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 Case No. MI092911 CA A147467 SC S062108

PETITIONER'S REPLY BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Deschutes County
Honorable Barbara A. Haslinger, Judge

Opinion Filed: December 18, 2013
Author of Opinion: Duncan, Judge
Concurring Judge(s): Schuman, Presiding Judge, and Nakamoto, Judge

PETER GARTLAN #870467
Chief Defender
ERIK BLUMENTHAL #073240
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Erik.Blumenthal@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
STEPHANIE STRIFFLER #824053
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
stephanie.striffler@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITIONER'S REPLY BRIEF ON THE MERITS

Summary of Argument

The state's primary arguments are (1) that regardless of whether wildlife are "property of another," this court may sustain defendant's conviction because there was evidence to support a theory that defendant aided his son in shooting what defendant knew to be a decoy; (2) that even if defendant believed that he was aiding and abetting his son in shooting a deer, criminal mischief does not require the defendant to know the specific owner of "property of another"; and (3) that the state has a legal or equitable interest in wildlife that is separate from its regulatory authority over wildlife, and cognizable under the criminal mischief statute.

The state's first argument is largely a reiteration of the arguments it made in its motion to dismiss review. Defendant addressed most of those arguments in his response to the state's motion, which is attached at ER 1-10. This reply brief responds to additional arguments that the state adds in its brief.

At trial, the state charged and tried the case under the legal and factual theory that defendant thought the decoys were deer. For the first time on review, the state argues that the jury could have found that defendant knew that the decoys were not deer. The state's theory on review is directly contrary to its legal position at trial, where it (1) argued that it did not have to prove that defendant knew that the decoys were decoys; (2) amended the charging

instrument over defendant's objection so that it no longer described defendant as committing criminal mischief by intentionally damaging a decoy; (3) did not support defendant's request for a jury instruction informing the jury that it needed to find that defendant intended to damage a decoy; and (4) argued to the jury that defendant thought that the decoys were deer. Had the state argued at trial what it argues on review, the record could have developed differently because the jury very likely would have acquitted defendant on one, if not all, of his charges.

The state's second argument takes down an irrelevant straw man of the state's creation. Defendant does contend that criminal mischief requires a defendant to know the identity of the owner of the property that the defendant damages. Rather, accomplice liability, and the criminal mischief statute, require defendant to act with an awareness that that the principal is damaging "property of another."

Finally, the state's third argument addresses the merits of the issue on review. Defendant's brief on the merits addresses the points raised by the state. However, defendant replies to the state's argument that this court's use of terms such as "sovereign interest" or "police power" in describing the state's authority over animals means that the state has something other than a regulatory authority over animals.

Each section heading below identifies a specific state argument and the text refutes it.

Argument

I. "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 of whether deer are property of the state." State's BOM at 6.

In its respondent's brief on appeal, the state characterized defendant as arguing "that the state had to prove that defendant knew who owned the property that he intended to damage." State's Resp Br at 12. The state then rejoined that "[t]he plain text of the [criminal mischief statute] does not link the mental state—intentionally —with the identification of a specific owner of the property." State's Resp Br at 10.

The Court of Appeals did not address the state's argument because defendant did not—and does not—contend that to prove criminal mischief, the state must show that defendant knew the owner of the "property of another." Defendant contends only that the state must show that a defendant aided and abetted the principal in "intentionally damaging the property of another." In so doing, the state must show that the defendant had the specific intent to damage "property of another." The specific "another" to whom the "property of another" belongs is irrelevant.

II. "Defendant's son testified that he concluded at some point that the decoys were not deer." State's BOM at 13.

The state alludes to defendant's son's (Kevin Espy) testimony without a citation to the record. Espy's testimony is clear that the point at which he realized the decoys were not deer was *after* they fired at them:

> "[DEFENSE COUNSEL]: *After you'd taken those two shots*, what happened then?
>
> "[ESPY]: Well, we realized that it wasn't real, and we started -- just drove off."

Tr 146 (emphasis added).

III. "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 * * *. The denial of the motion for judgment of acquittal should be sustained upheld on that basis. In making that argument, the state does not impermissibly raise "a new theory of the case[.]" State's BOM at 14.

Neither on appeal nor at trial did the state advance its primary argument on review: that defendant intended to aid and abet his son in damaging a decoy.

During its opening statement, arguments on defendant's motions for judgment of acquittal, and closing arguments, the state described its theory as being that defendant and his son thought that the decoys were deer. ER 4-5, 7. The trial court denied all of defendant's arguments that were predicated upon the state having elected to proceed under a theory that required it prove that the decoys were deer. ER 5-7. Over the defendant's objection, the state amended the criminal mischief charge so that it would not be worded in a way that

suggested that it needed to show that defendant knew the decoys were not deer. Tr 195-97, ER 6. The trial court denied defendant's request for a special jury instruction requiring the state to prove that defendant thought the decoy were deer, and defendant excepted after the trial court refused to so instruct the jury. Tr 175, 230; ER 6.

On appeal, the state did not argue that the jury could have found that defendant intended to damage decoys. It raises this alternative basis for affirmance for the first time on review. For that reason alone, this court should decline to address the state's argument. *See State v. Burgess*, 352 Or 499, 508, 287 P3d 1093, 1098 (2012) ("It has long been the rule in this court that we will not address arguments that were not raised in the Court of Appeals.").

IV. "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." State's BOM at 15-16.

As defendant explained in his response to the state's motion, the record would have developed differently if the state had advanced an argument that defendant knew the decoys were not deer. ER 8-9. If the state tried to convince the jury to find defendant guilty because defendant knew the decoys were not deer the defendant would have had the opportunity to defend against that theory—an opportunity for which defendant vociferously and unsuccessfully fought. The trial court probably would not have amended the charging

instrument and may have given defendant's proposed instruction that the state needed to show that defendant knew the decoys were decoys. In such a scenario, the jury, like the prosecutor, defense attorney, and court in this case, may have believed that the decoys had fooled defendant. If so, they would have rejected the state's proposed theory. That would have led to an acquittal on at least the unlawful hunting charge, and perhaps all the charges. ER 9. It is hard to imagine a more different way for the record to develop than for the defendant to be acquitted on all charges.

V. "[I]f 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[.]" State's BOM at 17.

Defendant argued that the court should acquit him of Count 1 because the state failed to prove that defendant knew the decoys were decoys. The state responded, "The State doesn't agree that he has to know that it is a wildlife decoy[.]" Tr 84; ER 5. The trial court agreed with the state. Tr 85. It concluded that defendant's argument, and now, the state's position on review, was "an absurd way to read the statute." Tr 85. The prosecutor and the state were correct: it is absurd to interpret a statute that has the manifest purpose of using decoys to deceive hunters as requiring that the hunters know that they are being deceived.

VI. "The charge of unlawful hunting does not necessarily require that shots be fired at something in particular, but can be based on other activities." State's BOM at 17.

Defendant readily accepts that a person could be convicted of unlawful hunting based on activities besides shooting. However, the state's theory was that defendant committed unlawful hunting (Count 2) by aiding and abetting his son in shooting at "what they believe are deer"; as the prosecutor neatly summarized in his closing argument to the jury:

> "[PROSECUTOR:] What is [defendant] doing that's consistent with the Unlawful Taking of Wildlife?
>
> "He's positioning that vehicle to get the light on the decoy, to allow Espey to hunt after hours and shoot what they believe are deer. That's what the defendant's doing."

Tr 205.

The prosecutor made a similar argument to the court in response to defendant's motion for judgment of acquittal on Count 2. The prosecutor argued that "they're hunting deer. I mean, that's the circumstantial evidence in this case." Tr 95; ER 5-6.

VII. "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*." State's BOM at 17 (emphasis in original).

Defendant does not dispute that this court reviews sufficiency of evidence to evaluate what a rational trier of fact could have found. But that is an incomplete description of the standard of review. This court reviews the

sufficiency of the evidence under the theory by which the state charged and tried the case. *State v. Schoen*, 348 Or 207, 211, 228 P3d 1207 (2010). It is "fundamentally unfair" for a court "to sustain [a] defendant's conviction on a separate factual and legal theory that has been proffered by the state for the first time on appeal." *Burgess*, 352 Or at 504.

The state goes to great lengths to argue that defendant "inaccurately assumes that the state's position at trial was inconsistent with its argument now." State's BOM at 16. As explained here and in defendant's response to the state's motion to dismiss, the state's position at trial and on review are not merely inconsistent, they are in direct conflict. ER 8-9.

VIII. "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." State's BOM at 19.

Unlike the state's arguments discussed in the preceding sections, it raised this argument before the Court of Appeals. The problem is that the state's argument only rebuts a straw man argument of the state's creation. Defendant takes no issue with the proposition that criminal mischief does not require a defendant to know the specific owner of "property of another." Defendant does not contend that he needed to know the specific owner of the damaged property, but that he needed to know that the object of his damage was "property of another."

Because the state proceeded under an accomplice theory of liability, it needed to establish that defendant had the specific intent "to promote or facilitate the commission of *the* crime" committed by the principal. *State v. Lopez-Minjarez*, 350 Or 576, 583, 260 P3d 439 (2011) (quoting ORS 161.155) (emphasis in *Lopez-Minjarez*). That is, the state needed to prove that defendant had the specific intent to promote or facilitate damage to the property of another. Defendant lacked that specific intent because it is a legal impossibility to damage property of another by shooting a wild deer.

IX. "During his conversations with the troopers, defendant apologized for his action and acknowledged that 'he knew that it was illegal to be—and what they had done, yes.'" State's BOM at 20.

Defendant did not apologize for committing criminal mischief. Defendant does not contest on review that what he did violated the provisions of the wildlife code for which the defendant was convicted in Counts 1 and 2.

X. "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." State's BOM at 20 (emphasis in original).

The criminal mischief statute does not define that offense in terms of intentionally damaging "property" that is not one's own. It defines criminal mischief as intentionally damaging "property of another," a legal term of art. ORS 161.354(1)(b). A person cannot intend to damage "property of another" by shooting at a deer if a deer is not "property of another." And, as explained in petitioner's brief on the merits, a deer is not "property of another" because the

state's sovereign interest in wildlife is regulatory; it is not a legal or equitable interest in property as the legislature intended "property of another" to mean in the context of criminal mischief.

XI. "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." State's BOM at 35 (discussing *Anthony v. Veatch*, 189 Or 462, 498, 220 P2d 493 (1950)).

Anthony correctly observes that older cases from this court have described the state's relationship to wildlife as having origins in concepts of state police power or common law concepts of property. *Id*. at 498. However, the state neglects to mention that *Veatch* recognized that those concepts were simply ways to describe the state's power to "regulate" animals.

> "The right of the state, either in the exercise of its police power, or in its sovereign capacity in trust for its people, to regulate and even to prohibit the capture of fish in navigable waters within its borders, has been asserted by this court, and is sustained by the weight of authority."

Id. at 498.

Older decisions that combined proprietary aspects of the doctrine of *ferae naturae* with "police power" must be viewed in light of the legal landscape in which courts made them. By tying the state's regulatory interest in animals to "police powers" and "property," courts could uphold critical regulatory wildlife protections that otherwise might have been invalidated under the prevalent economic substantive due process concerns articulated in *Lochner v. New York*,

198 US 45, 25 S Ct 539, 49 L Ed 937 (1905). Goble and Freyfogle, *Wildlife Law*, ch 5, § 1, 387 (2002); *see also, e.g., Portland Fish Co. v. Benson*, 51 Or 147, 108 P 122 (1910) (illustrating principle).

The legislature enacted ORS 497.005(1) with the 1973 Wildlife Code. That code marked a major revision of Oregon's wildlife laws in which the legislature sought to create a robust "regulatory scheme." *State v. Couch*, 341 Or 610, 622, 147 P3d 322 (2006). It is completely consistent with *Veatch*, with the purposes of the Wildlife Code, with the decisions of this court, and with the decisions of the United States Supreme Court, among others, to conclude that whatever term one uses to describe the state's relationship with wildlife, the state exercises a regulatory authority *over* wildlife by virtue of its sovereignty. It does not have legal or equitable property rights *in* wildlife. What was true at common law is still true today: a person does not commit general property crimes by unlawfully hunting wildlife. *See* Defendant's BOM at 45-46 (explaining that under common law, "larceny cannot be committed of things, that are *ferae naturae*" (quoting Sir Matthew Hale, I *Pleas of the Crown* 511 (1736)).

CONCLUSION

For the reasons expressed here and in defendant's brief on the merits, this court should rejects the state's arguments, including its proposed alternative basis for affirmance, reverse the opinion Court of Appeals, and reverse defendant's conviction for second-degree criminal mischief.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

ERIK BLUMENTHAL OSB #073240
DEPUTY PUBLIC DEFENDER
Erik.Blumenthal@opds.state.or.us

Attorneys for Defendant-Appellant
Lawrence Ben Allen Dickerson

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

Brief length

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 2,771 words.

Type size

I 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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 3, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Respondent on Review.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

ERIK BLUMENTHAL OSB #073240
DEPUTY PUBLIC DEFENDER
Erik.Blumenthal@opds.state.or.us

Attorneys for Petitioner on Review
Lawrence Ben Allen Dickerson