IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JERALD ALLEN ERICKSON,
Defendant-Appellant.

Linn County Circuit Court
13CR10601; A158448

Carol R. Bispham, Judge.

Submitted November 22, 2016.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Kristin A. Carveth, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Karla H. Ferrall, Assistant Attorney General, filed the brief for respondent.

Before DeHoog, Presiding Judge, and Egan, Judge, and Aoyagi, Judge.

DEHOOG, P. J.

Convictions on Counts 1 and 4 reversed; remanded for resentencing; otherwise affirmed.

DEHOOG, P. J.

A jury found defendant guilty of first-degree theft, second-degree criminal trespass, and second-degree criminal mischief for breaking down and selling as scrap metal an old excavator that he had found on private property. Defendant appeals the resulting judgment of conviction and assigns error to the trial court's denial of his motion for judgment of acquittal as to the theft and criminal mischief charges. Defendant argues that the state failed to prove that he took "property from an owner" or that the excavator was, in fact, the "property of another," because it adduced no evidence that the excavator had an owner. We agree with defendant that the state failed to prove an essential element of the theft and criminal mischief charges, and we reverse his convictions on those counts.

Because defendant's appeal arises from the denial of a motion for judgment of acquittal, we state the facts in the light most favorable to the state. *State v. Gaines*, 346 Or 160, 162, 206 P3d 1042 (2009). Defendant and a friend entered private land without the owner's knowledge or consent. There they found an excavator, which they disassembled and later sold as scrap metal. Various individuals witnessed different aspects of defendant's activities. First, Larry Coon, a member of a local mining club, came across defendant while he and his friend were taking apart the excavator. Coon was familiar with the property because his mining club had a mining claim on that land. Coon testified that he knew that the excavator had been on the property for a long time, but that he did not know who owned it.

Next, Deputy Wilcox of the Linn County Sheriff's Office encountered defendant and his friend at the excavator site with a large piece of metal loaded onto a flatbed trailer. Defendant told Wilcox that they were scrapping the metal. He told the deputy that they had talked to a miner the day before and that he had given them permission to take the metal. Wilcox responded by asking both men to leave and telling them to first remove the metal from their trailer because they did not have permission to take it.

Several days later, another deputy, Schrader, came across a trailer that was stuck in the mud and loaded with

what he recognized as a counterweight to an excavator. He drove to the excavator site and confirmed that it no longer had its counterweight. The following day, Schrader again saw the trailer carrying the counterweight, but at a different location. When the truck pulling the trailer drove off, Schrader followed it to a scrap metal dealer, B&B Auto Wrecking (B&B). Once there, Schrader spoke with defendant, who had been riding in the truck. Defendant told Schrader that the owner of the land on which he had found the excavator had given him permission to take the metal, but he was unable to tell Schrader the owner's name.

Rather than seize the counterweight, Schrader proceeded to scrap the metal with B&B for $1,058.40 and logged that sum into evidence. Schrader later determined that B&B's records showed that defendant and his friend had been paid $1,320.50 for scrap metal that they had sold there a few days earlier.

Schrader testified that, although he had tried, he had been unable to determine who owned the excavator. He explained that he had spoken with the owners of the property where the excavator had been located, but that they had told him that they did not own the excavator.

As a result of those events, the state charged defendant with, among other offenses, first-degree theft (Count 1), ORS 164.055,[1] and second-degree criminal mischief (Count 4), ORS 164.354.[2] At the conclusion of the state's case at trial,

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[1] ORS 164.055 provides, in relevant part:

"(1) A person commits the crime of theft in the first degree if, by means other than extortion, the person commits theft as defined in ORS 164.015 and:

"(a) The total value of the property in a single or aggregate transaction is $1,000 or more[.]"

The relevant portions of ORS 164.015 are discussed below.

[2] ORS 164.354 provides, in relevant part:

"(1) A person commits the crime of criminal mischief in the second degree if:

"(a) The person violates ORS 164.345, and as a result thereof, damages property in an amount exceeding $500[.]"

The relevant portions of ORS 164.345 are discussed below.

defendant moved for judgment of acquittal as to those two offenses. Defendant argued that the state had adduced no evidence as to who owned the excavator or, assuming that there was an owner, that the owner had not given defendant permission to take the metal for scrap. Defendant further argued that the state had not even shown that there was an owner. The trial court denied defendant's motion.

On appeal, defendant assigns error to the trial court's denial of his motion for judgment of acquittal. Defendant reprises his argument that the state failed to prove that the excavator was the property of another and not abandoned, because its evidence at trial only showed who was *not* the owner. The state acknowledges that it must prove that the excavator was the "property of another," but argues that it is not required to prove the identity of that owner or that the property was not abandoned. Because it is not required to prove either of those things, the state reasons, its evidence was sufficient to prove that the excavator was the property of another.[3]

We agree that the state was not required to prove the specific identity of the excavator's owner. *See State v. Woodward*, 187 Or App 233, 237, 66 P3d 556 (2003) (material element of theft is that the defendant deprived "another" of property or withheld property from "an owner"; the *identity* of the owner is not material). We do not, however, understand defendant to contend otherwise. Rather, as we understand defendant's argument, the problem with the state's case was that it lacked any evidence that the excavator *had* an owner, not that the state failed to prove *who that owner was*. In support of that argument, defendant reasons that the state could have shown that the excavator had an owner either through evidence that a specifically identified person owned it, or through other evidence indicating that it had not been abandoned. We do not equate those suggestions as to how the state might have proved that the excavator had

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[3] As we explain below, an element of theft as alleged here is that the person, with intent to deprive "another of property," takes the property from "an owner." ORS 164.015. An element of criminal mischief, in turn, is that the person tampers or interferes with "property of another." ORS 164.345(1). Because we see no material distinction between those elements as they apply to the circumstances here, we discuss them both as "property of another" throughout this opinion.

an owner with an argument that the state must produce that specific evidence to avoid a judgment of acquittal.[4]

Turning, then, to defendant's argument, defendant correctly contends that both theft and criminal mischief require proof that the property at issue is the property of another; stated differently, the property must belong to an owner who is not the taker. Under ORS 164.015, "[a] person commits theft when, with intent to deprive *another of property*," the person takes such property from "an *owner*." (Emphases added.) And, with respect to the property taken, "owner" means "*any person who has a right* to possession thereof superior to that of the taker, obtainer or withholder." ORS 164.005(4) (emphasis added). Similarly, under ORS 164.345(1), a person commits criminal mischief when, "with intent to cause substantial inconvenience to the owner or to another person, and having no right to do so nor reasonable ground to believe that the person has such right, the person tampers or interferes with *property of another*." (Emphasis added.) "Property of another," in turn, is "property in which *anyone other than the actor has a legal or equitable interest* that the actor has no right to defeat or impair, even though the actor may also have such an interest in the property." ORS 164.305(2) (emphasis added). Relying on those definitions, defendant argues that the state failed to prove that the excavator was the "property of another," as required for both offenses.

Because defendant appeals the trial court's denial of his motion for judgment of acquittal, we review the evidence in the light most favorable to the state to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995). In this case, the disputed element is "property of another." We therefore review to determine whether the state produced evidence at trial from which a rational trier of fact could have found that the excavator was the property of another.

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[4] Given that understanding, it is unnecessary to address the state's contention that defendant failed to preserve his abandonment argument because he did not argue, in his motion for judgment of acquittal, that the state was required to prove that the excavator had not been abandoned.

As noted, the state does not dispute, as a general proposition, that it must prove that the excavator was property of another. The state contends, however, that because it is not required to prove the identity of any specific owner, *see Woodward*, 187 Or App at 237, the evidence at trial was sufficient to establish that the excavator was, in fact, property of another. The state appears to reason that, because the excavator did not belong to defendant, it is presumed to be the "property of another" unless defendant raises a defense requiring the state to prove otherwise. And, in the state's view, defendant did not raise such a defense.

The state acknowledges that defendant argued that it was required to prove that the excavator had an owner, but contends that defendant's argument did not give rise to an obligation that the state prove that the excavator was not abandoned. According to the state, it is under no obligation to prove that property is not abandoned until a defendant raises the defense of an "honest claim of right," ORS 164.035(1). In relevant part, ORS 164.035(1) provides:

> "In a prosecution for theft it is a defense that the defendant acted under an honest claim of right, in that:
>
> "(a) The defendant was unaware that the property was that of another; or
>
> "(b) The defendant reasonably believed that the defendant was entitled to the property involved or had a right to acquire or dispose of it as the defendant did."

When a defendant raises an "honest claim of right" defense at trial, the state must disprove that defense beyond a reasonable doubt. ORS 161.055(1). As the state notes, however, that burden typically does not arise until a defendant raises the defense, either by written notice to the state or by producing affirmative evidence of the defense in the defendant's case-in-chief. ORS 161.055(3). Because, as the state correctly observes, defendant never raised an honest claim of right defense, the state was not required to disprove that defense. From that premise, the state concludes that it was not required to prove that the excavator in this case was not abandoned.

The state's argument fails for two reasons. First, defendant is not arguing—nor did he argue in the trial court—that, if the excavator belonged to another, he either was unaware of that fact, ORS 164.035(1)(a), or nonetheless reasonably believed he could dispose of the excavator as he did, ORS 164.035(1)(b). Instead, his contention is that the state never proved that the excavator was property of another; under defendant's theory, there was no reason to raise the defenses provided by ORS 164.035(1). Stated differently, defendant does not argue that the state failed to disprove his defense; his argument is that the state never proved its affirmative case.

Second, the state's approach effectively reads an element out of both the offenses of theft and criminal mischief. If we were to accept the state's apparent suggestion—that it was only required to prove that the excavator did not belong to *defendant*—we would remove from the statutory definition of each offense the essential element of "property of another." *See, e.g.*, *State v. Dickerson*, 356 Or 822, 828, 345 P3d 447 (2015) (in prosecution for criminal mischief, state's argument that the jury needed to find only that the defendant had aided his son in shooting at property that his son believed he did not have a right to shoot would have read out of the statute the requirement that the damaged property be "property of another"). Accordingly, we reject that suggestion.

Instead, we conclude that, to establish the required element that the property taken or damaged was property of another, the state was required to produce affirmative evidence that the excavator had an owner. That does not mean that the state must prove the identity of any specific owner; its evidence, however, must be sufficient to allow the jury to find that the property at issue is not abandoned. That is because "[a]bandoned property is that of which the owner has relinquished all right, title, claim, and possession, with the intention of not reclaiming it or resuming its ownership, possession or enjoyment." *Jackson v. Steinberg*, 186 Or 129, 134, 200 P2d 376 (1948), *reh'g den*, 186 Or 129, 205 P2d 562 (1949). Thus, an owner who has abandoned property is no longer an "owner," and the property abandoned can therefore no longer be the "property of another" for purposes of the theft and criminal mischief statutes. Accordingly, at

least in cases such as this one, in which the issue of abandonment has been raised,[5] the state must establish that the property at issue is not abandoned.[6]

Here, viewing the evidence in the light most favorable to the state, we cannot conclude that a rational trier of fact could have found that the excavator was the "property of another." The state's evidence showed that the excavator was located on private property, but the owners of that property expressly denied ownership of the excavator. The state's evidence also showed that, despite his efforts to do so, Schrader was unable to determine who owned the excavator; in fact, none of the state's evidence as much as suggested that *anyone* owned the excavator.

In sum, the state in this case did not adduce any evidence to prove that the excavator was the property of another. As a result, no rational trier of fact could have found that essential element of the theft and criminal mischief charges beyond a reasonable doubt. Accordingly, we reverse defendant's convictions on those counts.

Convictions on Counts 1 and 4 reversed; remanded for resentencing; otherwise affirmed.

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[5] We note that, although the state argues that defendant did not raise the issue of abandonment as an affirmative defense, it does not dispute that defendant raised the possibility that the excavator had been abandoned in the course of the trial.

[6] Other state courts have taken a similar approach. For example, in *Howard v. State*, 583 P2d 827, 833 (Alaska 1978), the Supreme Court of Alaska held that the state is required to prove that the property is not abandoned to show it was the property of another, explaining:

> "[O]nce sufficient evidence had been adduced [by defendants] concerning [the alleged victim's] purported abandonment of the scrap copper, it then became incumbent upon the prosecution as part of its overall burden of proof to demonstrate beyond a reasonable doubt that the scrap metal was not abandoned at the time the alleged larceny was perpetrated. If the copper was in fact abandoned, then it was neither owned by nor in the possession of another person or entity and thus could not be the subject of larceny."

See also Szewczyk v. State, 7 Md App 597, 601, 256 A2d 713, 715 (1969) ("It is true that the 'defendant is not guilty of larceny if he has taken possession of the property with the reasonable and actual belief that it had been abandoned,' since such a belief negates the requisite intent to steal[.]" (Quoting 2 Wharton's Criminal Law and Procedure, (Anderson Ed.), § 493, p 161.)); *Commonwealth v. Meinhart*, 173 Pa Super 495, 500, 98 A2d 392, 395 (1953) ("Abandoned property does not so qualify. It belongs to no one, nor is it regarded as being in the possession of any one. Because there is no property right in it in any one it cannot be the subject of larceny.").