

State v. Webber, 736 P.2d 220 (Or. Ct. App. 1987).

Court of Appeals of Oregon.

STATE of Oregon, Respondent,
v.
John Carl WEBBER, Appellant.

209–C–86; CA A40783.

|
Argued and Submitted Jan. 14, 1987.

|
Decided May 6, 1987.

|
Reconsideration Denied June 26, 1987.

Synopsis

A jury convicted the Defendant of taking game mammal in closed season and wasting game mammal. The Defendant appealed. The Court of Appeals, Young, J., held that the Defendant was not entitled to jury instruction on choice-of-evils defense.

Affirmed.

West Headnotes (3)

[1] **Criminal Law**🔑Necessity of instructions
Criminal Law🔑Defenses in general

Criminal defendant is entitled to instructions on all issues of law arising from the evidence and to present his theory of defense if that theory is supported by the evidence; whether evidence entitles defendant to jury instruction on particular defense is governed by statutory requirements for establishing the defense.

[2] **Criminal Law**🔑Compulsion or necessity;
justification in general

Choice-of-evils defense is not limited to actions taken to protect life but may also be invoked by defendant who has acted unlawfully in order to protect property.

[3] **Game**🔑Criminal prosecutions

Rancher who killed deer without obtaining statutorily required permit was not entitled to choice-of-evils instruction; even though logical relationship existed between rancher's conduct and harm to property, and rancher's conduct could have abated harm to property, there was no evidence that rancher had no reasonable alternative but to kill deer without obtaining permit; thus, evidence was not sufficient as matter of law to raise question of fact as to whether it was necessary for rancher to kill the deer without permit.

Attorneys and Law Firms

*221 Mike Kilpatrick, Mt. Vernon, argued the cause for the Defendant. With him on the brief were Robert S. Johnson, Certified Law Student, and Kilpatrick & Pope, Mt. Vernon.

Charlene Woods, Asst. Atty. Gen., Salem, argued the cause for the State. With her on the brief were Dave Frohnmayer, Atty. Gen., and Virginia L. Linder, Sol. Gen., Salem.

Before WARDEN, P.J., and VAN HOOMISSEN and YOUNG, JJ.

Opinion

YOUNG, Judge.

The Defendant appeals his misdemeanor convictions for taking a game mammal in a closed season and for wasting a game mammal. He assigns error to the trial court's refusal to instruct the jury on the choice-of-evils defense. For the reasons set forth below, we affirm.

The Defendant produces cattle and hay on his ranch in eastern Oregon. The ranch is near forest land that abounds with game animals, especially deer. The ranch has had a history of deer problems. In 1983, the Defendant complained to the Fish and Wildlife Department about deer feeding at his haystacks. The Department supplied him with haystack panels designed to

State v. Webber, 736 P.2d 220 (Or. Ct. App. 1987).

protect the hay from the deer. He installed the panels and apparently had no further problems with deer feeding at the haystacks for some time.

However, in 1986, when deer again began to feed at his hay feeders despite the panels, the Defendant did not call the Department to complain about the damage or to request assistance. He knew that he could apply for a permit to kill deer, but he did not want to participate in the kill-permit program, because the terms of that program would require him to skin, dress and dispose of all deer that he killed—steps that the Defendant found costly and inconvenient, though he admitted that he had sufficient funds to cover the cost and sufficient time to complete the requisite steps. On November 28, 1986, the Defendant shot at some deer, and a neighbor reported him to police officers. He was charged and convicted of killing and wasting six of them.

***222** ^[1] The Defendant's assignment of error arises from the trial court's refusal to instruct the jury on the choice-of-evils defense. A criminal defendant is entitled to present his theory of defense to a jury if the available evidence could support that theory. *State v. Shaw*, 684 P.2d 7, 9 (Or. Ct. App. 1984) (citations omitted). To determine whether the evidence entitles a defendant to a jury instruction on a particular defense, the court must review the statutory requirements for establishing the defense. *State v. Matthews*, 569 P.2d 662, 668 (Or. Ct. App. 1977).

In Oregon, a statute codifies the choice-of-evils (COE) defense to criminal charges. Section 161.200(1) of the Oregon Revised Statutes provides that criminal conduct is justifiable when it is necessary as an emergency measure to avoid an imminent private injury, if the threatened injury is of such gravity that “the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.”

^[2] The COE statute does not limit the defense to actions taken to protect life, so a defendant who has acted unlawfully to

protect property may also invoke it. *See State v. Olson*, 719 P.2d 55, 57 (Or. Ct. App. 1986).

A defendant is entitled to a COE instruction if there is some evidence from which the jury could find that (1) his conduct was necessary to avoid a threatened injury, (2) the threatened injury was imminent and (3) it was reasonable for defendant to believe that the need to avoid the threatened injury was greater than the need to avoid the injury that the law under which he was prosecuted seeks to prevent. *See Matthews*, 569 P.2d at 668. Once the defendant has properly raised the defense, the State has the burden of disproving it beyond a reasonable doubt. Or. Rev. Stat. § 161.055(1), 161.190; *Olson*, 719 P.2d at 56.

***223** ^[3] We agree with the trial court that the Defendant was not entitled to present the COE defense to the jury because the evidence would not allow a jury to find that his conduct was necessary to avoid the threatened injury to his hay. To be sure, there is a logical relationship between the Defendant’s killing of the deer and the ongoing harm to the Defendant’s property, because the deer were feeding at the Defendant’s haystacks. Additionally, killing the deer could have abated the harm, because if the deer are dead, they can no longer feed. However, there is no evidence in the record from which the jury could infer that the defendant had no reasonable alternative but to kill the deer without a permit. The Defendant did not even seek a permit. And the Defendant acknowledged that it was possible for him to comply with the skinning, dressing, and disposal requirements necessary to obtain a kill permit. The only reason in the record for his failure to do so is that he did not *want* to have to do what the kill-permit program would require of him. That explanation is insufficient as a matter of law to raise a question for the jury as to whether it was necessary for him to kill the deer without a permit. Thus, the trial court correctly refused to instruct the jury on the COE defense.

Affirmed.