State v. Doe, Docket No. 32575

Thirteen-year-old John Doe, his brother, and a friend were walking through a weed-covered field adjacent to an apartment complex. Doe's brother produced a cigarette lighter and proceeded to light on fire, and then extinguish, several weeds. Doe took control of the lighter and also began lighting weeds on fire. The fire ignited by Doe grew out of control and the trio was unable to extinguish it. Doe and his companions ran to a nearby community center to phone the fire department. Even though the fire department was contacted, it was too late to stop the adjacent apartment complex from catching on fire and being destroyed. When questioned about the fire, Doe initially claimed someone else had caused the fire. Doe eventually admitted that he started the fire by intentionally burning the weeds in the adjacent field. The state filed a petition alleging that Doe committed two counts of malicious injury to property for the destruction of the apartment building and the personal property of one of the apartment's tenants.

An evidentiary hearing was held and, at the close of the state's evidence, the magistrate found that Doe committed the two counts of malicious injury to property. On appeal, Doe argues that the state failed to demonstrate the element of malice at trial because no evidence was produced to prove Doe intended to injure or destroy the apartment complex or the personal property within when he started the fire and burned the weeds.

IN THE SUPREME COURT OF THE

STATE OF IDAHO

* * * * *

In the Interest of:

JOHN DOE,

A Child Under Eighteen (18) Years of Age.

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

JOHN DOE,

Defendant-Appellant.

DOCKET NO. 32575

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon

HONORABLE RENAE J. HOFF, Presiding Judge

THOMAS A. SULLIVAN
Canyon County Public Defender
P.O. Box 606
Caldwell, ID 83606-0606

LAWRENCE WASDEN
Attorney General
P.O. Box 83720
Boise, ID 83720-0010

IN THE SUPREME COURT OF THE

STATE OF IDAHO

* * * * *

In the Interest of: JOHN DOE, A Child Under Eighteen (18) Years of Age.	)	DOCKET NO. 32575
STATE OF IDAHO, Plaintiff-Respondent, vs. JOHN DOE, Defendant-Appellant.	)	

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon

HONORABLE RENAE J. HOFF, Presiding Judge

THOMAS A. SULLIVAN
Canyon County Public Defender
P.O. Box 606
Caldwell, ID 83606-0606

LAWRENCE WASDEN
Attorney General
P.O. Box 83720
Boise, ID 83720-0010

TABLE OF CONTENTS

TABLE OF CASES AND STATUTES

I. **STATEMENT OF THE CASE**

A. Nature of the Case

Appellant appeals from his convictions, under the Juvenile Corrections Act of two counts of malicious injury to property.

B. Course of Proceedings and Statement of Facts

Appellant was charged by way of an Amended Petition, filed September 18, 2001, with two counts of malicious injury to property. He entered a denial or a plea of not guilty. The case proceeded to court trial on October 10, 2001.

The facts adduced at the trial are substantially undisputed, and Appellant agrees with the recitation of the facts by the District Court, in its appellate capacity:

> On July 12, 2001, the Appellant, his twin brother and their friend James Mayes were walk- ing across an open field in Nampa, Idaho. The boys were on their way to the Nampa Recreation Center where they were going to go swimming. The Appellant's twin brother Jimmy produced a cigarette lighter and started lighting some individual weeds in the field on fire. Each time Jimmy lit a weed, he would extinguish the fire he lit. Eventually, the Appellant took control of the lighter and also lit some weeds on fire. Unfortunately, Appellant's fire grew from small to large. The fire continued to grow and got out of control in spite of the boys' attempts to extinguish it. The boys rushed off to the recreation center to call the fire department. Regrettably there was an apartment complex behind the field where the fire was started. The fire destroyed both the building structure and personal property within the complex.

The petition's charges were that Appellant "did maliciously destroy certain property, to-wit: all the contents of an apartment . . by setting a field on fire which travelled to

their apartment building burning the Rankin's apartment" and that Appellant "did maliciously injure and/or destroy certain real property, to-wit: the Juniper Court Apartments by setting an adjacent field on fire which travelled to the Juniper Court Apartment building burning the structure."

Based on the facts set forth, the Magistrate Court convicted Appellant on both counts. He was placed on probation with 339 days suspended and ordered to pay $34,885.48 in restitution. An appeal was taken to District Court, asserting that Appellant's Motion for Judgment of Acquittal should have been granted because the evidence was simply not sufficient to warrant a conviction for the two charged offenses. In its appellate capacity, the District Court affirmed.

This appeal follows.

II. **ISSUE ON APPEAL**

A. Whether The Magistrate Erred By Denying The Motion For Judgment of Acquittal

III. **ARGUMENT**

A. The Magistrate Erred By Denying the Motion For Judgment of Acquittal

1. Standard of Review

Review of a denial of a Motion for Judgment of Acquittal requires that the appellate court independently consider the evidence in the record to determine whether a reasonable mind could conclude that the defendant's guilt as to each material element of the offense was proven beyond a reasonable doubt. State v. Dietrich, 01.40 ICAR 550 (2001); State v. Espinoza, 133 Idaho 618 (Ct. App. 1990). When a District Court imparts a decision in its

appellate capacity, the Court of Appeals or Supreme Court conducts an independent review of the record before the Magistrate. State v. Madden, 127 Idaho 894, 908 P.2d 587 (Ct. App. 1995).

2. The Damage to the **Property Alleged In the Petition** Was Accidental, Not Intentional.

The evidence is clear, unrebutted and undisputed. The boys started a little fire and tried to put it out. They never intended to injure or burn the apartment building. That property damage was wholly accidental. The damage was obviously related to the boys' acts, but only enough so as to potentially reach civil liability under a negligence standard, and not enough for criminal liability for malicious injury to property.

Appellant contends that under State v. Nastoff, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993) and under I.C. §18-114, a conviction cannot be had without proof that John intended to injure the property alleged in the Petition to have been injured. "There is no implied legislative intent to create criminal liability under this section where the injury to property was an unintended consequence of conduct that may have violated some other statute." State v. Nastoff, supra. Nastoff is on-point and controlling in the present case.

Under the State's view, anyone who burns weeds is vicariously guilty of any subsequent damage, even if it is accidental and even if the accused tried to prevent the damage. Under the State's view, anyone whose campfire gets out of control and burns other property is guilty of a crime. The State never proved who owned the weeds or the property they were located on, and therefore, never made a proper case that John's act of

lighting the weeds on fire was in fact unlawful. Even if the State had proved that, it would not prove what was charged: felony malicious injury to the apartment buildings.

It is analogous to someone who fails to yield the right-of-way and causes a motor vehicle collision. That driver committed a wrongful, illegal act. The act caused damages. The driver is liable, under a negligence standard, for the damage. However, the driver is **not** criminally liable for malicious injury to property for damaging the other vehicle.

Note that this is also **not** a case where Appellant was subject to a vague charging document. The Petition was quite specific as to what he was accused of maliciously injuring: the apartment buildings. The facts did not bear out this assertion. As tragic as the fire was, it is made no less tragic by a disingenuous attempt to hold Appellant criminally liable for malicious injury to the property of the apartment building. This case is one of a classic accident. It simply cannot be stated that where, undisputedly, John tried to prevent damage to the apartments, he "maliciously" injured the apartments.

The Nastoff court held that I.C. §18-114 is simply a legislative adoption of the common law rule that guilt of a crime generally requires a concurrence of the requisite mental fault with the prohibitive act. The court approvingly quoted other authority for the rule that "the distinctions now drawn between various kinds of crimes in terms of their seriousness, as reflected by the punishments provided for them, would lose much of their significance if an intent to cause any one specific type of harm would

suffice for conviction as to any other type of harm which is criminal when intentionally caused."

Applying a negligence standard to reach felony criminal liability was again eschewed in State v. Blake, 133 Idaho 237, 985 P.2d 117 (1999)

Thus, even if the State did prove that the weed to which John set fire was the property of another and was unlawful (which they did not do), that act and intent cannot rightly be transferred to a mens rea state necessary for criminal liability for the burning of an apartment building where it is undisputed that the accused tried to prevent, and had the intent to prevent, damage to the apartment building. That having been said, it is also clear that the State did not prove that it was a crime for John to light the "weed" on fire. Nor did they prove that the weeds were the property of Juniper Court Apartments, William or Jennifer Hankins or Robert Bennett, which is what John was charged with. Canyon County residents burn weeds regularly to prevent overgrowth and reduce fire damage and to slow the spread of noxious weeds. In fact, it is a misdemeanor crime to fail to control or eradicate noxious weeds on one's property. I.C. §22-2404. The State did not identify the name of the landowner upon whose land John burned the weed. In fact, the State did not prove the weed was, in fact, the property of "another" as the code requires. Nor did the State prove that John intentionally or maliciously "set[] a field on fire" as alleged; that language implies he intentionally set the field ablaze, although the facts do not bear this assertion out. By all accounts, the weed could very well have been wild and not

owned by anyone, subject to protection only under I.e. §18-7004.

Finally, the Petition charges that John maliciously destroyed certain "real and personal property in the apartment building". "Maliciously" as used in the Petition is directly equated to the apartments, and therefore, the statutory definition of that term, I.e. §18-101, would require proof of John's intent to do a wrongful act relevant to the property charged. His intent to burn a weed, even if wrongful, is not the malicious act he was charged with committing.

In summary, the manner in which this case was charged, combined with the statutory definitions and the caveat that words in the code have a significance attached by the definition in I.e. §18-101 "unless otherwise apparent from the context" and combined with the undisputed circumstances, requires proof of malicious intent towards the apartment building and its contents. State v. Nunes, 131 Idaho 408, 958 P.2d 34 (Ct. App. 1998). None was proven.

The facts do not fall within the ambit of I.C. §18-7001. I.e. §18-7001 only applies to destruction of property "in cases otherwise than such as are specified in this code". What John did is specifically covered by I.e. §18-7004, and hence his actions cannot be charged under I.C. §18-7001. John set fire to a weed in a field of weeds and it spread to the apartment building. This fits within the provisions of I.e. §18-7004 for "wilfully or carelessly" setting fire on grass or prairie land. While he may be guilty of that offense, he is not guilty of Count I or Count II of the petition.

IV. **CONCLUSION**

The convictions in this case should be set aside.

Dated this 30th day of May, 2006.

Respectfully submitted,

CANY DER

_____

THOMAS A. SULLIVAN
Attorneys for Defendant-Appellant
Residing at Caldwell, Idaho

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing Appellant's Brief was mailed to:

Idaho Attorney General
P.O. **Box 83720**
Boise, ID 83720-0010

properly enclosed in an envelope, with postage prepaid, on this 30th day of May, 2006.

THOMAS A. SULLIVAN

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 32575**
	)	
vs.	)	
	)	
JOHN DOE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE WILLIAM B. DILLON, Magistrate Judge
HONORABLE RENAE J. HOFF, District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

THOMAS A. SULLIVAN
Canyon County Public
Defender's Office
PO Box 606
Caldwell, ID 83606
(208) 454-2264

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature of the Case

Doe, a juvenile, appeals the denial of his motion for judgment of acquittal.

Statement of the Facts and Course of the Proceedings

Thirteen-year-old Doe, his brother, and a friend were walking through a weedy field adjacent to an apartment complex, on their way to the Nampa Recreation Center, when Doe's brother produced a lighter. (10/10/01 Tr., p.23, L.23 – p.26, L.22; R., p.65.) Doe watched his brother light and extinguish several small fires in the weeds. (10/10/01 Tr., p.26, L.23 – p.27, L.3; R., pp.65-66.) Doe took the lighter from his brother and lit several weeds on fire. (10/10/01 Tr., p.27, Ls.4-7; R., p.66.) Doe concedes he intended to start a fire. (Appellant's brief, p.3.) The other boys told Doe to put the fire out, but Doe refused until the fire grew much larger. (10/10/01 Tr., p.27, L.25 – p.28, L.12.) By then, it was too late to put the fire out. (10/10/01 Tr., p.28, Ls.8-16.) When Doe's fire grew beyond the boys' control, they left to find help. (10/10/01 Tr., p.28, Ls.12-16; R., p.66.) Before help arrived, the nearby apartment complex burned down. (R., p.66.) Doe initially lied about the fire, claiming someone else had caused it by playing with fireworks, but he eventually confessed. (10/10/01 Tr., p.29, L.7 – p.30, L.15; p.36, L.18 – p.37, L.2.)

The Canyon County Prosecutor filed a petition against Doe under the Juvenile Corrections Act ("JCA"). (R., pp.4-6.) An amended petition charged Doe with two counts of malicious injury to property. (R., pp.13-16.) The petition charged that Doe destroyed the apartment building and an apartment's contents

when he lit the field on fire. (R., p.14.) The magistrate adjudicated Doe under the purview of the JCA on both counts of malicious injury to property. (10/10/01 Tr., p.42, L.10.) Doe filed an I.C.R. 29 motion for judgment of acquittal, which the magistrate denied. (R., pp.19-20; 10/29/01 Tr., p.7, Ls.10-12.) Doe appealed that denial to the district court, which affirmed. (R., pp.27-28, 65-72.) Doe timely appeals. (R., pp.73-75.)

ISSUES

Doe states the issue on appeal as:

> Whether The Magistrate Erred By Denying The Motion For Judgment of Acquittal

(Appellant's brief, p.2.)

The state rephrases the issues as:

1. Has Doe failed to show that the trial court's finding of guilt was not supported by substantial and competent evidence?

2. Has Doe failed to show that, as a matter of law, he could not be charged with malicious injury to property?

ARGUMENT

I.
Doe Has Failed To Show That The Trial Court's Finding Of Guilt Was Not Supported By Substantial And Competent Evidence

A. Introduction

Doe contends the state presented insufficient evidence to sustain his juvenile adjudication for malicious injury to property, and that the trial court therefore erred when it denied his motion for judgment of acquittal. Specifically, Doe contends that the state failed to present evidence from which the trier of fact could find beyond a reasonable doubt that Doe harbored the intent to knowingly injure property he did not own. (Appellant's brief, pp.2-6.)

Doe's claim fails. A review of the record shows that the state presented substantial and competent evidence to support the trial court's finding that, when Doe lit the fire, he intended to injure property he did not own, thus satisfying the elements of the crime.

B. Standard Of Review

In an appeal from the denial of an I.C.R. 29 motion for a judgment of acquittal, the issue presented is whether there was substantial and competent evidence to support a guilty verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997). The evidence must be construed in the light most favorable to the verdict, recognizing that it is the trier of fact's province to determine the credibility of witnesses and the weight to give to the evidence. State v. Thomas, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999). The evidence is sufficient where there is substantial, even if disputed, evidence from

which it was reasonable to find all the elements of the crime proven beyond a reasonable doubt. Id. An appellate court will not set aside a judgment of conviction entered on a verdict if there is substantial evidence on which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992).

C. Doe Has Failed To Show That The Trial Court's Finding Of Guilt Was Not Supported By Substantial And Competent Evidence

The elements of malicious injury to property are: "malicious injur[y to] any real or personal property not [the defendant's] own." I.C. § 18-7001. *Compare with* ICJI 1301. Malice requires "a wish to vex, annoy, or injure another person," or alternatively, "an intent to do a wrongful act." I.C. § 18-101. Where, as here, "the state relies upon the 'intent to do a wrongful act' form of malice in a prosecution under I.C. § 18-7001, the malice element is satisfied by evidence that the defendant intended to injure the property of another, and the state is not required to prove that the defendant intended the particular degree or scope of injury that ensued from his acts." State v. Nunes, 131 Idaho 408, 410, 958 P.2d 34, 36 (Ct. App. 1998).

In this case, Doe concedes he intended to start a fire. Although the state did not present any evidence that specifically established the ownership of the field or weeds, it did not need to. The state presented evidence that Doe was 13 years old and was only passing through the field on his way to the Recreation Center. The trial court reasonably inferred from those facts that Doe did not own

the property he lit on fire. (10/10/01 Tr., p.40, L.14.) Specifically, the trial court found, "no possible set of facts that the evidence would support that would cause the Court to believe that the juvenile had the right to set grass on fire in a vacant lot." (10/29/01 Tr., p.7, Ls.7-10.) Because Doe intended to injure the property of another, his conduct was malicious, satisfying all the elements of Idaho's malicious injury to property statute.

On appeal, Doe argues that to sustain his adjudication for malicious injury to property the state was required to prove that Doe intended to injure the apartment complex that burned as a result of his malicious conduct. Citing State v. Natstoff, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993), Doe argues that he is not criminally liable for the damage to the apartment buildings, contending the damage was caused by negligence, not malice. The state agrees with Doe that the reasoning of Natstoff is useful. Contrary to Doe's assertions, however, the outcome of Natstoff is not "controlling in the present case." (Appellant's brief, p.3.)

Natstoff used an illegally modified chainsaw to cut wood and, in doing so, started a forest fire. Id. at 668, 862 P.2d at 1090. The state charged Natstoff with malicious injury to property but did not contend or present any evidence at trial to establish that Natstoff intended to start a fire by his operation of the chainsaw. Id. Interpreting the word "maliciously" as that term is used in I.C. § 18-7001, the Idaho Court of Appeals concluded that the malicious injury to property statute "creates culpability for malicious injury to property only where the defendant's conduct causing the injury is accompanied by an intent to injure

property of another." Id. at 670, 862 P.2d at 1092. Because the state failed to meet its burden of showing that Natstoff, in using the illegally modified chainsaw, "harbored the intent to knowingly injure real or personal property that he did not own," Nastoff's conviction was reversed. Id.

In deciding Natstoff, the Court of Appeals "intimate[d] no opinion that the intent [requirement of I.C. § 18-7001] must be to injure precisely the same property that is in fact injured." Natstoff, 124 Idaho at 670 n.3, 862 P.2d at 1092 n.3 (citing 1 LaFave and Scott, Substantive Criminal Law, § 3.12(d) at 399-400 (1986)). Instead, the court specifically recognized that under the doctrine of "transferred intent" malice may transfer from one victim to another if the intended criminal act matches the criminal harm that resulted. Id. at 670, 862 P.2d at 1092. Quoting the leading treatise on the doctrine, the court of appeals explained:

> [W]hat has sometimes been referred to as "transferred intent" is applicable only within the limits of the same crime; A's intent to kill B may suffice as to his causing the death of C, but A's intent to steal from C will not suffice as to his causing the burning of C's property. That is, while a defendant can be convicted when he both has the *mens rea* and commits the *actus reus* required for a given offense, he cannot be convicted if the *mens rea* relates to one crime and the *actus reus* to another.

Id. at 670, 862 P.2d at 1092 (quoting 1 LaFave and Scott, Substantive Criminal Law, § 3.11 at 385 (1986)). Thus, under the doctrine of "transferred intent" recognized in Natstoff, if a defendant intends to knowingly injure specific property he does not own, and the defendant's actions injure different property he does not own, his malice as to the intended result (burning the weeds) satisfies the

mental state requirement of the unintended result (burning the adjacent apartment building).

The Court of Appeals subsequently applied a similar principle in State v. Nunes, 131 Idaho 408, 958 P.2d 34 (Ct. App. 1998). In that case, Nunes conceded that he intended to break a fuel tank's lock to steal gas, but claimed he did not intend the resulting land contamination and should not have been liable for it. Id. at 408, 958 P.2d at 34. Because I.C. § 18-7001 does not require that the perpetrator intend to cause any particular amount of damage, the Court of Appeals held that it was no defense that the damage Nunes caused vastly exceeded the damage he intended to cause. Id. at 410, 958 P.2d at 34. The court also rejected Nunes' argument, similar to that made by Doe in this case, that his conviction for malicious injury to property could not stand because it was based upon an act of negligence. Id. The court held instead that Nunes' intention "to break the lock on the fuel tank so that he could steal gasoline. … constitutes an intention to do the type of wrongful act that is proscribed by I.C. § 18-7001 and therefore satisfies the malice element of the crime." Id.

Although Doe contends he did not intend to burn down the apartment building, he concedes he intended to burn the weeds. The magistrate concluded the unlawful act of burning the weeds caused the injuries alleged in the amended petition. (10/10/01 Tr., p.42, Ls.3-10.) Applying the reasoning of Natstoff and Nunes, Doe's intent to burn the weeds transferred to the apartment fire his actions caused. (*See* 10/10/01 Tr., p.42.)

The magistrate found Doe had intentionally lit on fire property that was not his own and thereby satisfied the requirements of malicious injury to property. (10/10/01 Tr., p.42, Ls.1-3.) The facts and reasonable inferences to be drawn therefrom support the trial court's finding of guilt, and Doe has therefore failed to show the trial court's finding of guilt was not supported by substantial and competent evidence.

II.
Doe Has Failed To Show That, As A Matter Of Law, He Could Not Be Charged With Or Convicted Of Malicious Injury to Property

A. Introduction

Doe contends he could not have been found guilty of malicious injury to property under I.C. § 18-7001 as a matter of law because that offense is limited to "cases otherwise than such as are specified in this code." Doe asks this Court to interpret that clause to mean a defendant may only be found guilty under I.C. § 18-7001 if his crime does not make him potentially culpable under any other section of the Idaho Code. Doe claims for the first time on appeal that he should have been charged with a violation of I.C. § 18-7004, firing timber or prairie lands, and therefore contends the trial court's finding of guilt under I.C. § 18-7001 was invalid. (Appellant's brief, p.6.)

Doe's claims fail for several reasons. First, although he has framed the issue as one of sufficiency of the evidence, Doe's challenge is actually an attack on the charging document, an attack which was required to have been raised by way of an I.C.R. 12(b)(2) motion prior to the evidentiary hearing in this case. Because Doe did not object to the sufficiency of the petition prior to the

evidentiary hearing, he has waived his right to challenge it on appeal. Second, even assuming Doe did not waive this claim, his argument fails because charges may be brought under I.C. § 18-7001 even when another statute is applicable. Finally, Doe's argument is without merit because the more specific offense he cites as an alternative does not apply in this case.

B. Standard Of Review

The appellate court exercises free review over the application and construction of statutes. State v. Reyes, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003).

C. Doe's Claim That He Should Not Have Been Charged With A Violation Of I.C. § 18-7001 Was Waived By His Failure To Challenge The Juvenile Petition Before The Evidentiary Hearing As Required By I.C.R. 12(b)(2)

Doe claims for the first time on appeal that his actions in setting the weeds on fire could not be charged as malicious injury to property in violation of I.C. § 18-7001, claiming instead that he should have been charged with firing timber or prairie lands in violation of I.C. § 18-7004. (Appellant's brief, p.6.) This Court should decline to consider the merits of Doe's claim, however, because Doe never challenged the charging document below.

Idaho Criminal Rule 12(b)(2), applicable to juvenile proceedings through Idaho Juvenile Rule 21, requires that defendants object to alleged defects in a criminal complaint prior to trial. State v. Casano, 140 Idaho 461, 463, 95 P.3d 79, 81 (Ct. App. 2004). Defenses or objections that must be made prior to trial are waived if not made prior to trial. I.C.R. 12(f). Therefore, if Doe was to object

to his juvenile petition because it allegedly charged him with an inapposite offense, his objection must have been made prior to the evidentiary hearing in this case. *Compare* State v. Callaghan, 2006 WL 1699657 (Idaho App., June 22, 2006) (Callaghan filed his motion to dismiss, based on applicability of statute, prior to trial), *petition for review pending*. Because Doe did not object to the petition until he filed his motion for judgment of acquittal, his objection was untimely and therefore he waived the issue he attempts to raise on appeal.

D. Doe Has Failed To Show That Idaho's Malicious Injury to Property Statute Applies Only When No Other Law Is Applicable

Doe argues that his adjudication for malicious injury to property is invalid as a matter of law, contending that he should have been charged instead with firing timber or prairie lands in violation of I.C. § 18-7004. (Appellant's brief, p.6.) Even if Doe had preserved this claim by timely raising it by way of a pretrial I.C.R. 12(b)(2) motion, it would nevertheless fail on the merits. The plain language of I.C. §§ 18-7001 and 18-7002 evidence the legislature's intent that Doe and others like him be subject to prosecution for malicious injury to property, regardless of whether any other statute also applies.

It is a well-established principle of statutory interpretation that "the clearly expressed intent of the legislature must be given effect, thus leaving no occasion for construction where the language of a statute is plain and unambiguous." State v. McCoy, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996) (citations omitted). If possible, separate statutes that address the same subject should be construed harmoniously. State v. Maland, 124 Idaho 537, 540, 861 P.2d 107,

110 (Ct. App. 1993). The more specific statute will prevail if no harmonious construction is possible. State v. Roderick, 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962).

The plain language of I.C. § 18-7001 provides in relevant part:

> **Malicious injury to property. –** Every person who maliciously injures or destroys any real or personal property not his own, . . . in cases otherwise than such as are specified in this code, is guilty of a misdemeanor and shall be punishable by imprisonment in the county jail for up to one (1) year or a fine of not more than one thousand dollars ($1,000), or both ….

Doe contends that pursuant to the "in cases otherwise than such as are specified in this code" language of the statute, a defendant may only be convicted under I.C. § 18-7001 if his crime does not make him potentially culpable under any other section of the Idaho Code. Doe's contention fails because the clause he refers to does not require the state to charge the defendant with any alternative offense. Instead, the plain language of the clause suggests it refers to cases where injury to property is justified, including situations of necessity (I.C. § 18-201(4)), or situations where officers must in the line of duty break a door or window to effectuate a lawful arrest (I.C. § 19-611), *i.e.*, statutorily authorized justifications for injury to property.

Doe's interpretation of the clause is directly contrary to the plain language of I.C. §18-7002, which provides: "The specification of the acts enumerated in the following sections of this chapter is not intended to restrict or qualify the interpretation of the preceding section." Construing the plain language of I.C. § 18-7002 in harmony with the plain language of I.C. § 18-7001, it is clear that the legislature intended to vest prosecutors with the discretion to bring charges under

I.C. § 18-7001, regardless of whether any other sections of the Idaho Code criminalize the same conduct.

The Court of Appeals' recent opinion in State v. Callaghan, 2006 WL 1699657 (Idaho App. June 22, 2006), *petition for review pending*, does not change the analysis. In Callaghan, the court held that the state had no discretion to charge a defendant with felony forgery when his conduct met the elements of a more recent and more specific law that made it a misdemeanor to forge proof of insurance. Callaghan, 2006 WL 1699657 at *2. Callaghan had presented the DMV with a forged certificate of insurance, which satisfied the elements of both crimes. Id. at *1. The court noted that the insurance forgery statute was part of a unified statutory scheme for automotive offenses, that the two offenses were codified in separate titles of the Idaho Code, and that the general forgery statute pre-dated the motor vehicle scheme's adoption. Id. at *2. The court inferred from the scheme that the legislature intended all forgeries of proof of insurance to be tried under that specific statute rather than the general forgery law, and therefore did not intend the statutes to be alternative enforcement mechanisms. Id.

Unlike Callaghan, where the more general statute was codified in a separate title from the motor vehicle scheme, both criminal statutes in this case are part of a scheme that criminalizes variations of vandalism and trespassing. *See* I.C. §§ 18-7001 – 18-7041. Additionally, the legislature specifically stated its intent in I.C. § 18-7002 that individuals be subject to prosecution under I.C. § 18-

7001, regardless of whether their criminal acts are also punishable under I.C. § 18-7004, *et. seq*.

Doe's reading of the malicious injury to property statute not only defies the plain language of I.C. §§ 18-7001 and 18-7002, it would also constrain prosecutorial discretion to an even greater degree than in Callaghan and lead to absurd results. For example, in a case of minor vandalism of a jail, a prosecutor would have no discretion to bring misdemeanor charges under I.C. § 18-7001 instead of a felony injury to jail charge, under Idaho Code § 18-7018. As another example, in a case of very serious injury to crops, a prosecutor would be forced to charge misdemeanor injury to crops under I.C. § 18-7015 rather than felony malicious injury to property under I.C. § 18-7001. Unlike Callaghan's forgery of proof of insurance statute, which could only be broken or not broken in a binary manner, the malicious injury to property law at issue in this case can apply to violations of varying seriousness. That wide range of severity demands that prosecutors have the discretion to charge violations as either misdemeanors or felonies depending on the severity of each case. This conclusion is supported by an amendment to the statute in 1973 that changed malicious injury to property from a misdemeanor offense to a crime that may be charged as a felony, 1973 Idaho Session Laws ch. 186, clearly demonstrating the legislature's intent to allow prosecutors to bring charges under the malicious injury to property statute in a wide variety of situations.

Both the plain language of the statute and the legislative intent suggest Idaho's malicious injury to property law, I.C. § 18-7001, may be prosecuted

whenever its elements are met, regardless of whether any other statute may apply. This interpretation is further supported by I.C. § 18-7002's clear statement that the legislature did not intend I.C. § 18-7001 to be constrained by any other section of its statutory scheme. Doe has thus failed to show that a violation of I.C. § 18-7001 can only be prosecuted when no other offense applies.

E. Doe Has Failed To Show That The Law Prohibiting "Firing Timber Or Prairie Lands" Applies To The Facts Of This Case

Even if the legislature intended the malicious injury to property statute to be read in the way Doe contends, the clause would be inapposite in this case because Doe could not have been convicted of the alternative offense he cites, firing timber or prairie lands in violation of I.C. § 18-7004. That offense requires that the accused "set on fire, any timber or prairie lands in this state, thereby destroying the timber, grass or grain on any such lands." I.C. § 18-7004. The legislature did not provide definitions of "timber lands" or "prairie lands." However, Merriam Webster's Collegiate Dictionary defines prairie as: "1: land in or predominantly in grass 2: a tract of grassland." Merriam Webster's Collegiate Dictionary 915 (Frederick C. Mish ed., 10th ed., Merriam Webster 1997), attached hereto as Appendix A.

Doe started his fire in an overgrown weedy lot next to an apartment complex in Nampa. One victim testified that Doe and his friends were loitering right outside her window before Doe started the fire. (10/10/01 Tr., p.6.) These facts do not suggest Doe lit on fire a "tract of grassland," or even a "land in or predominantly in grass." Doe could not have been charged with, much less

convicted of, firing timber or prairie lands because he did not burn any timber or prairie.

Regardless of any effect of the clause Doe points to in Idaho Code § 18-7001, his conviction under that statute was proper as a matter of law because his conduct does not satisfy the elements of the statute he cites as an alternative. In any event, he has waived that question of law for appeal because he did not raise it prior to trial as required by Idaho Criminal Rules 12(b)(2) and 12(f). Finally, because Doe has failed to show his conviction was not supported by substantial and competent evidence, he has failed to show the magistrate court erred when it denied Doe's motion for judgment of acquittal.

CONCLUSION

The state respectfully requests that this Court affirm the magistrate's denial of Doe's motion for judgment of acquittal.

DATED this 21st day of August, 2006.

_____
LORI A. FLEMING
Deputy Attorney General

TY BAIR
Legal Extern

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of August, 2006, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

THOMAS A. SULLIVAN
CANYON COUNTY PUBLIC DEFENDER
P.O. BOX 606
CALDWELL, ID 83606-0606

_____
LORI A. FLEMING
Deputy Attorney General

LAF/pm