

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

PERRY ANANTH KANURY BORDEAUX,
Defendant-Appellant.

Lincoln County Circuit Court
21CR15614; A180673 (Control)

STATE OF OREGON,
Plaintiff-Respondent,

v.

CASSIDY BORDEAUX,
Defendant-Appellant.

Lincoln County Circuit Court
21CR15618; A180669

Amanda R. Benjamin, Judge.

Argued and submitted December 19, 2024.

Emma McDermott, Deputy Public Defender, argued the cause for appellants. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Colm Moore, Assistant Attorney General, argued the cause for respondent. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Powers, Presiding Judge, Pagán, Judge, and Lagesen, Chief Judge.*

PAGÁN, J.

Reversed and remanded.

* Lagesen, Chief Judge, *vice* Armstrong, Senior Judge.

PAGÁN, J.

In this consolidated¹ criminal appeal, defendants appeal from judgments entered after conditional guilty pleas related to fishing activity. Defendants each reserved the same two issues for appeal. In their first assignment of error, defendants assert that the trial court erred by denying defendants' motion to suppress the location data of their fishing boat obtained via a federally mandated tracking device. In their second assignment of error, defendants assert that the trial court erred when it denied their demurrer, in which they asserted that the offenses as charged failed to state an offense because they did not allege the appropriate mental state. We conclude that defendants consented to the search of their vessel because they consented to the use of the tracking device data as laid out by federal law; federal law allows disclosure of that data to states under certain circumstances that existed here; and, thus, the trial court did not err by denying the motion to suppress. As to the demurrer, we conclude that at least some of the charges failed to state an offense because they did not include the appropriate culpable mental state. We thus reverse and remand.

I. BACKGROUND

We review a trial court's ruling on a motion to suppress for errors of law. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). We are bound by the trial court's factual findings if there is constitutionally adequate evidence to support them. *State v. Edwards*, 319 Or App 60, 62, 509 P3d 177, *rev den*, 370 Or 212 (2022) (citing *Ehly*, 317 Or at 75). If the trial court did not make express findings of fact on all pertinent issues, we "presume that the facts were decided in a manner consistent with the court's ultimate conclusion," but only if the evidence allows for application of that presumption. *Ehly*, 317 Or at 75.

Perry and Cassidy Bordeaux, whom we collectively refer to as defendants, managed Tiburon Fisheries and sailed the fishing vessel *Das Bug*. The state alleged that defendants

¹ Defendants moved to consolidate their cases on appeal only after having both filed briefs in the case. We ruled that their motion was moot as to briefing but allowed consolidation for oral argument. Defendants agree that their briefs are substantially similar in facts and argument, apart from the description of their separate pleas.

began a series of illicit fishing practices to conceal from regulators and law enforcement how much fish they were catching. The state charged Perry and Cassidy as co-defendants with the same 18 counts.² Perry conditionally pleaded guilty to Counts 1, 4, 5, and 8. Count 1, selling fish without a wholesaler's license, ORS 508.025, was for conduct committed on or about January 9, 2020. Count 4 was for failing to complete a fish-receiving ticket, under ORS 508.535, on or about December 10, 2019. Count 5 was for the unlawful purchase of fish without a fish buyer's license on or about November 26, 2019. Count 8 was for failure to complete a fishing ticket, ORS 508.025, for conduct committed on or about September 23, 2019. Cassidy conditionally pleaded guilty to a class A violation of ORS 508.025, a lesser-included charge of Count 5. The remaining counts were dismissed.

We lay out the background of Counts 1, 2, and 3 (illicit crab landings that could be proven by GPS data and partly relevant to the demurrer); then Count 8 (illicit sablefish landings relevant to the demurrer and the GPS data); then fish ticket counts relevant to the demurrer; and then counts relating to illicit fish purchases relevant to the demurrer. Of all the charges, only Count 2 was alleged with a mental state other than criminal negligence.

A. *Counts 1, 2, & 3: Illicit Dungeness Crab Landings*

Oregon State Police (OSP) began investigating Tiburon Fisheries for fishing violations in July 2019. The operation came to a head on January 9, 2020, when *Das Bug* made port in Newport to offload a catch of Dungeness crab (which became the basis for Count 1). OSP Trooper Quinten Graves was inspecting the crab as it was offloaded. Graves suspected that *Das Bug's* harvest was illicit after discovering that the crab was being sold to a buyer without properly recording the catch in a "fish ticket" as required by ORS 508.535 and OAR 635-006-0210. In turn, OSP suspected that other recent sales might have evaded scrutiny. To prove when and where fish were being caught and sold, OSP

² Count 8, as convicted, was originally charged as Count 9, but the original Count 5 was dismissed as against Perry and the counts were renumbered. The originally numbered Counts 16 and 17 were also dismissed against Perry. The originally numbered Counts 6, 8, and 10 through 18 were dismissed as against Cassidy. We refer to the counts as renumbered against Perry.

needed to know where the boat had been. There happened to be an exact log of *Das Bug*'s GPS location—and the access to that data is the focus of appellant's first assignment of error.

Under the federal Magnuson-Stevens Fishery Conservation and Management Act ("the Act"), 16 USC section 1801 to 1883, commercial fishers who fish in certain ways up to 200 miles off the West Coast are required to equip their boats with a vessel monitoring system (VMS). 50 CFR § 660.14 (VMS requirements); *see* 33 CFR § 2.30 (defining the United States' "exclusive economic zone" out to 200 miles off-shore). A VMS records the vessel's GPS location at a regular interval—in this case, *Das Bug*'s system recorded its position once per hour. The VMS data is then transmitted to the National Oceanic and Atmospheric Administration (NOAA), which is then anonymized and used by NOAA to aid in fisheries management. But NOAA retains a de-anonymized copy of the data.

The NOAA Fisheries division maintains a joint enforcement agreement with the OSP Fish and Wildlife Division as it relates to fisheries management. As part of that joint agreement, NOAA is obligated to turn over—upon request—VMS data for vessels sailing off the Oregon coast. NOAA had done so several times for *Das Bug*, starting in the fall of 2019. But the key request came after Graves caught the alleged illicit offload on January 9, 2020.

OSP Trooper Ryan Howell approached Brian Corrigan of NOAA's Fisheries law enforcement team and asked for VMS data from *Das Bug* during parts of December 2019 and January 2020. Howell did not tell Corrigan why he wanted the data, merely that disclosing the data was a condition of the joint enforcement agreement and that he was a law enforcement officer. Howell did not have a warrant.

The VMS data not only revealed that *Das Bug* had gone out to sea on January 9 (which could be used to prove the crab had been caught that day), but also that *Das Bug* had gone to sea three days earlier, which became the basis for Counts 2 and 3. Count 2 was for intentionally falsifying business records, ORS 165.080, on or about January 6. Count 3 was for selling fish without a wholesaler's license,

ORS 508.025, also on January 6. The state alleged that Perry took *Das Bug* out fishing and illicitly offloaded fish on January 6. The state further alleged that Cassidy then filed a fish ticket for that day but later amended it to state that the fish had really been caught the prior December. The VMS data allegedly showed that *Das Bug* had been on the water that day, which would support a conclusion that defendants had caught and offloaded the fish in January and falsified the paperwork to show otherwise.

B. *Count 8: Illicit Sablefish Landing*

On September 23, 2019, *Das Bug* was filmed offloading a catch of sablefish, which the state alleges was beyond defendants' annual bag limit; the state also alleged that defendants had altered the ship's log to obfuscate that delivery. The state further alleged that defendants had at various points in September 2019 purposefully turned off *Das Bug*'s VMS to evade scrutiny for other sablefish landings, which was evidenced by a series of gaps in the VMS data.³ The state did not charge the bag limit violation or the ship log tampering but did charge defendants' failure to complete a fish ticket for the September 23 incident, which became Count 8.

C. *Counts 4, 9, 14, 15: Failure to Complete Fish Tickets*

Counts 4, 9, 14, and 15 arose from alleged fish sales in 2019 in which defendants would buy fish from or sell fish to a third party (sometimes giving that party a fish ticket) and then fail to file a fish ticket with the Oregon Department of Fish and Wildlife (ODFW) as required by ORS 508.535 and OAR 635-006-0210. The state did not allege that the VMS data was relevant to those charges and instead intended to present witnesses and jail audio.

D. *Counts 5, 6, 7, 10, 11, 12, 13: Illicit Fish Purchases*

Counts 5, 6, 7, 10, 11, 12, and 13 alleged that defendants were purchasing bulk fish without a wholesaler's license in violation of ORS 508.025. Defendants were

³ Keeping the VMS on at all times, with limited exceptions, is required by federal regulation. 50 CFR § 660.14(d)(3). Testimony from a NOAA agent indicated that it was likely that the VMS had been intentionally turned off, so as to hide the vessel's location—although hardware failure was also a possibility.

alleged to be purchasing substantial quantities of fish from other sellers, allegedly without the proper license. The state did not seek to use VMS data to prove those charges but, rather, averred that it had witnesses with knowledge of the sales and licensure.

E. *Pretrial Procedures*

Perry filed a pretrial motion to suppress the VMS data, which Cassidy joined. After a contested hearing in which the state presented the testimony of various state and federal officials, the trial court denied the motion on the grounds that defendants had consented to the search and that the search was an administrative search as part of a regulatory scheme that offered a constitutionally adequate substitute for a warrant. Perry also filed a demurrer (which Cassidy joined) on the ground that all counts failed to state an offense because they only alleged a culpable mental state of criminal negligence, which the trial court also denied. After the denial of the motion to suppress, defendants conditionally pleaded guilty as previously described, and each reserved for appeal the issues of the motion to suppress and the demurrer.

II. ANALYSIS: MOTION TO SUPPRESS

Article I, section 9, of the Oregon Constitution protects individuals against unreasonable searches and seizures. *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013); Or Const, Art I, § 9 (“No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure ***.”). For purposes of Article I, section 9, a “search” occurs when “governmental action invades ‘a protected privacy interest.’” *State v. Lien/Wilverding*, 364 Or 750, 759, 441 P3d 185 (2019) (quoting *State v. Newcomb*, 359 Or 756, 764, 375 P3d 434 (2016)).

Defendants argue that they had a protected privacy interest in the location of their vessel, that a search occurred when Howell requested the VMS data from NOAA (as opposed to some earlier time such as when the VMS data was collected), and that they did not consent to that search. We assume without deciding that defendants had a protected privacy interest in the location of their vessel and

that a search occurred at some point to obtain that data. We need not decide whether the search occurred at the time of the VMS ping (or when that data was first received by the government through the VMS vendor) or at the time of Howell's request, as it is not dispositive. In each case, the issue is whether there was an exception to the warrant requirement. We ultimately conclude that defendants, by installing and operating the VMS, consented to the use of its data—including for state law enforcement purposes.

“Warrantless searches are *per se* unreasonable under Article I, section 9, unless they fall within a recognized exception to the warrant requirement,” such as consent. *State v. Voits*, 186 Or App 643, 648, 64 P3d 1156, *rev den* 336 Or 17 (2003), *cert den*, 541 US 908 (2004). The state must prove, by a preponderance of the evidence, “that someone having the authority to do so voluntarily gave the police consent to search the defendant’s person or property and that any limitations on the scope of the consent were complied with.” *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994). “In determining whether a particular search falls within the scope of a defendant’s consent, the trial court will determine, based on the totality of circumstances, what the defendant actually intended.” *State v. Blair*, 361 Or 527, 539, 396 P3d 908 (2017). “Voluntary consent may be manifested by conduct.” *State v. Brownlie*, 149 Or App 58, 63, 941 P2d 1069 (1997) (the defendant consented to having her purse x-rayed by the fact that she put it on a belt that fed into an x-ray machine).

Defendants argue instead for a different framework than consent: bailment. They argue that we should treat the government’s holding of the VMS data as a bailment, such that they consented to give the data to the government with certain restrictions on its use—as one would hand over property with restrictions in a bailment. But a bailment requires an expectation that the bailor be able to regain the bailed property. *See State v. Zweygardt*, 337 Or App 234, 243, 562 P3d 1106, *rev den*, 373 Or 738 (2025) (declining to find a bailment where the “defendant did not contemporaneously express an expectation of return” of a cellphone he gave to a minor). Further, our bailment cases

have focused on physical property, not intangible data. *See, e.g., State v. Sholedice*, 364 Or 146, 156, 431 P3d 386 (2018), *adh'd to as modified on recons*, 364 Or 575, 437 P3d 1142 (2019) (package given to post service was a bailment). Even in *Zweygart*, where the incriminating evidence was intangible, the defendant's argument focused on the physical property that it was stored on—a phone. 337 Or App at 243. Here, defendants have not advanced an argument as to why we would extend bailment to intangible location data evidence—which is neither returnable in a traditional sense nor a physical item—and we decline to do so here. Thus, we are not persuaded by defendants' bailment analogy and conclude that the scope of consent is a more appropriate framework under the circumstances.

Defendants concede that they consented to the use of the VMS data insofar as authorized by the Act. But they argue that the Act allows VMS data to be used only for enforcement of federal law, not state law. We must thus determine: Did the disclosure of VMS data here comport with federal law?

Defendants argue that the Act made it clear that VMS data was confidential, that the state's use of the VMS data for state fisheries enforcement was not allowed under the Act, and that they therefore did not consent to a use that the Act did not allow. To determine what the Act allows, we must engage in federal statutory interpretation. In interpreting federal law, we are not bound by the decisions of federal circuit courts—only the Supreme Court of the United States, although circuit court decisions may provide persuasive authority. *J. M. v. Oregon Youth Authority*, 288 Or App 642, 645, 406 P3d 1127 (2017), *aff'd*, 364 Or 232, 434 P3d 402 (2019). At any rate, we could not find, nor have the parties provided, any federal case law that interprets the relevant part of the Act.⁴ Otherwise, “we follow the methodology

⁴ There has been some litigation related to the constitutionality of VMS, in challenges typically brought by fishing advocates. *E.g., Blue Water Fisherman's Ass'n v. Mineta*, 122 F Supp 2d 150 (DDC 2000). But there is a general dearth of litigation related to federally mandated VMS being used for enforcement purposes. The limited examples we could find were when VMS has been used for enforcing federal fisheries law—not state law. *See, e.g., Lobsters, Inc. v. Evans*, 346 F Supp 2d 340 (D Mass 2004) (concluding, in a civil violation proceeding, that

that federal courts have prescribed for interpreting federal statutes ***. In general, that means examining the text, context, and legislative history of the statute.” *Friends of Columbia Gorge v. Columbia River* (S055722), 346 Or 366, 377-78, 213 P3d 1164 (2009).

Under the Act, VMS data “shall be confidential and shall not be disclosed,” except under specific enumerated circumstances. 16 USC §1881a(b)(1)(A)-(I). From that enumerated list, it is clear that the de-anonymized data cannot be publicized, *id.*, which surely would be of importance in an industry where the best fishing spots might be a trade secret. But the list does not explicitly forbid VMS data from being used for state fisheries enforcement.

Indeed, one of the disclosure exceptions is for disclosure “to State employees who are responsible for fishery management plan enforcement, if the States employing those employees have entered into a fishery enforcement agreement with the Secretary and the agreement is in effect.” 16 USC §1881a(b)(1)(C). The state provided uncontroverted evidence that there was such an agreement between the federal government and the State of Oregon, in the form of a copy of the cooperative enforcement agreement between OSP and NOAA. The state further presented evidence that Howell was acting within the scope of that agreement when he contacted Corrigan at NOAA.

Defendant argues that the phrase “who are responsible for fishery management plan enforcement” should be read in context with 16 USC § 1861(b) (which provides sweeping authority to deputized state officials to enforce the Act) to mean that VMS data may only be used by state officials

VMS data was admissible and could be used to show that a particular boat had been in a particular place).

An issue regarding the constitutionality of state-mandated vessel tracking under the Fourth Amendment is pending for *certiorari*. *Thompson v. Wilson*, 159 F4th 91 (1st Cir 2025), *petition for cert filed* (Mar 23, 2026) (No 25-1105). *Thompson* found such searches to be generally constitutional as searches of closely regulated industries. *Id.* at 106. While defendants’ arguments align with the lobstermen in *Thompson* in regard to closely regulated industries, *Thompson* makes no mention of consent. *Id.* at 98. Because consent in this case takes precedence over whether the VMS ping would have otherwise been a legal search of a closely regulated industry, and defendants partly concede consent in this case, we need not address *Thompson’s* conclusion.

to enforce federal fisheries law. We disagree. We see no indication that the Act limited or prevented VMS data from being shared with state officials for state fisheries enforcement. Certainly, 16 USC § 1861(b) gives very broad powers to state officials when they are enforcing federal fisheries law, but nothing in it prevents those same state officials from also enforcing state law using state law powers. We need not resolve whether state officials may enforce state law based on the federal powers exercised under 16 USC § 1861(b), because that does not change the fact that, under 16 USC §1881a(b)(1)(C), disclosure of VMS data is allowed to the officials *who are responsible* for fishery management plan enforcement—even when they are not enforcing federal fisheries law. In sum, 16 USC §1881a(b)(1)(C) allows disclosure of VMS data to state officials under certain circumstances, and those circumstances were met here.

Because defendants concede that they consented to the use of VMS data as allowed by the Act, and we conclude that the Act allows states to use VMS data for state enforcement as laid out above, defendants consented to the use of their VMS data for state fisheries enforcement. In turn, the trial court did not err by denying defendants’ motion to suppress the *Das Bug*’s VMS data.

III. ANALYSIS: DEMURRER

In their second assignment of error, defendants assert that the trial court erred when it denied their demurrer. Defendants argue that the charges against them failed to state an offense because the proper mental state was not alleged for each charge. As we explain, we conclude that at least some of the charges were not properly alleged.

In reviewing the demurrer, we begin by examining the background of the commercial fishing laws and the parties’ arguments before turning to recent case law on the subject and the legislative history of ORS 506.991 (laying out what elevates a breach of the fishing laws from a violation to a misdemeanor). We conclude that ORS 506.991 does not define the culpable mental state of any offense; it merely prescribes how appropriately charged crimes may be punished. Because at least some of the relevant charges did not

allege the requisite knowing or intelligent mental state, we conclude that the trial court erred in denying the demurrer on at least some charges. We remand for defendants to withdraw their guilty pleas and for the parties to engage in any necessary further arguments regarding the remaining charges.

We review the denial of a demurrer for errors of law, considering only the information appearing on the face of the accusatory instrument and the applicable law. *State v. Shelnutt*, 309 Or App 474, 475, 483 P3d 53, *rev den*, 368 Or 206 (2021). The appropriate culpable mental state for a given element of a crime is a question of law. *State v. Haltom*, 366 Or 791, 823, 472 P3d 246 (2020). “In the construction of a statute, a court shall pursue the intention of the legislature if possible.” ORS 174.020. When interpreting the meaning of a statute, text and context are the first layer of analysis. *State v. Gaines*, 346 Or 160, 164, 206 P3d 1042 (2009); *see Benjamin v. O’Donnell*, 372 Or 764, 769, 557 P3d 1089 (2024) (applying the statutory analysis framework).

A. *The Commercial Fishing Laws and the Parties’ Arguments*

Breaches of Oregon’s commercial fishing laws are treated as Class A violations by default. ORS 506.991(2). But when alleged with a culpable mental state, breaches of the fishing laws are treated as Class A misdemeanors. ORS 506.991(1).⁵ In this case, the counts were charged as misdemeanors—but only Count 2 (not a fishing violation) was alleged to be intentional. The remaining counts were alleged with the minimum culpable mental state, which is criminal negligence. *See State v. Simonov*, 358 Or 531, 539, 368 P3d 11 (2016) (every material element of a crime has at a minimum a culpable mental state of criminal negligence). As a preliminary matter, the trial court did not err by denying the demurrer on Count 2, as it was outside the fishing regulations, and the state alleged it with an intentional

⁵ ORS 506.991(1) states that “[e]xcept as otherwise provided ***, violation of any provision of the commercial fishing laws, or of any rule adopted by the State Fish and Wildlife Commission in carrying out the commercial fishing laws, is a Class A misdemeanor if the offense is committed with a culpable mental state.”

mental state.⁶ *See Simonov*, 358 Or at 539 (generally requiring an intentional or knowing mental state).

We agree with the parties that, although the commercial fishing laws are not part of the Oregon Criminal Code, *see* ORS 161.005 (listing which statutes constitute the criminal code), misdemeanor breaches of fishing laws are treated as if they were part of the criminal code because the legislature did not intend to forgo the mental state requirement altogether. *See State v. Harper*, 296 Or App 125, 129, 436 P3d 44 (2019) (addressing crimes that are defined outside the criminal code); ORS 506.991(1). Consequently, relevant sections of the criminal code apply, including that “[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing.” ORS 161.095(1). In turn, “[e]xcept as provided in ORS 161.105, a person is not guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state.” ORS 161.095(2).

Defendants argue that at least some part of the offense must be charged with a mental state of knowledge or intent, and that, because the counts were not charged as such, the accusatory instrument failed to state an offense, and the demurrer should have been granted. The state argues that ORS 506.991 provides the minimum culpable mental state, which is criminal negligence, and that the accusatory instrument properly stated the offenses. In the alternative, the state argues that the accusatory instrument was pleaded in the language of the statute and thus any deficiency with regards to mental state was excusable.

Defendants particularly argue that the charged crimes have a conduct element, and that by default, conduct elements require a knowing or intentional mental state. Indeed, the Oregon Supreme Court concluded that, generally, “‘conduct’ elements require proof of an intentional or

⁶ Count 2 alleged that defendants “did unlawfully, with *intent* to defraud, alter, erase, obliterate, delete, remove or destroy a true entry in the business records of an enterprise, to wit: Tiburon Fisheries, LLC.” (Emphasis added); *see* ORS 165.080 (defining the crime of falsifying business records).

knowing mental state, ‘result’ elements require proof of an intentional, reckless, or criminally negligent mental state, and ‘circumstance’ elements require proof of a knowing, reckless, or criminally negligent mental state.” *Simonov*, 358 Or at 539-40.

The state argues that *Simonov*’s description of the default mental states is not the only source to determine the mental state that applies to a particular element. The state points to the legislative and judicial history of the fishing and wildlife statutes in support of its argument that the legislature intended to bypass the default rule when it wrote that a breach of the commercial fishing laws “is a Class A misdemeanor if the offense is committed with a culpable mental state.” ORS 506.991(1).

B. *Legislative History of ORS 506.991*

The wording of ORS 506.991(1) (the fishing penalty statute) is, as relevant here, the same as ORS 496.992 (the wildlife penalty statute). As we lay out, that is no accident and lays the path to case law that helps resolve the issue. “In the construction of a statute, a court shall pursue the intention of the legislature if possible.” ORS 174.020. When interpreting the meaning of a statute, text and context are the first layer of analysis. *Gaines*, 346 at 164; see *Benjamin*, 372 Or at 769 (applying the statutory analysis framework). Here, the text of the two statutes is identical. As the legislative history shows, we should interpret the text of the two statutes alike.

After examining text and context, we may examine proffered legislative history “for whatever it is worth—and what it is worth is for the court to decide.” *Gaines*, 346 Or at 173; see also ORS 174.020(1)(b) (“To assist a court in its construction of a statute, a party may offer the legislative history of the statute.”); ORS 174.020(3) (“A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.”). We would traditionally examine judicial history as part of context, but because the judicial and legislative histories are intertwined, we examine the context and legislative history together.

In 1984, the Supreme Court decided *State v. Cho*, 297 Or 195, 681 P2d 1152 (1984). In *Cho*, the court held that a violation of the wildlife statutes (separate from the fishing laws) required a culpable mental state, with a minimum of criminal negligence. *Id.* Following that decision, the legislature amended ORS 496.992 (governing the wildlife statutes) to require that misdemeanor breaches of the wildlife laws be committed “with a culpable mental state.” Or Laws 1985, ch 372, § 1; ORS 469.992(1). In 2013, the legislature passed SB 198, which amended the commercial fishing penalty statute (ORS 506.991) such that it matched the wording of ORS 496.992, adding the previously absent phrase “with a culpable mental state.” Or Laws 2013, ch 164, § 7.⁷

The text, context, and legislative history show that the legislature intentionally aligned the wording of ORS 506.991 and ORS 496.992,⁸ and thus decisions pertaining to one of the statutes may apply to the other.⁹

C. *State v. Mankiller*

After the submission of this case, we decided *State v. Mankiller*, 344 Or App 327, 580 P3d 313 (2025), *rev den*, 375

⁷ Previously, the relevant provision stated: “Except as provided in this section, and subject to ORS 153.022, violation of any provision of the commercial fishing laws, or of any rule promulgated by the State Fish and Wildlife Commission in carrying out the commercial fishing laws, is a Class A misdemeanor.” ORS 506.991 (2011).

⁸ Prior to 2013, a breach of the commercial fishing laws could be charged only as a misdemeanor—not a violation—which supporters of SB 198 pointed to as an example of the prior version’s inefficiency and misuse. Audio Recording, House Committee on Agriculture and Natural Resources, SB 198, Apr 23, 2013, at 41:00-44:00 (comments of Jim Markee) <https://olis.oregonlegislature.gov/> (accessed Apr 10, 2026). Law enforcement officials testified that they wanted flexibility for their officers in the field, so that they could charge violations—which could be handled via mail, saving time for defendants, officers, and the court system. Audio Recording, Senate Environment and Natural Resources Committee, SB 198, Feb 18, 2013, at 29:17 (comments of Curt Melcher of the Oregon Fish and Wildlife Department), <https://olis.oregonlegislature.gov/> (accessed Apr 10, 2026). From the legislative history, we conclude that the legislature sought to provide a route to charge conduct that lacked a culpable mental state via violation.

⁹ While it does not affect the outcome here, the legislature has set intentional boundaries between the fishing and wildlife laws. ORS 506.031(1) provides, “Nothing in the wildlife laws of this state affects the lawful operation of any fishing gear or the lawful taking of any food fish under the commercial fishing laws.” And ORS 506.031(2) provides, “The commercial fishing laws apply to food fish except as otherwise provided in ORS 506.045 and 506.050, and shall be enforced regardless of any conflicting provisions in the wildlife laws of this state.”

Or 155 (2026), which applied to ORS 496.992. We ordered additional briefing in this case “addressing how, if at all, [*Mankiller*] affects the resolution of the second assignment of error.”¹⁰

In *Mankiller*, the defendant was charged with violating a wildlife statute for taking elk in a closed reserve. *Id.* at 329. The defendant argued that ORS 496.992 (the wildlife penalty statute) established an element of the crime (*i.e.*, that he knew he was violating the wildlife statutes); we ultimately disagreed. *Id.* at 331.

In *Mankiller*, the state argued, and we agreed, that the penalty statute ORS 496.992 did not create an element of the charged wildlife crime. *Id.* at 331. But that argument cuts against the state here. Because the penalty statutes do not create an element of a crime within their respective statutory schemes and, instead, establish only that the relevant crimes may be punished as a violation or a misdemeanor, they do not actually control the culpable mental state of any particular offense.

The penalty statutes only provide that offenses that are charged with mental states are misdemeanors and that offenses that are charged without them are violations. As we laid out in *Mankiller*, that is not in tension with *Cho*, as the legislature’s addition of the mental state language memorialized *Cho*’s holding that “misdemeanor wildlife offenses are subject to culpable mental state requirements like all other crimes” and did not create a new element. *Mankiller*, 344 Or App at 336.

How then, are the mental state elements within the accusatory instrument supposed to be pleaded? In *Mankiller*, we noted that the elements of a particular wildlife crime are determined in a variety of ways and may require a combination of statute and regulation. *Id.* at 337. The parties

¹⁰ Defendants previously argued that we should follow *State v. Jones*, 82 Or App 388, 390, 728 P2d 100 (1986), in which we concluded that the crime of possession of illicitly harvested deer and salmon required a mental state of knowing, and that an accusatory instrument that alleged only criminal negligence was insufficient. Defendants argue that that longstanding precedent would have been known by the legislature and should be factored into the statutory analysis. But because we conclude that ORS 506.991 does not determine the culpable mental states of the crimes, that argument is ultimately inapposite.

here, however, have not examined the charges individually, so as to suggest what the elements and mental states of each offense should be. Rather, the parties' arguments are broader in that either all of the charges are viable according to one, or none of the charges are viable according to the other. The reality is more nuanced. Having concluded that ORS 506.991 does not establish a culpable mental state, we must examine the individual charges.

Given that the parties have not briefed the actual elements and mental states of each crime, we are hesitant to conclude that all of the charged crimes had a conduct element that required a knowing or intentional mental state. However, we need not determine the mental states and elements for all of the counts. That is because the parties have appealed pursuant to conditional plea agreements and a reversal on any basis necessitates remand to allow the parties a chance to withdraw their guilty pleas, we resolve only the straightforward fish sale and purchase counts. *See* ORS 135.335(3) ("A defendant who finally prevails on appeal may withdraw the [conditional] plea."); *State v. Leach*, 294 Or App 639, 646, 432 P3d 310 (2018) (explaining that in an appeal arising from a conditional plea under ORS 135.335(3), court does not conduct harmless error analysis because a defendant who succeeds on appeal has a statutory right to withdraw the plea).

Counts 1 and 3 alleged that defendants "did unlawfully and with criminal negligence sell fish without a Wholesale Fisher Dealers License." Counts 5, 6, 7, 10, 11, 12, and 13 alleged that defendants "did unlawfully and with criminal negligence purchased [sic] [fish/crab] without a Fisher Buyers License." The relevant statute, ORS 508.025, proscribes the following relevant conduct:

"(1) It is unlawful for any person, without first procuring a license from the State Fish and Wildlife Commission, to:

"(b) Buy, sell or otherwise deal in food fish for commercial purposes."

As alleged, the crime has at least two elements: (1) buy or sell food fish, (2) without a proper license.¹¹

Under the *Simonov* framework, buying or selling fish is the conduct element and is the essential character of the proscribed act. *Simonov*, 358 Or at 546. Being unlicensed is an accessory fact, and thus a circumstance element. *Id.* That is common sense: a person may not know that they are unlicensed, or that they need to be licensed, when they intentionally buy or sell a fish. That understanding also aligns with the statute and *Simonov*. Thus, to convict a person of selling food fish without a license, the state must at least prove that a person knowingly or intentionally bought or sold fish and that they, at a minimum, failed to be aware of a substantial and unjustifiable risk that they were unlicensed, and that such failure was a gross deviation from the standard of care.¹² See ORS 161.085(10) (defining criminal negligence).

Because the state failed to allege those charges with the culpable mental state of knowledge or intent, the charges failed to state an offense. In turn, the trial court erred by failing to grant the demurrer on Counts 1, 3, 5, 6, 7, 10, 11, 12, and 13. We leave the remaining counts for the parties to further develop their arguments on remand, if necessary.

IV. CONCLUSION

The trial court did not err when it denied the motion to suppress. However, the trial court did err when it denied defendants' demurrer on Counts 1, 3, 5, 6, 7, 10, 11, 12, and 13. The trial court did not err in denying the demurrer on Count 2. We do not address the demurrer as to Counts 4, 8, 9, 14, and 15 because we are remanding the case for an opportunity for defendants to withdraw their guilty pleas, and the parties may develop their arguments further on remand.

Reversed and remanded.

¹¹ We note that the statute requires the transaction be "for commercial purposes." ORS 508.025. We acknowledge that could potentially be construed as a third element, or be subsumed as part of the licensing element; but we need not determine its particular construction today.

¹² We do not suggest that phrasing is sufficient for jury instructions but, rather, use it to illustrate the breakdown of elements.