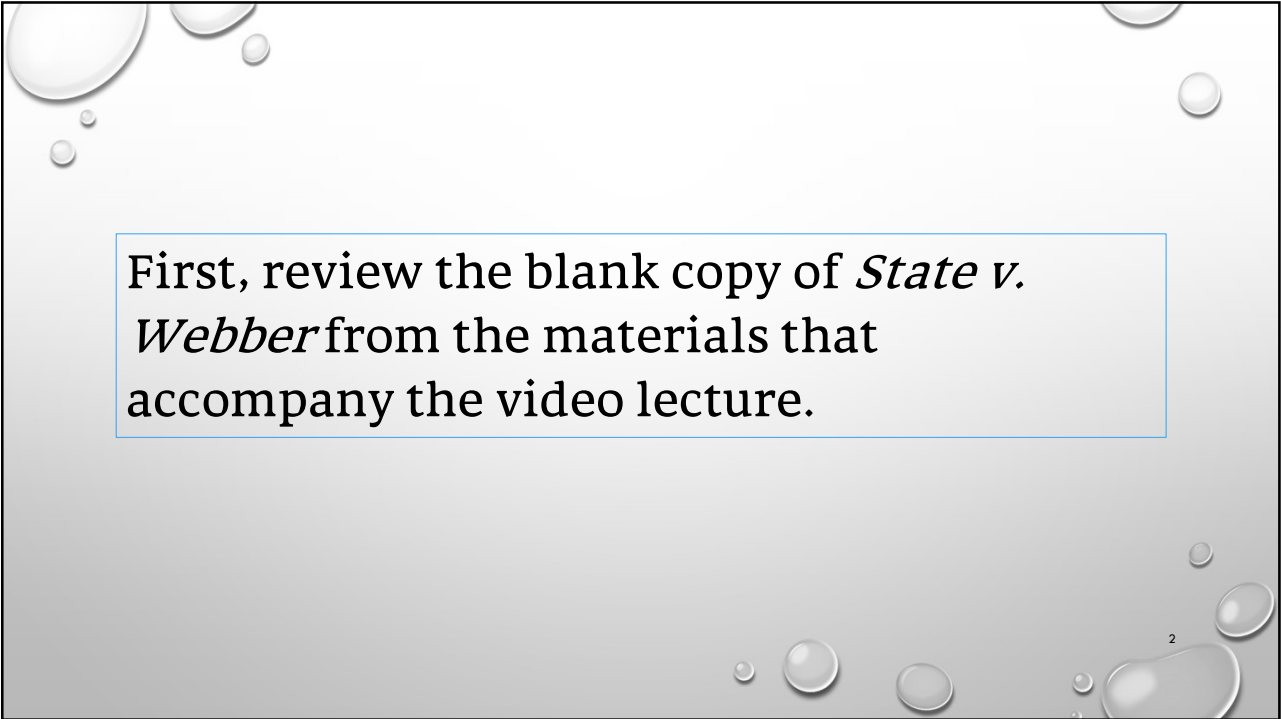


DEMONSTRATION:
ANNOTATING AND BRIEFING A CASE

1



First, review the blank copy of *State v. Webber* from the materials that accompany the video lecture.

2

DEMO ANNOTATIONS

Images of the annotated opinion appear on the next few slides, but you also have a PDF of the annotated case in your Orientation materials.

3

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.

permitted; 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 — **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.

OVERALL OUTCOME

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

Provide some obvious indicator of where the content from the court actually starts

Here, the reader labeled opinion parts. A reader might also take shorthand notes on the facts in an opinion with longer or more complicated facts.

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COE ELEMENTS — *Annotations to COE jury instruction*
 evidence would allow jury to find that
 On's conduct was NECESSARY to avoid a threat

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

② the threatened injury was IMMINENT, AND
 ③ it was reasonable for the Δ to believe that
 the need to avoid the threatened injury was
 greater than the need to avoid the injury that
 the law under which they've prosecuted seeks to
 prevent.

GLOBAL RULES - COE ELEMENTS
 - 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 *Mathews*, 509
 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.

OVERALL HOLDING - NECESSITY
 The Δ was acting 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 was a logical relationship between the Defendant's killing
 of the deer and the ongoing harm to the Defendant's property.
 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. **OVERALL HOLDING**

NECESSITY REASONING
 Affirmed. **NECESSITY REASONING**
 - Yes logical relationship b/w deer killing + hay harm
 b/c deer were eating hay.
 - Yes killing could have abated harm b/c dead deer
 can't eat the hay.
 - No evidence to allow finding that Δ had no reasonable
 alternative but to kill w/o permit. *Evidence shows he could fulfill permit reqs but he did not want to.*

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.

PHS

2222. (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*, 688 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. Mathews*, 509 P.2d 662, 668 (Or. Ct. App.
 1977).

GLOBAL RULES - WHEN Δ CAN PRESENT DEFENSE + HOW Ct. EVALUATES
 GLOBAL RULE - COE STATUTORY LANGUAGE
 In Oregon, a statute codifies the choice-of-evils (COE)
 defense to criminal charges. Section 161.000(1) of the Oregon
 Revised Statutes provides that criminal conduct is justifiable
 when it is necessary in 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."

GLOBAL RULE - COE STATUTE DOES NOT LIMIT THE DEFENSE TO ACTIONS TAKEN
 OR MAY USE COE DEFENSE IF THEY HAVE ACTED UNLAWFULLY TO PROTECT
 LIKE OR PROPERTY.

Annotation techniques at work:

- **Labeling of major case parts and boxing for easy visual spotting later**
- **Shorthand summaries of rule content and reasoning**
 - **WRITING IT OUT** helps the reader learn the content
 - The reader can also **REFER BACK LATER** to the shorthand notes so that they can more quickly re-process the text of the original opinion
- **What to underline/circle?**
 - The decision might depend on the reader's needs and how many cases on this topic they have already read.
 - Keep in mind that underlining everything is about as effective as underlining nothing, in terms of whether it will be valuable in the future.
- **Could the reader use color?** Sure, if it's helpful to them!

5

Remember, the reader wrote this flashcard information AFTER reading AND annotating the case.

DEMO CASE FLASHCARD

Shorthand description of basic facts (so reader can remember which case this is) and overall decision (in case reader needs to sort a pile by decision)

Name and court/year are eye-catching for easy spotting in a pile

Quickly reminds reader which COE element the case actually discusses

NO COE Δ killed deer eating his hay

STATE V. WEBBER Or. Ct. App. 1987

covers NECESSITY only

Global Rules
 - When a Δ can present a defense
 - how Ct. evaluates
 - COE - like or property
 - COE statute elements
 - once raises, State must disprove

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

• Evidence would NOT support finding that killing w/o permit was necessary.
 • YES logical relationship
 • facts indicated that Δ could comply w/ permit reqs but did not want to, so jury could not possibly find that he had no reasonable alternative but to kill w/o permit.

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.

Quickly reminds reader of reasoning

Quickly reminds reader which Global Rules are in opinion

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.

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SAMPLE BRIEF(S)

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MUST I BRIEF THE CASE IN ORDER?

- No! The beauty of typing the brief is that you can add the pieces as they come to you.
- You might identify some parts of the opinion more quickly than others; it's OK to brief those parts first.
 - Identifying legally significant facts may be easier after you have read the entire opinion.
 - You might identify relevant general rules after digesting the court's holding and fact-specific reasoning. Alternatively, in some opinions, the explicit rules might stick out to you first, and the reasoning might be harder to decipher.
- After you finish briefing a case, review the earlier brief portions to identify possible additions/revisions.
 - Briefing clarifies understanding
 - Revised brief may get longer (as you find additional content to include) or shorter (as your understanding increases, you might be able to summarize more concisely) ⁸
- After you discuss a case in class, review your brief and revise as needed.

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

FACTS: The Δ, a cattle rancher and hay producer, had repeated problems with deer feeding at his haystacks. He had previously sought help from the local Fish and Wildlife Department and had successfully used haystack panels provided by the Department for several years, until deer began eating the hay again despite the panels. The Δ knew that he could apply to the Department for a permit to kill the deer. However, he did not apply, because he found the permit's dress/skin/disposal requirements "costly and inconvenient," though he had the financial means and time to comply with them. One day, a neighbor reported the Δ to the local police after the Δ shot at and killed some deer.

PROCEDURAL HISTORY: The trial court refused the Δ's request to instruct the jury on the COE defense, and the jury convicted the Δ of killing and wasting six deer.

ISSUE: Did the trial court err in refusing to instruct the jury on the COE defense?

HOLDING AND OUTCOME: The trial court did not err in refusing to issue a COE instruction to the jury. The appellate court affirmed the conviction.

- **Subholding(s):** The evidence would not permit a jury to find that the Δ's killing of the deer was necessary to prevent a threatened injury.

The facts of this case are simple, so the Facts section is short. For longer Facts sections, consider using a bulleted list instead of a giant paragraph.

Some writers choose to list the holding separately from the outcome.

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EXPLICIT RULES:

- Global Rules
 - What is the COE defense?
 - Section 161.200(1) of the Oregon Revised Statutes creates the COE defense: 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."
 - A defendant may invoke the COE defense if the defendant has acted to protect either life or property, because the statutory language does not limit the defense to actions taken to protect life.
 - A defendant is entitled to a jury instruction on the COE defense 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 [the] 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."
 - Procedural rules about the COE defense
 - "A criminal defendant is entitled to present his theory of defense to a jury if the available evidence could support that theory."
 - The court must review the statutory requirements for establishing the defense when it evaluates whether the evidence entitles a defendant in a particular case to a jury instruction on that defense.
 - Once the defendant has properly raised the defense, the State must disprove it beyond a reasonable doubt.

- Element-specific rules: None

In Oregon, the test for the COE defense consists of three requirements called elements.

The writer has organized the Explicit Rules section of the brief so that they could easily differentiate "global" rules about the entire defense from rules specific to one element (if any appear in the opinion). This structure helps the brief writer process the information and refer to it more easily later.

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REASONING:

Remember, all Reasoning content must be content that actually appears in the opinion.

- Necessity element subholding: The evidence would not allow a jury to infer that the Δ 's killing of the deer was necessary to prevent the threatened injury to his hay.
 - There was a logical relationship between the killing of the deer and the harm to the defendant's property, because the deer were feeding at the haystacks.
 - Killing the deer could have abated the harm, because "if the deer are dead, they can no longer feed."
 - The evidence would not allow a jury to infer that the defendant had no reasonable alternative but to kill the deer without a permit.
 - He never sought a permit.
 - He was capable of complying with the permit requirements. He failed to seek a permit only because he did not want to comply with them.

The brief writer chose to repeat the element-specific subholding immediately above the reasoning that supports it.

The *Webber* opinion contained reasoning on only one COE element: necessity. If it had contained reasoning on the other elements, the brief writer would have started a new bullet in the list for the next element's reasoning.

POTENTIAL RULES IMPLICIT IN *WEBBER*:

- To evaluate whether a defendant can offer evidence that would allow a jury to find that the defendant's actions were necessary to avoid a threatened harm, the court will consider whether the defendant's conduct bore a logical relationship to the ongoing harm, whether his conduct could have prevented the harm, and whether he had no reasonable alternative but to commit the crime.
 - This rule appears as an explicit rule in later COE cases!!
- An available legal alternative is not unreasonable merely because the defendant thinks that it is inconvenient or expensive.

The writer notes for themselves that the rule that was merely implicit in *Webber* became explicit in later cases.

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DEMO OF AN ELEMENT CHART WITHIN A BRIEF

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Element	Element-specific Subholding	Element-specific Rules	Element-specific Reasoning
Necessity	The evidence would not permit a jury to find that the Δ's killing of the deer was necessary to prevent a threatened injury to his hay.	NONE	• There was a logical relationship between the killing of the deer and the harm to the defendant's property, because the deer were feeding at the haystacks. • Killing the deer could have abated the harm, because "if the deer are dead, they can no longer feed." • The evidence would not allow a jury to infer that the defendant had no reasonable alternative but to kill the deer without a permit. ○ He never sought a permit. ○ He was capable of complying with the permit requirements. He failed to seek a permit only because he did not want to comply with them.
Imminence	NONE	NONE	NONE
Balancing of Evils	NONE	NONE	NONE

This briefing method balances the brief writer's need to dissect the opinion by *type of content* (holding, rule, reasoning, etc.) and their need to understand *which content pertains to each element*.

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