislature intended "property of another" to be broadly construed to mean not simply a proprietary or possessory interest, but any legal or equitable interest. The state's interest in wild deer falls easily within the scope of that broad definition.

1. The plain text and legislative history of the criminal mischief statute definition of "property of another" demonstrate that the legislature intended the statute to be broadly construed to prohibit intentionally damaging property in which any other person has any legally protected and enforceable interest.

The text of the criminal mischief statute provides:

> A person commits the crime of criminal mischief in the second degree if:
>
> * * * * *
>
> (b) Having no right to do so nor reasonable ground to believe that the person has such right, the person intentionally damages property of another * * *.

ORS 164.354(1).

Accordingly, whether that statute includes wildlife in its coverage hinges on the meaning of the term "property of another." For purposes of the criminal mischief statute, that term is defined as "property in which anyone other than the actor has a legal or equitable interest that the actor has no right to defeat or impair * * *." ORS 164.305. Thus the question presented here is whether the state's interest in wild deer is a "legal or equitable interest" that defendant had "no right to defeat or impair."

The term "legal or equitable interest" is undefined in the statute. "Legal interest" is a legal term of art meaning "[a]n interest that has its origin in the principles, standards, and rules developed by courts of law as opposed to courts of chancery. 2. An interest recognized by law, such as legal title." *Black's Law Dictionary* 886 (9th Ed 2009). An "equitable interest" is defined as "[a]n

interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary." *Id*. at 885. *See also Webster's Third Int'l Dictionary* 769 (1993), defining "equitable interest" as "an interest in or with respect to property of the sort recognized by a court of equity (as an interest arising because of fraud)." *Webster's* does not include a definition of "legal interest." But in that dictionary, "interest" means;

> 1 a: right, title or legal share in something (what exactly is your – in this affair) * * * participation in advantage, profit and responsibility (half —in a hardware business) (offered to buy out his —in the company): STAKE, CLAIM b: something in which one has a share of ownership or control: BUSINESS (has —-s all over the world)"

Id. at 1178.

And definitions of "legal" include "recognized or made effective by a court of law as distinguished from equity—compare EQUITABLE;" and "arising by operation of law as distinguished from that which arises by agreement or act of the parties." *Id*. at 1290. Together, those definitions indicate that the phrase "legal or equitable interest" describes an interest that has its origin in the principles, standards, and rules developed by courts of law, or an interest of the sort recognized by a court of equity. In sum, the plain text of the criminal mischief statute encompasses an expansive range of property interests—any interest that a court will recognize and enforce.

The legislative history of the expansion of the criminal mischief statute confirms that the legislature intended for the scope of the statute to be broad, and to include any property in which someone other than the defendant has any legally protected interest. At one time the criminal mischief statute protected only "proprietary or possessory" interests in property, but the legislature broadened that definition. The current definition of "property of another" was enacted in 1977. 1977 Or Laws Ch. 640. The original bill was introduced at the request of "the Oregon Fire Services" and was described as expanding the crime of arson. HB 2384 (1977). The bill was intended, at least in part, to facilitate prosecution for arson and insurance fraud, which presented challenges when a person burned his own house or car in order to collect insurance proceeds. Such cases were problematic because a lender might hold an interest that did not qualify as "property of another" under the statutory definition requiring that someone other than the actor have a "possessory or proprietary interest." *Minutes, House Committee on Judiciary,* Mar. 15, 1977 at 1-2, testimony of John Farber and James Ayers*; Minutes, House Committee on Judiciary,* March 31, 1977 at 5. There was also concern about the need to address situations where a husband and wife both have an equitable interest in a piece of property. *Minutes, House Committee on Judiciary,* May 23, 1977 at 18; *House Committee on Judiciary,* May 24, 1977 at 8-9. *See also Minutes, Senate Committee on Judiciary*, June 20, 1977 at 10-11 (discussing need to

address security interests and tenancies by the entirety); *see also* House Floor Debate, HB 2384, June 7, 1977 (statement of Rep. Bugas) (noting, as an example of the expanded definition, that "even though I would choose to burn my own home it could be arson if indeed I still owed on that home to the bank or to someone other person, or if I was a co-owner of it with my wife"); Senate Floor Debate, HB 2384, July 4, 1977, (statement of Sen. Brown) (describing bill as expanding definition to include equitable title of purchaser through a land sale contract). Although much of the committee discussion focused on the crime of arson, the committee was aware that the change in definition applied to the criminal mischief statute. *Minutes, House Committee on Judiciary*, May 23, 1977 at 18 (Comment of Rep Lombard; stressing that the change in definition applies to criminal mischief as well as arson).

Defendant contends that the legislative history precludes a construction of "property of another" that includes the state's interest in wildlife. While the state does not disagree significantly with defendant's general discussion of the legislative history, the state disagrees with defendant's reliance on that history to limit the meaning of "legal or equitable interest." (Pet Br 38-40.)[6] Although the impetus for the 1977 revision was a desire to expand the types of property

[6] Defendant describes the debate as centering on personal property. (Pet Br 40.) However, as noted above, the legislature discussed real property as well.

covered specifically in the case of arson, the legislature did not limit the amendment to such cases. The legislature did not amend only the arson statute; nor did the legislature create a specific exception to the "possessory or proprietary" category that would apply to specifically protect a mortgagee's interest or other similar interest. Instead, the legislature adopted a broad definition of "property of another."

Further, even if defendant were correct about the legislature's goal, the court cannot interpret the statute inconsistently with its text. Unless the limitation that defendant urges is actually reflected in the text, defendant cannot rely on it. *See Gaines*, 346 Or at 172 (a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it). As this court has emphasized on multiple occasions, even where the legislature drafts a statute to address a specific problem, the legislature often chooses broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention, *e.g. State v. Walker*, 356 Or 4, 22, __P3d __(2014) (though legislative history suggested certain objective, "textually the statute is not so limited"); *Hamilton v. Paynter*, 342 Or 48, 55, 149 P3d 131 (2006) ("Statutes ordinarily are drafted in order in order to address some known or identifiable problem, but the chosen solution may not always be narrowly confined to the precise problem * * * When the express terms of a statute indicate such broader coverage, it is not necessary to show

that this was its conscious purpose," *quoting South Beach Marina, Inc. v. Dep't of Rev.*, 301 Or 524, 531, 724 P2d 788 (1986)).

Thus, regardless of the original impetus for the change here, the history nevertheless demonstrates that the legislature intended to *expand* the kinds of property interests for purposes of both the criminal mischief and arson statutes, and the legislature chose to do so with broad language. Moreover, as explained below, when the 1977 legislature broadened the definition of "property of another" from "possessory or proprietary" to "legal or equitable interest," it already considered wildlife to be "the property of" the state. ORS 498.002. And more specifically, the legislature viewed wildlife as the kind of property for which the state is entitled to "institute suit" for damages.[7] Defendant has

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[7] ORS 498.002, as adopted in 1973, provided:

> "Wildlife is the property of the state. No person shall angle for, hunt trap or possess, or assist another in angling for, taking, hunting, trapping or possessing any wildlife in violation of the wildlife laws or of any rule promulgated pursuant thereto."

The wildlife statute in effect when the "property of another" definition was enacted was the 1973 version of ORS 496.705, which provided, in part:

> The commission may institute suit for the recovery of damages for the knowing unlawful killing of any of the wildlife referred to in subsection (2) of this section that are the property of the state.

Former ORS 406.705 (1973).

cited no history, and the state is aware of none, indicating that—despite the broad language of the amendment—the legislature intended to limit the kinds of interests to interests in real property, or to exclude the state's interest in wildlife.

2. Wild deer fall within the scope of the criminal mischief statute because the state has a legally protected and enforceable property interest in wild deer.

As just explained, the criminal mischief statute protects any property in which a person other than the defendant has a legally protected property interest. Both this court and the legislature have long recognized that the state has a cognizable and enforceable interest in its wildlife, including wild deer. Therefore, wild deer are "property of another" for purposes of the criminal mischief statute.

Oregon courts have long described wildlife as held by the state in its sovereign capacity in trust for all the state's citizens. In *State v. Hume*, 52 Or 1, 95 P 808 (1908), the defendant contended that the state could not require him to have a license to can salmon. This court disagreed, concluding that the state held migratory fish in the state's "sovereign capacity in trust for all its citizens," 52 Or at 5. An incident of the state's sovereign ownership in migratory fish is the ability to enact laws to protect the species from injury and extinction, and they could not lawfully be captured without the permission of the state. *Id*. at 5-6. This court followed that principle in later cases, *e.g.*, *State v. Pulos*, 64 Or

92, 95, 129 P 128 (1913) (enforcing duck hunting regulation prohibiting possession of game during a closed season; stating that the state holds title to wild game, and that "no person has an absolute property right in game or fish while in a state of nature and at large," and that the taking of wild game is a privilege that may be restricted by the state); *Monroe v. Withycombe*, 84 Or 328, 334-35, 165 P 227 (1917) (upholding state regulation of gillnet fishing, stating that wildlife "are classified as *ferae naturae*, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common"); *Fields v. Wilson*, 186 Or 491, 498-99, 207 P2d 153 (1949) (citing *Monroe* to note that, because of the state's sovereign interest, beaver cannot be captured without permission of the state); *Anthony v. Veatch*, 189 Or 462, 474, 220 P2d 493 (1950) (emphasizing the right of the state to regulate or prohibit capture, "either in the exercise of its police power, or in its sovereign capacity in trust for the people.") [8]

The case law described above shows that, although the state does not own wildlife in a proprietary sense, the state holds its interest in wildlife as a trustee in its sovereign capacity for the benefit of and in trust for its people in

[8] Those cases demonstrate that defendant's argument below—that *no one* owns wild animals until they are reduced to possession—was long ago rejected by Oregon appellate courts.

common. That interest is a "legal or equitable interest" for purposes of the criminal mischief statute, ORS 164.305(2). A trustee holds a legal interest in a trust. *See generally Restatement of Trusts, Third* (2003) § 2, comment d.[9] The state's interest in wildlife as described in the caselaw—held in trust for the people—is a "legal interest," because it is an interest that "has its origins in the principles, standards, and rules developed by courts of law as opposed to courts of chancery."[10]

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[9] That comment provides: "Although trust beneficiaries have equitable title, a trustee's title to trust property may be either legal or equitable. Although it is usually true (and is, unfortunately, often stated without qualification in cases and texts) that the trustee has legal title, in some instances the trustee will hold only an equitable title.

* * * * *

The distinction between legal and equitable interests is due to the historical circumstance that these two types of interest were originally enforced in different tribunals and by different forms of procedure."

Alternatively, as the Restatement of Trusts indicates, such an interest may be considered equitable. Either kind of interest meets the statutory definition.

[10] Further, as the Court of Appeals explained, the common law sovereign interest in wildlife was historically enforced in English courts of law, *e.g. Bowlston v. Hardy*, (1597) 78 Eng Rep 794(KB) 794 (enforcing Queen's interest in coneys). *Dickerson*, 260 Or App at 86.

3. The legislature has recognized the state's interest in wildlife.

Consistently with judicial recognition of the state's sovereign interest in wildlife, the Oregon legislature has long declared and implemented its understanding that wildlife is "property of the state":

> "Wildlife is the property of the state. No person shall angle for, take, hunt, trap or possess, or assist another in angling for, taking hunting, trapping or possessing any wildlife in violation of the wildlife laws or of any rule promulgated pursuant thereto." [11]

ORS 498.002.

Significantly, the legislature also has long provided that the state can be compensated for injury through civil suits for "damages": "The State Fish and Wildlife Commission may institute *suit for the recovery of damages* for the unlawful taking or killing of any of the wildlife referred to in subsection (2) of

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[11] "Wildlife" is currently defined for purposes of the wildlife laws (chapters 496, 497, 498 and 501) as follows: "Wildlife" means fish, shellfish, amphibians and reptiles, feral swine as defined by State Department of Agriculture rule, wild birds as defined by commission rule and other wild mammals as defined by commission rule." ORS 496.004(19). See OAR 635-057-000 (defining "wild mammal as all mammals not excluded in the rule; deer are not excluded). That statute was amended in 2007 following this court's decision in *State v. Couch*, 341 Or 610, 147 P3d 322 (2005). At that time, the definition of "wildlife'' provided that "wildlife" means "fish, shellfish, wild birds, amphibians and reptiles, feral swine * * *and other wild mammals."

When ORS 164.302 was amended in 1977, "wildlife" meant: "game fish, wild mammals except whales and porpoises, birds, amphibians and reptiles." ORS 496.006(3)(1971).

Defendant does not contend that wild deer are not "wildlife" within the current definition.

this section that are the property of the state." ORS 496.705 (emphasis added). The phrase "suit for the recovery of damages" reflects a "legal interest." "Damages" means "money claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Black's Law Dictionary* at 445. Similarly, *Webster's* defines "damages" as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for violation of a legal right (bring a suit for —)." *Webster's* at 571. A "suit," in turn, is "[a]ny proceeding by a party or parties against another in a court of law." *Black's Law Dictionary* at 1572. That statute demonstrates that the legislature has treated the state's interest in wildlife as a "legal interest"—that is, an interest that may be injured, and for which the state may seek compensation in a court of law.

Other aspects of the wildlife code demonstrate the significance and nature of the state's interest in wildlife. At least since the reorganization of the wildlife code in 1973, the legislature has required landowners to obtain permits to hunt on their own land. ORS 496.146(4). *See also* ORS 496.012 (requiring a permit to take wildlife causing damage on that person's land); ORS 496.012 (stating wildlife policy and requiring the Fish and Wildlife Commission to "represent the public interest of the State of Oregon").

In sum, the legislature has understood the state's interest in wildlife to constitute a significant interest, one that could be injured or damaged. Further,

the legislature has understood the state's interest to be one that could be protected through a suit for damages. Those laws demonstrate that the state has a legal interest in wildlife that is protected by the criminal mischief statute.

3. The state's interest in wildlife arises from stewardship of a resource and is not "merely regulatory."

Defendant contends generally that the judicial understanding of the state's interest in wildlife has changed over time and now reflects only a "police power" or "regulatory" interest, which cannot therefore qualify as a property interest protected by the criminal mischief statute. Defendant's argument unduly minimizes the state's interest in wildlife and ignores the definition of "property of another." To be sure, as defendant points out, judicial understanding of the state's relationship to wildlife has evolved. However, as discussed below, that evolution does not alter the conclusion that the statutory definition of "property of another" applies.

The origins of the holdings expressed in the early Oregon cases can be traced at least to English common law and the idea that animals *ferae naturae* belonged to the King. William Blackstone, 2 *Commentaries on the Laws of England* 391-92; *see generally, State v. Couch*, 196 Or App 665, 673-677, 103 P3d 671 (2004), *aff'd on other grounds*, 341 Or 610, 147 P3d 322 (2006). The United States Supreme Court has explained in more recent years that the concept of state "ownership" of wildlife is a "legal fiction," *Hughes v.*

Oklahoma, 441 U.S. 322, 331-35, 99 S Ct. 1727, 60 L.Ed.250 (1979), *Toomer v. Whitsell*, 334 U.S. 385, 68 S Ct 1156, 92 LEd. 1460 (1948) ("The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'") Accordingly, the more modern case law describes the state's interest less in terms of the "king's prerogative" as in *The Case of Swans* (1592), 77 Eng. Rep. 435 (KB) 439, and more in the terms reflected in the *Hume*, *Monroe* and *Anthony v. Veatch* decisions discussed above, *i.e*., "sovereign capacity for the benefit of and in trust for its people in common." *See generally*, Dale B. Goble, *Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 Envtl L Rev 807 (2005); (discussing evolution of law from the concept that animals *ferae naturae* were not owned by anybody until reduced to possession, to the concept of the "king's prerogative" in wildlife to American views of common ownership in trust); *see also* Michael C. Blumm and Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl L 673, 699-706 (2005) (describing Supreme Court's limitation on the concept of "sovereign ownership"). But this court has not recently invoked a concept of state ownership in such terms. Indeed, this court specifically recognized long ago that the state holds wildlife "not as a proprietor," *Monroe*, 84 Or at 334-35.

At the same time that the courts have recognized state "ownership" of wildlife as a "legal fiction," this court and the legislature have described state regulation of wildlife in terms that extend beyond mere police power regulation of conduct, but rather involves more—the stewardship of a resource. Indeed, in describing state regulation of wildlife, this court has referenced the state's police power as an authority distinct from the state's sovereign interest in wildlife, *Anthony v. Veatch*, 189 Or at 498 (describing state's authority to regulate *either* in the exercise of its police power, *or* in its sovereign capacity in trust for the people" (emphasis added)). Thus the state's sovereign interest in wildlife has not been entirely replaced by police power regulatory authority, as defendant appears to contend.

In any event, even though "state ownership" of wildlife in a traditional sense has properly been called a legal fiction, that fact does not resolve the statutory construction issue presented by the criminal mischief statute. The judicial recognition of state "ownership" as a legal fiction means only that the state does not have a *proprietary or possessory* interest in wildlife. However, the question presented under the criminal mischief statute is whether the state has a "legal or equitable interest." As described above, the case law demonstrates that the state does have such an interest in wildlife that the law protects. And further, that common law understanding is reflected in the legislature's declaration of and protection of the state's interest in wildlife. In

sum, Oregon's courts and the legislature have recognized for approximately a century the state's sovereign interest in wildlife as a "legal interest." Accordingly, wildlife are "property of another"—the state—for purposes of the crime of criminal mischief.

CONCLUSION

This court should dismiss the petition for review as improvidently granted. Alternatively, this court should affirm the Court of Appeals decision and the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 23, 2014, 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 Peter Gartlan and Erik M. Blumenthal, attorneys for relator, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,896 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(2)(b).

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