STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION July 3, 2012 9:25 a.m.
v BLAINE RUSSELL LEVIGNE, JR., Defendant-Appellant.	No. 306776 Emmet Circuit Court LC No. 10-002981-AR

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v WILLIAM GERARD MCNEIGHT, Defendant-Appellant.	No. 306777 Emmet Circuit Court LC No. 11-002982-AR

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

William McNeight and Blaine Levigne[1] appeal by leave granted from the circuit court's order affirming their convictions before the district court for unlawfully taking a bear in violation of MCL 324.40118(3). Defendants were charged with a misdemeanor violation of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30701 *et seq.*, for using trained hunting dogs to assist Todd Yoder, a Native American hunter in capturing and killing a bear out of hunting season. We reverse.

[1] The spelling of "Levigne" is inconsistent in the record. Most of the court documents spell his name as "Lavigne," while the documents submitted by defendants' attorney (including those filed in this appeal) identifies the defendant as "Levigne."

Plaintiff argued that defendants unlawfully took a bear outside of the season in which it is lawful to hunt bear with the use of a firearm, which was defined in Wildlife Conservation Order (WCO) 3.203 as running between September 17 and September 25, 2010. Plaintiff asserted that MCL 324.40118(3) precludes the unlawful "taking" of a bear, which is defined in the statute to include both hunting and attempting to hunt. Plaintiff also claimed that Yoder's permit to hunt out of season did not extend to defendants and permit them to assist. As defendants knowingly assisted the hunter in capturing and killing a bear, plaintiff argued that defendants could not claim that they were only "training" their animals out of season.

Defendants argued that they did not break the law because their no-kill tags permitted them to participate in a bear hunt out of season, so long as they did not kill the bear. Defendants asserted that the tags were designed to limit the number of bears killed/harvested, not the number of participants permitted in a bear hunt. As Yoder was authorized by his permit to hunt bear until October 26 and defendants did not actually kill the bear, defendants reasoned that they did not violate the law. Defendants conceded that they were participating in the hunt rather than training their dogs to hunt bear because they intended to assist the hunter in harvesting the bear. While defendants claimed that the law did not prohibit them from acting as licensed hunting guides, they also conceded that Yoder would not have been able to harvest the bear without their assistance.

The district court found defendants guilty of violating MCL 324.40118(3). The court noted that the essential question before the court was whether defendants were lawfully permitted to participate in a bear hunt out of season simply because the hunter had a valid permit to hunt out of season. The court concluded that defendants' own no-kill permits restricted their right to participate in bear hunting outside of the hunting season specified for authorized Michigan residents.

During the appeal before the circuit court on September 9, 2011, the parties argued consistent with their respective positions before the district court. Defendants additionally argued that they did not "take" the bear because longstanding precedent requires that a hunter possess or capture an animal before it can be "taken." As they did not chase the bear while using a gun or bow, defendants argued, they could not have committed a "taking" under the statute. Plaintiff responded that "taking" is defined by statute to include defendants' chasing and capturing of the bear. The circuit court affirmed the district court conviction, reasoning that defendants were participating in a bear hunt out of season, which constitutes hunting under the statute. The court specifically held as follows:

> Whether they were carrying a gun, or discharged the gun themselves, they were participating in hunting and therefore using hunting in its commonly understood term, they were hunting as participants in the hunt. And the clear language of the statute says that these Defendants are not permitted to do that outside of the bear hunting season.

Defendant's now appeal the circuit court's order affirming their convictions.

On appeal, defendants assert that the trial court was precluded from finding that they acted in violation of MCL 324.40118(3). We agree. Defendants' sole issue on appeal is

essentially an argument that the evidence presented at trial did not demonstrate that they committed an action proscribed by law. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-269; 380 NW2d 11 (1985). Essential to defendants' argument on appeal is the claim that the trial court erred in interpreting MCL 324.40118(3). On appeal, questions of statutory interpretation are reviewed de novo. *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007).

Defendants were convicted of violating MCL 324.40118(3), which reads as follows:

> A person who violates a provision of this part or an order or interim order issued under this part regarding the possession or taking of deer, bear, or wild turkey is guilty of a misdemeanor and shall be punished by imprisonment for not less than 5 days or more than 90 days, and a fine of not less than $200.00 or more than $1,000.00, and the costs of prosecution.

A reading of the above-quoted provision demonstrates that to violate MCL 324.40118(3), an individual must violate an underlying provision or order relating to the taking of certain animals. In the present case, defendants are alleged to have violated DNR order 3.203(4), which provides:

> The open season for taking a bear with firearms, crossbows, or bow and arrow in the red oak bear management unit in zone 2 shall be from the first Friday following September 15 and 8 days thereafter. The open season for taking a bear with bow and arrow only in the red oak bear management unit shall be from the first Friday following October 1 through 6 days thereafter.

In charging defendants with a violation of MCL 324.40118(3), the prosecution theorized that defendants' conduct constituted a taking of a bear. That theory is largely based on the statutory definition of the term "take." "Take" is statutorily defined as "fishing, hunting, trapping, catching, capturing, killing, or the attempt to engage in such an activity." MCL 324.43508(1). Likewise, "hunt" is defined to mean "to pursue, capture, shoot, kill, chase, follow, harass, harm, rob, or trap a wild animal, or to attempt to engage in such an activity." MCL 324.43505. As a result of its interpretations of those statutory provisions, both the prosecution and the lower courts have determined that defendants, by working in concert with Yoder, "took" the bear when they utilized dogs to tree the bear prior to its shooting.

It is certainly reasonable to conclude that defendants, by pursuing, chasing, following and harassing a bear with hunting dogs did commit a taking under the statutory definition of that term. However, DNR order 3.203(4) does not merely prohibit the taking of a bear. Rather, the order at issue placed qualifying language after the term "taking a bear" in the form of the phrase "with firearms, crossbows, or bow and arrow." The parties agree that neither of these defendants utilized a firearm, crossbow or bow and arrow while assisting Yoder. As the prosecution points out, these defendants were not convicted on a theory of aiding and abetting the unlawful taking of a bear. Indeed, the trial court emphasized that whether these defendants utilized a gun was irrelevant to its determination. However, when interpreting a statute, the court's goal is to "give effect to the intent of the Legislature." *People v Hill*, 486 Mich 658, 667-668; 786 NW2d 601

(2010). Unless ambiguous, statutory language should be given its ordinary meaning and is presumed "to have intended the meaning expressed in the statute." The statutory provision and the DNR order at issue do not prohibit an unarmed individual from assisting someone with the lawful taking of a bear, nor do they prohibit someone from taking a bear *without* a firearm, crossbow or bow and arrow. Had the legislature or DNR intended to prohibit such behavior, the unambiguous language of those bodies would exhibit that intent. Because the parties stipulate that neither defendant utilized a firearm, crossbow or bow and arrow to take a bear, there was insufficient evidence presented to support a conviction under MCL 324.40118(3) and DNR order 3.203(4).

Reversed.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens