FILED January 13, 2017 02:29 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ROBERT L. BRANCH, aka Robert Lee Branch, Jr., aka Rueben Netzer, Defendant-Appellant, Petitioner on Review.	Jackson County Circuit Court Case No. 14CR00250 CA A158214 **SC S064318**

BRIEF ON THE MERITS – PETITIONER ON REVIEW

Review of the decision of the Court of Appeals on an appeal from a judgment of the Circuit Court for Jackson County
Honorable J. Adam Peterson, Judge

Opinion Filed: July 20, 2016
Author of Opinion: Lagesen, Judge
Concurring Judges: Ortega, Presiding Judge, and Garrett, Judge

Review Allowed: November 3, 2016

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
BRETT ALLIN #142719
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Brett.J.Allin@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JACOB R. BROWN #152032
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
jacob.brown@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Question Presented

Does a person "knowingly initiate a false alarm or report" in violation of ORS 162.375 when, in response to police questioning about involvement in a crime, the person fabricates details about the incident and maintains the falsehoods when confronted?

Proposed Rule of Law

No, a person who lies in response to police questioning, who does so about a report someone else initiated, and who does not recant when confronted, does not "initiate" a false report or alarm. Rather, ORS 162.375 describes an offense committed when a person, on his or her own initiative, fabricates an alarm or report of an emergency. Here, defendant did not initiate a report, because he lied in response to police questioning during an investigation of a report that someone else had initiated.

Nature of the Proceeding

A jury found defendant guilty of driving under the influence of intoxicants, failure to perform duties of a driver, reckless driving, and—as relevant here—initiating a false report. Those charges stemmed from a traffic

incident in which defendant rear-ended a car and left the scene. After the other driver called 9-1-1, police went to defendant's house and asked him why he had left. Defendant said that he left only after the other driver had pointed a gun at him. When another police officer subsequently warned defendant that he would be arrested for initiating a false report if he could not describe the gun found in the other driver's car (a misleading gambit, since no firearm had been found), defendant stuck to his account and provided additional false details.

At trial, defendant moved for a judgment of acquittal on the charge of initiating a false report, arguing that his responsive lies to police questions were not an initiation of a report. Tr 117. The trial court denied the motion. The Court of Appeals affirmed, holding that—although defendant's initial statements about the gun did not violate ORS 162.375—a jury could find that defendant knowingly initiated a false report after being warned that the police would treat further statements as a report of a crime. *State v. Branch*, 279 Or App 492, 496-97, ___ P3d ___ (2016). This court allowed review to determine whether defendant's conduct implicated ORS 162.375.

Statement of Facts

On January 9, 2014, Joseph stopped his car at an intersection and defendant rear-ended it, causing damage. Tr 24-25. The two drivers drove into the parking lot of a nearby market to exchange information. Tr 25. They both

exited their cars and conversed, and suggested they exchange insurance information. Tr 26. While went into the market to get a pen, defendant got into his car and drove away. Tr 26-27, 98. wrote down defendant's license plate number and called 9-1-1 to report a hit-and-run. Tr 27.

Jackson County Sheriff's Deputy Ian Lance arrived at the scene and contacted Tr 27, 97. Meanwhile, Deputy David Duke arrived at defendant's house, using the address connected to the license plate number. Tr 35-36. Another deputy was already at defendant's house and had defendant in handcuffs. Tr 36. Duke took over the investigation and quickly concluded that defendant was intoxicated. Tr 37-38. Duke advised defendant of his rights and asked him what happened. Tr 39. Defendant admitted to drinking alcohol, driving the car involved in the collision, and leaving the scene after the accident. Tr 41-43. Duke asked defendant why he had left, and defendant responded that he left because had pointed a gun at him—either a 9-millimeter or a .40-caliber black handgun. Tr 43, 100.

Deputy Duke passed that information to Deputy Lance, who was still at the accident scene with Tr 43, 100. Lance had learned that had a concealed handgun license, but had told Lance that he was not carrying a weapon that day. Tr 100-01. Lance patted down, searched his car, and looked in a nearby grassy area and in a trashcan at the market, but he did not find a gun. Tr 101-02, 111-12.

Lance went to defendant's house to complete his accident report and confront defendant about what he believed to be a false report of a gun. Tr 103. He arrived as defendant was performing field sobriety tests. Tr 76, 104; Ex 7 (dash-cam video). At that point, Deputy Duke had read defendant his *Miranda* rights. Tr 76-77; Ex 7. Lance and Duke questioned defendant, first warning him that he could be charged with initiating a false report, and then asking specific questions about the gun and actions:

> "DEPUTY LANCE: Before you answer these questions, I need for you to know that I've already dealt with the other driver, I've searched him, and I've searched his car and there was somebody out with him the entire time, okay? So I know what he's got in his vehicle.
>
> "[DEFENDANT]: I'm under arrest?
>
> "DEPUTY LANCE: You're not under arrest right now. What I'm trying to do is make this kind of a low and slow pitch for you, all right? If you tell me that he had a gun and cannot describe for me the kind of gun that I found in the vehicle, then I'm going to arrest you for what's called initiating a false report, which is giving me information that's not true about a weapon being pointed.
>
> "[DEFENDANT]: It was a nine millimeter.
>
> "DEPUTY DUKE: Okay. How do you know it's a nine millimeter?
>
> "[DEFENDANT]: I know I saw a black (inaudible) pointed at me.
>
> "DEPUTY LANCE: Okay. And what was he doing when he pointed the gun at you? Where was he and where were you?

> "[DEFENDANT]: I was here (inaudible) and he said, 'I will kill you.'"[1]

Tr 77-78, 105-07; Ex 7. Defendant continued to describe the gun, and the deputies arrested defendant. Tr 54, 78-79; Ex 7. They did not perform any further investigation into the brandishing of a gun, because Lance was certain that defendant was lying about it. Tr 54-55, 107.

Summary of Argument

The issue in this case is whether a person "knowingly initiates a false alarm or report" by giving responsive lies to police questioning. The legislative history is especially helpful, because the legislature discussed that issue when selecting "initiates," the critical text of the statute. The drafters expressed concern that the proposed crime of "*rendering* a false report," which occurred when someone "knowingly *causes* a false alarm or report to be transmitted," would apply to a suspect who lies in response to police investigatory questioning. They did not want to punish anyone who was responding to police inquiries, questioning, or interrogation. Ultimately, they uniformly agreed the gravamen of the offense was reaching out to police on one's own initiative, *i.e.*, the person "who called the fuzz" and who "starts the ball rolling." To avoid sweeping in the person who lies in response to an officer's question, the drafters

---

[1] Counsel reviewed Exhibit 7 but was unable to discern any words in the portions denoted "inaudible."

changed the title of the offense from "rendering a false report" to "initiating a false report" and revised the conduct from "causes a false alarm or report to be transmitted" to "initiates a false alarm or report."

The term "initiates" effectuated the legislative intent to exclude a person who lies in response to police questioning. Rather, to be guilty of initiating a false report, a defendant must be the original impetus for creating the report—for example, the defendant calls 9-1-1, flags down a police officer, pulls a fire alarm, or otherwise "initiates" a report to an emergency-response organization.

The broader context of statutes that proscribe giving or providing false information also confirm that the legislature's use of "initiates" narrows the scope of the statute to exclude responsive lies to police investigatory questions. Unlike perjury-type statutes, statutes that punish unsworn statements are limited in subject-matter scope. The other statutes that proscribe false information to police use verbs like "give," "provide," or "make," which suggests that the legislature's unique use of "initiate" in ORS 162.375 is meant to require something more than merely *giving* a false report to police.

Looking at the evidence in the light most favorable to the state, a reasonable jury could not conclude that defendant *initiated* a false report. Rather, the evidence shows only that defendant gave false responses to police questioning. Each of defendant's statements about the gun was directly

responsive to a police question asked while the officers were following up on an investigation into a report someone else initiated.

Contrary to the reasoning of the Court of Appeals, Deputy Lance's warning to defendant that he could be prosecuted under the statute does not meaningfully affect the analysis. Although a warning might help the state prove the mental state of the offense, it does not establish the actus reus, "initiates." In fact, Lance did not warn defendant that he would be initiating a false report; Lance instead warned him that his failure to convince the officer of the truth of his prior report would lead to his arrest. That defeats the claim that the defendant's *subsequent* statements initiated the report. Because defendant's lies were directly responsive to police investigatory questioning, defendant did not initiate a report. This court should reverse.

ARGUMENT

This case turns on the meaning of the phrase "initiates a false alarm or report" in ORS 162.375. The appropriate sources for discerning statutory meaning all show that the legislature intended that phrase to proscribe originating acts such as calling 9-1-1 to report a false emergency or pulling a fire alarm when no fire exists, and to exclude a person's responsive lies to police questioning during the course of a criminal investigation, even when those lies constitute an alarm or report. Defendant's conduct in this case fits

squarely within the latter category, and thus, it falls outside the scope of the statute. The trial court and the Court of Appeals erred in holding otherwise.

I. A person who lies in response to police questioning does not *initiate* a false report or alarm.

ORS 162.375(1) provides: "A person commits the crime of initiating a false report if the person knowingly initiates a false alarm or report which is transmitted to a fire department, law enforcement agency or other organization that deals with emergencies involving danger to life or property." The statute does not define "initiates."

To interpret a statute, "a court shall pursue the intention of the legislature if possible." ORS 174.020(1). To discern the legislative intent, this court examines the statutory text in context and, regardless of ambiguity, any useful legislative history proffered by a party. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). If the legislature's intent remains unclear, the court may resort to general maxims of statutory construction. *Id.* at 172.

The legislative history is squarely on point with the question presented in this case, so defendant begins his statutory analysis there.

A. The legislative history of ORS 162.375 shows that the legislature expressly sought to exclude responsive lies to police by amending the proposed statute from "causing" or "rendering" a false report to "initiating" a false report.

"A court shall give the weight to the legislative history that the court considers to be appropriate." ORS 174.020(3). As shown below, the

legislature squarely addressed the issue presented in this case, discussed it at length, and amended drafts of the statute to ensure that it would not extend beyond the intended scope. Consequently, in this instance, this court should give the legislative history great weight. That history shows that the legislature intended to exclude from the scope of ORS 162.375 the person who makes a false alarm or report that is responsive to police questioning during the course of a criminal investigation that someone else initiated.

Subcommittee 2 of the Criminal Law Revision Commission first addressed what would become ORS 162.375 on September 16, 1969. Minutes, Criminal Law Revision Commission, Subcommittee No 2, Sept 16, 1969, 15 ("9/16/69 Minutes"). That section was proposed under Article 22, "Perjury and Related Offenses." *Id.* at 1.

As initially proposed, the statute split the crime into two alternative methods of violation, with "alarm" (as a noun) describing incidents that were transmitted to fire departments, and "reports" (as a verb) describing incidents that were transmitted to law enforcement officers or agencies:

> "A person commits the crime of rendering a false report if, knowing, or having reason to know, it to be false he:
>
> "(1) Intentionally *causes* a false alarm of fire or other emergency *to be transmitted* to an official or volunteer fire department, or to any other government agency that deals with emergencies involving danger to life or property; or

> "(2) *Gratuitously reports, or causes to be transmitted*, to any law enforcement officer or agency false information relating to:
>
> "(a) an actual offense or incident or to the alleged implication of some person therein; or
>
> "(b) an alleged offense or incident which did not in fact occur; or
>
> "(c) an alleged impending offense or incident which in fact is not about to occur."

Id. (emphasis added); Criminal Law Revision Commission, Art 22, Preliminary Draft No 1, May 1969, 50 (emphasis added). Under that two-prong approach, an alarm had to relate to a "fire or other emergency," while a report had to relate to an "offense or incident." *Id.*

When first addressing that proposed language, some members expressed concerns over the possibly broad reading of the "reports" prong of the proposed statute. Representative Wallace Carson remarked that the language would cover any false information given to law enforcement. 9/16/69 Minutes at 15-16. He asked, "Do we want to be this broad?" Tape Recording, Criminal Law Revision Commission, Subcommittee No 2, Sept 16, 1969, Tape 81, Side 1. Research counsel Roger Wallingford responded, "That's one thing—when you're talking about the law enforcement area, that you're rather careful, because they ask a great many questions during their investigations." *Id.*

Wallingford referred to the then-current "false alarms" statute under ORS 476.740, which proscribed "wantonly or maliciously transmit[ting] or caus[ing]

to be transmitted by any means a false alarm of any emergency" to a fire department. *Id.*; 9/16/69 Minutes at 16. Carson asked: "Why didn't we use those words?" Tape 81, Side 1. Wallingford explained that the purposes of the proposed statute included avoiding the waste of government resources such that they would be unavailable for true emergencies. *Id.* Another member[2] identified the additional purpose of avoiding the danger of unnecessary public alarm, like shouting "fire" in a crowded theater. *Id.*

Returning to the language of the proposed statute, Wallingford explained that "gratuitously" in subsection (2) was "referring to *a report that originates in the person giving the report, rather than in response to an investigative question*." *Id.* at Side 2 (emphasis added); 9/16/69 Minutes at 15. Haas contrasted that with the "liberal" Wisconsin statute, which he explained "allow[ed] the prosecution for any oral statement to a police officer that may be false." Tape 81, Side 2. He asked the subcommittee: "Do you want to go that far?" *Id.*; 9/16/69 Minutes at 17. Wallingford noted that under then-current Oregon law, it was not possible to prosecute for an oral statement made to a police officer. *Id.*

At one point in the subcommittee's deliberations, Thomas O'Dell, representative of the Attorney General expressed that he "felt the whole section

---

[2] Where possible, defendant notes the speaker, but at times is unable to discern which particular member said what.

could be condensed somewhat and still say the same thing." *Id.* at 15. The subcommittee took a recess to craft an amendment to the proposed statute. Tape 81, Side 2. After the break, Project Director Donald Paillette proposed a much-condensed version of the statute based on the Model Penal Code:

> "A person commits the crime of rendering a false report if he knowingly *causes* a false alarm or report *to be transmitted* to a fire department, law enforcement agency or other organization that deals with emergencies involving danger to life or property."

Id.; 9/16/69 Minutes at 17-18 (emphasis added). O'Dell proposed similar language. Tape 81, Side 2; 9/16/69 Minutes at 18 ("Any person who knowingly, or having good reason to know, *makes or causes to be made* a false report or alarm * * *" (emphasis added)). Thus, both proposed amendments retained the alarm-report dichotomy, but in simpler language than the initial proposal.

Wallingford asked whether O'Dell's proposed language "could * * * cover the situation where you're making a response to a police officer who's investigating a crime." Tape 81, Side 2. Paillette thought that the statute should not exclude such conduct. *Id.*; 9/16/69 Minutes at 18. Subcommittee members expressed mixed feelings on the matter but nonetheless amended the section with Paillette's proposed language. Tape 81, Side 2; 9/16/69 Minutes at 18.

//

Haas said the proposed statute "still kind of worries me a little. * * * This will have the effect of enlarging the present situation where * * * *an oral statement made to a police officer, requested and solicited by the officer*, could be the subject of prosecution." Tape 81, Side 2; 9/16/69 Minutes at 18 (emphasis added). In response to those concerns, O'Dell suggested: "Perhaps that could be amended to put the word 'initial' or 'initiating' in front of 'report' or 'alarm.'" Tape 81, Side 2.

Haas restated his concerns: "If every time you talk to a police officer, you're in essence testifying under oath, subject to the penalties of being prosecuted for your statement if it's in error, that's a pretty big policy statement. * * * People are going to be a little reluctant to talk." Tape 81, Side 2; 9/16/69 Minutes at 18.

Carson disagreed that the proposed statute was too broad, stating "he had no sympathy for the person who intentionally lies in the course of a police investigation." *Id.* at 19. Haas responded, "I really don't think we want to * * * take that one further step towards the police state where every statement you make to a man in blue puts you in a position of prosecution, do we?" Tape 81, Side 2.

Paillette agreed with Haas's concerns: "This does not contemplate follow up investigation. * * * It's '*who called the fuzz?*'—'police officers,' I mean." *Id.* (emphasis added). Wallingford also agreed and pointed to the

safeguards in the law of perjury, which requires that a person be under oath before they can be prosecuted for lying. *Id.*; 9/16/69 Minutes at 19.

Haas referred to an incident where a person had called the police to report that he had been kidnapped, when in fact no kidnapping had occurred. Tape 81, Side 2. He stated: "That's a big deal. That's what we're talking about. *It's initiating the wheels of law enforcement to go in action on an assertion you've made*, as opposed to a verbal statement to a police officer." *Id.* (emphasis added).

Carson pointed out that the Criminal Law Revision Commission was proposing a statute that would criminalize "unsworn falsification."[3] *Id.* Haas responded that that statute was limited to the fraud situation where the person lies for their own pecuniary benefit. *Id.*

O'Dell again proposed amending the section with the word "initiates," which was met with agreement. *Id.* He further suggested what he meant: "'If he *starts the ball rolling*.' Too bad we can't put that in there." Tape 81, Side 2 (emphasis added). Other members agreed, and jokingly proposed amending the language with the phrase "knowingly starts said ball rolling." *Id.*

//

---

[3] That crime is codified at ORS 162.085, and it prohibits "knowingly mak[ing] any false written statement to a public servant in connection with an application for any benefit."

Carson proposed titling the amended statute "initiating a false report" rather than "rendering a false report." *Id.* Another member responded, "That's the key, isn't it?" *Id.* The subcommittee unanimously amended the section with those revisions and adopted it as amended. *Id.*; 9/16/69 Minutes at 19-20.

Later, the full Commission unanimously adopted that language without any discussion relevant to the present issue. Minutes, Criminal Law Revision Commission, Nov 7, 1969, 11-12; Tape Recording, Criminal Law Revision Commission, Nov 7, 1969, Tape 38, Side 2. In a final session the next year, the Commission moved the section from the perjury article to the article on obstructing governmental administration, after Wallingford noted that it did not fit well with the perjury article.[4] Minutes, Criminal Law Revision Commission, May 15, 1970, 61; Tape Recording, Criminal Law Revision Commission, May 15, 1970, Tape 61, Side 2.

In sum, the subcommittee engaged in a lively discussion about whether the statute should capture false alarms or reports that are responsive to police

---

[4] At that session, the Commission also noted the similarity between the "initiating a false report" provision and a provision under another article titled "falsely reporting an incident." It ultimately folded the latter into the disorderly conduct statute, where it remains today: "A person commits the crime of disorderly conduct in the second degree if, with [the requisite intent], the person * * * [i]nitiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency[.]" ORS 166.025(1)(e). In 2005, the legislature created the offense of disorderly conduct in the first degree, which uses the same "initiates or circulates a report" language. ORS 166.023.

questioning, and the view that ultimately—and, despite some initial disagreement, unanimously—prevailed was that, categorically, the statute should not punish such conduct. Moreover, the evolution of the statute shows that an "alarm" refers to fires or other emergencies (which generally will be transmitted to a fire department), and "report" refers to offenses or incidents (which generally will be transmitted to police). Criminal Law Revision Commission, Art 22, Preliminary Draft No 1, May 1969, 50; *supra* pp 9-10 (listing language of "false report" statute as originally proposed).

Thus, the legislative history shows that the word "initiates" in ORS 162.375 excludes oral unsworn false reports of offenses or incidents (or false alarms of fires) that are responsive to police investigative questioning. Rather, the statute targets the person who reaches out to law enforcement on his own initiative and sets in motion the official process of activating law enforcement or other emergency agency—*i.e.*, the person who "starts the ball rolling."

The legislature's policy choice to distinguish between responsive reports to police and reports that a person initiates makes practical sense. Whereas police generally have little reason to distrust a report that someone sets in motion on his own initiative, it is generally known that a person who is confronted with his own criminal wrongdoing may try to minimize his crime or lay the blame at someone else's feet by lying. *See State v. Nefstad*, 309 Or 523, 551, 789 P2d 1326 (1990) ("The significance of a suspect's lies to the police is

no more obscure than the meaning of his flight from them. Neither matter requires the court's explication."). Thus, the risk that police resources will be wasted—which was the harm that the legislature sought to avoid—is less. Further, at least one subcommittee member was worried that the threat of prosecution might discourage people from answering police questions. Tape 81, Side 2 (Haas remarking: "People are going to be a little reluctant to talk.").

The text and context are consistent with the conclusions that defendant draws from the legislative history.

B. The text of the statute suggests that "initiate" means to set in motion on one's own initiative or to be the original impetus for a thing and that the offender must reach out to the government to create an alarm or report.

This court gives words of common usage "their plain, natural, and ordinary meaning," and it uses dictionaries to discern that meaning. *State v. Dickerson*, 356 Or 822, 829, 345 P3d 447 (2015); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). "This court consults *Webster's Third* more often than any other dictionary," because it has "a 'descriptive' focus, reporting ordinary usage, as opposed to other dictionaries with a 'prescriptive' focus, reporting 'correct' usage." *Kohring v. Ballard*, 355 Or 297, 304 n 2, 325 P3d 717 (2014).

The word "initiate" can mean "to begin or set going **:** make a beginning of **:** perform or facilitate the first actions, steps, or stages of"; "to bring about

the initial formation of"; or "to mark the beginning of." *Webster's Third New Int'l Dictionary* 1164 (unabridged ed 1993).[5] Those definitions suggest that for a person to initiate something, the person must be the original impetus for its creation. As the editors observe when comparing the term with its synonyms, such as "begin," "commence," and "start," initiate "suggests taking or facilitating first steps or preliminary measures culminating in an actual start, without suggesting any necessary continuation." *Id.* at 198.

"Initiate" also entails a sense of formality. Bryan A. Garner, *Garner's Dictionary of Legal Usage* 457 (3d ed 2011) (describing "initiate" as "a formal word for begin, open, or introduce"); *see also Alfieri v. Solomon*, 358 Or 383, 393, 365 P3d 99 (2015) (citing 2011 edition of *Garner's Dictionary of Legal Usage* to interpret statutory text that legislature enacted before 2011). The word "is appropriate when referring to taking the first step in an important matter. Although you may *begin* an interview, *begin* a conversation, or *begin* a lecture, you *initiate* a series of high-level negotiations." Bryan A. Garner, *Garner's Modern American Usage* 468 (3d ed 2009) (emphasis in original).

---

[5] The legislature enacted ORS 162.375 as part of the 1971 criminal code revision. The 1993 edition of *Webster's Third* is a proper source for discerning the meaning of "initiate" as understood in 1971, because the third edition was published in 1961, and subsequent versions of that edition retain the original definitions, adding new definitions in separate addenda. Merriam-Webster, *About Us*, http://www.merriam-webster.com/about-us/ongoing-commitment (last visited Jan 12, 2017).

Thus, the plain text of ORS 162.375 suggests that, to be guilty of *initiating* a false report, a person must be the original impetus for creating an alarm or report. That could include calling 9-1-1 to report a false crime, pulling a fire alarm when no fire exists, or going to the police station to file a false police report. In short, the defendant must reach out to the government to set the report or alarm in motion. The text confirms that the legislature used "initiates" to exclude responsive reports to police questioning.

C. Context confirms that the legislature intended to limit the scope of the statute by using "initiates" in place of a verb such as "provides" or "gives," and a broad interpretation of "initiates" would make ORS 162.375 much more expansive than other unsworn-oral-falsification statutes.

"Context includes * * * related statutes." *Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004). Those related statutes show that when the legislature proscribes oral unsworn lies to the government, it limits the scope of those statutes to narrow situations. That suggests that the legislature similarly intended to limit the scope of ORS 162.375.

Oregon has a number of statutes that penalize the giving of false information to the government, and broadly speaking, those statutes fall into one of two categories: (1) perjury-type offenses; and (2) prohibitions on unsworn false statements. The first category carries an inherent formality in that it requires the person to attest under the penalty of perjury that they are telling the truth. Statutes in the second category, although not carrying the

penalty of perjury, are limited in scope to lies on only a narrow class of subjects. These statutes often deal with situations that are traditionally subject to pervasive government regulation, like driving privileges, firearms, alcohol, commerce, or government benefits.

The perjury-type offenses inherently involve a high level of formality in that a defendant, before making a false statement, must go through some formal process such as an oath, affirmation, or declaration in which the person vows to tell the truth "with sufficient formality to impress on the person the seriousness of his or her act." *State v. Carr*, 319 Or 408, 413, 877 P2d 1192 (1994) (interpreting meaning of "sworn statement"); *see, e.g.*, ORS 162.065 (defining perjury as "mak[ing] a false sworn statement or a false unsworn declaration in regard to a material issue, knowing it to be false"); ORS 162.075 (defining false swearing as "making a false sworn statement or a false unsworn declaration, knowing it to be false").[6] The perjury-type offenses are broad in their scope, in that they capture lies on any subject whatsoever (although perjury requires the lie relate to a material issue).

---

[6] The perjury and false swearing statutes, like the statute at issue here, were part of the 1971 criminal law revisions. ORS 161.005 (providing all three statutes are part of the Oregon Criminal Code of 1971). Although the legislature recently amended the perjury and false swearing statutes to include not only sworn statements but also "unsworn declarations," the latter still demands a high level of formality in that it requires "a declaration in a signed record that * * * is given under penalty of perjury." ORS 194.805(7); ORS 162.055(5).

In contrast, the statutes dealing with unsworn statements—like the one at issue here—are tailored to specific situations that generally entail a heightened level of seriousness or formality.[7] For example, many of the statutes require that the false statement be in writing, which gives the person making the statement more time to reflect upon it. *See, e.g.*, ORS 162.085 (defining unsworn falsification, which requires a false written statement on "an application for any benefit"); ORS 260.715(7) ("A person may not falsely write anything purporting to be written by an elections official in performance of duties on the ballot.").

Others deal with matters that are inherently dangerous or traditionally highly regulated, such as firearms, driver's licenses, corporate commerce, and taxes. *See, e.g.*, ORS 166.416 (defining crime of "providing false information in connection with a transfer of a firearm"); ORS 807.530 (criminalizing the giving of certain false information in application for a driver's license); ORS 725.319 ("A person may not knowingly give or cause to be given to the Director of the Department of Consumer and Business Services any document

---

[7] It should be noted that most of the statutes in this category were enacted after 1971, suggesting that at the time the legislature enacted the statute at issue here, laws against unsworn lies were more exceptional than they are now. Of the statutes cited as examples below, only ORS 314.075 (dealing with tax returns) was in effect before 1971, while ORS 162.085 (defining "unsworn falsification") and ORS 162.375 (the statute at issue here) were enacted as part of the 1971 criminal law revisions.

or any oral or written statement or report that is false in any material respect, in the course of any investigation or examination by the director under this chapter."); ORS 314.075 ("No person * * * shall, with intent to evade any requirement of any law imposing taxes * * * [m]ake, render, sign or verify any false or fraudulent return or statement; or * * * [s]upply any false or fraudulent information.").

Particularly apt here are the statutes that proscribe giving false information to police officers, because those statutes are limited to a narrow class of statements about the person's identifying information. *See, e.g.*, ORS 162.385 (criminalizing "knowingly us[ing] or giv[ing] a false or fictitious name, address or date of birth to any peace officer for the purpose of * * * issuing or serving the person a citation under [certain statutes] or * * * arresting the person on a warrant"); ORS 807.620 (criminalizing "knowingly use[ing] or giv[ing] a false or fictitious name, address or date of birth to any police officer who is enforcing motor vehicle laws").

All of this is to say that when the legislature decides to punish unsworn falsifications made to the government, it limits the scope of that liability to very specific and serious situations. It does not broadly punish any lie made to the government for any purpose, unless that lie is made under the penalty of perjury.

The "initiating" statute at issue here is expansive in terms of the content of the false statements that it targets; it is not limited to certain types of reports. ORS 162.375 (targeting "a false alarm or report which is transmitted" to any organization that deals with emergencies). It would be quite out of line with the legislature's treatment of unsworn oral false statements if ORS 162.375 were intended to capture *any* false report that a person *causes* to be transmitted to police, no matter what the content of that statement. So the context suggests that the legislature intended to limit its scope in some other way.

As the legislative history shows, the legislature limited the scope of the statute by using the word "initiates." *Supra* pp 8-17. That word stands in contrast with other unsworn-false-statement statutes. For example, ORS 811.740 defines the crime of "*giving* a false accident report" and provides that a person commits that offense "if the person *gives* information in any report required under ORS 811.725 or 811.730, knowing or having reason to believe that such information is false." (Emphasis added).

Similarly, a person commits a crime if he "knowingly *uses or gives* a false or fictitious name, address or date of birth to any police officer who is enforcing motor vehicle laws." ORS 807.620 (emphasis added); *see also* ORS 162.386 (defining "crime of *giving* false information to a peace officer for issuance or service of a citation or for an arrest on a warrant" (emphasis added)).

Several other statutes use similarly broad language to criminalize lies made to the government in specific situations. *See, e.g.*, ORS 166.416 (defining crime of "*providing* false information in connection with a transfer of a firearm" (emphasis added)); ORS 162.085 ("A person commits the crime of unsworn falsification if the person knowingly *makes* any false written statement to a public servant in connection with an application for any benefit." (Emphasis added)); ORS 806.055 (defining crime of "*giving* false information about liability insurance to a police officer" (emphasis added)).

The legislature's unique use of "initiates" in ORS 162.375 suggests that it does not include merely *giving* or *providing* of a false report or *causing* a false report to be transmitted. Rather, as the text and legislative history confirm, it is limited to the situation where a person, without any prompting from the government, decides to reach out to an emergency organization to convey a false alarm or report.

II. Defendant did not initiate a false report, because his false statements were responsive to police questions during an investigation of a report that someone else initiated.

Defendant did not *initiate* a report, because each of his responses about the gun was "an oral statement made to a police officer, requested and solicited by the officer," which the legislature intended to exclude from the statute when it used the word "initiates." Tape 81, Side 2; 9/16/69 Minutes at 18. As the Court of Appeals noted, defendant made two sets of statements to police about

the gun: (1) his initial responses to Deputy Duke; and (2) his later responses to Deputy Lance after Lance warned defendant about the risk of prosecution if he could not describe the gun in a convincing manner. Neither set of responses provided a sufficient basis from which to find that defendant *initiated* a report.

Defendant's first statements on the matter were directly responsive to Deputy Duke's investigative question about why he had left the accident scene. Tr 43. In other words, Duke—presumably seeking to get defendant to admit to being drunk or willfully fleeing the scene—asked defendant for his reason for leaving, and defendant gave the officer a reason for leaving. That defendant's answer was ostensibly false is beside the point. A response does not cease to be a response because it is false. Defendant's statements to Duke were responsive to police questioning.

Defendant's second set of statements on the matter were also directly responsive to a series of investigative questions, this time from Deputy Lance after Lance warned defendant that he could be prosecuted for initiating a false report. *See supra* pp 4-5 (excerpting Lance's warning and questioning of defendant about the gun). Lance elicited details about the gun with focused questions, and defendant's answers were responsive to those questions. *Id.* Defendant's responses to both Duke and Lance about the gun do not constitute an initiation of a false report, because in both instances, police initiated the questioning and elicited the information about the gun.

The state might argue, as the Court of Appeals held, that Lance's admonition to defendant that he could be prosecuted for initiating a false report was sufficient to impress upon defendant the weight of the situation, and thus, the statute captures his false remarks made thereafter.[8] That argument fails for several reasons—first, because it ignores the categorical distinction that the legislature conveyed when it used the word "initiates." As discussed in the previous section, the legislature intended to exclude from the statute the type of responsive oral falsifications to police questioning that occurred here.

The argument fails second because it conflates the mental state element of the offense—*knowingly*—with the actus reus—*initiates*. If the defendant's responsive lies to police questions do not satisfy the actus reus, the officer cannot convert that conduct into the actus reus by telling him that it is so.

Even if a police officer could turn a person's responsive lie to police questioning into an initiation of a report by warning him how the officer will

---

[8] The Court of Appeals reasoned that, from Lances's warning,

> "a factfinder could find that defendant knew that if he made further statements accusing of a crime, those statements would be treated by law enforcement as initiating a report of that crime. A factfinder could further find that defendant, knowing that additional statements would be treated by officers as a report of a crime, persisted in making them, and thereby initiated a false report."

Branch, 279 Or App at 496-97.

treat the information, the warning here was not sufficient to do so. Lance gave defendant the following warning:

> "DEPUTY LANCE: Before you answer these questions, I need for you to know that I've already dealt with the other driver, I've searched him, and I've searched his car and there was somebody out with him the entire time, okay? *So I know what he's got in his vehicle*.
>
> "[DEFENDANT]: I'm under arrest?
>
> "DEPUTY LANCE: You're not under arrest right now. What I'm trying to do is make this kind of a low and slow pitch for you, all right? *If you tell me that he had a gun and cannot describe for me the kind of gun that I found in the vehicle*, then I'm going to arrest you for what's called initiating a false report, which is giving me information that's not true about a weapon being pointed.

Tr 77 (emphasis added). In response, defendant gave Lance more information about the gun, and Lance and Duke asked defendant more questions about the gun and actions, which defendant answered.

Lance's warning did not tell defendant that his conduct would initiate a report. Rather, Lance told defendant that he had already completed an investigation by searching car and discovering whatever was inside, and he invited defendant to "describe for [him] the kind of gun that [he] found in the vehicle[.]" Thus, Lance prompted defendant to give more information about the gun with the threat of arrest, and defendant took the bait. That is not the situation that the legislature intended to proscribe with ORS 162.375.

To invoke the legislature's "ball" analogy, defendant did not "start the ball rolling." *See* Tape 81, Side 2, *supra* p 14 (members of subcommittee stating that statute was to capture the person who "starts the ball rolling"). Rather, it was Deputy Lance who, by his own admission, "pitch[ed] the ball kind of low and slow" to defendant and elicited responses about the gun. Tr 105. Thus, defendant did not *initiate* a report with his responses after Lance's warning.

The state might also argue, as it did in the Court of Appeals, that even if, as a general matter, responsive lies to police questioning do not constitute the initiation of a false report, defendant's conduct fell within the statute because he "did not just give false information about a true incident," but rather "fabricated a new crime, and reported that crime to Deputy Duke." Resp Br at 6. That distinction also fails under the weight of the legislative history. The legislature recognized that a "report" under ORS 162.375 could include statements that falsely accused another of a crime. The original proposed language of the statute provided that a person commits the crime if he

> "[g]ratuitously reports, or causes to be transmitted, to any law enforcement officer or agency false information relating to:
>
> "(a) an actual offense or incident or to the alleged implication of some person therein; or
>
> "(b) *an alleged offense or incident which did not in fact occur*; or

> "(c) an alleged impending offense or incident which in fact is not about to occur."

Criminal Law Revision Commission, Art 22, Preliminary Draft No 1, May 1969, 50 (emphasis added).

Although that language did not make it into the final version, it shows that the legislature recognized that a report could be about a true incident with a false implication of another person, or about an entirely fabricated crime. Yet when the legislature amended the statute to exclude responsive reports, it did not distinguish between reports that merely include false details and reports in which those false details describe what would be a separate crime. Instead, after lengthy deliberation, the legislature drew the line between responsive reports to police questioning and reports which a defendant initiates without prompting from police. The state's rule would erase the distinction that the legislature built into the statute when it replaced "causes" with "initiates" and amended the title of the statute from "rendering a false report" to "initiating a false report."

Moreover, a rule that depends on whether a responsive report describes a new crime would be unworkable. It would require a jury to decide whether the contents of a defendant's false report fit the elements of a criminal statute, creating a trial within a trial. Further, that rule would seem to capture a person's false confession to a crime made in response to police interrogation.

Even if a defendant could violate ORS 162.375 by making a report during police questioning that was sufficiently remote from the facts of the crime under investigation, here, defendant's statements about the gun were not so remote. Defendant was responding to police questioning about what occurred during the incident under investigation with his version of events.

Where, as here, the defendant's falsifications are directly responsive to police questions during an investigation that defendant did not initiate, those falsifications cannot serve as the basis for a conviction under ORS 162.375, because the defendant did not *initiate* a report. Here, the state's evidence allowed a rational juror to conclude only that defendant's lies were responsive to police questioning. Consequently, the state failed to present sufficient evidence that defendant *initiated* a false report.

//

//

//

//

//

//

//

CONCLUSION

For the foregoing reasons, defendant respectfully asks this court to reverse the decision of the Court of Appeals and reverse defendant's conviction for initiating a false report.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

BRETT J. ALLIN OSB #142719
DEPUTY PUBLIC DEFENDER
Brett.J.Allin@opds.state.or.us

Attorneys for Defendant-Appellant,
Petitioner on Review
Robert L. Branch

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

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 9.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,265 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 Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on January 13, 2017.

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 Benjamin Gutman, #160599, Solicitor General, and Jacob R. Brown, #152032, Assistant Attorney General, attorneys for Respondent on Review.

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

BRETT J. ALLIN OSB #142719
DEPUTY PUBLIC DEFENDER
Brett.J.Allin@opds.state.or.us

Attorneys for Defendant-Appellant,
Petitioner on Review
Robert L. Branch