No. 310787

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

CLAY MARTIN HULL,

Appellant.

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APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE F. JAMES GAVIN, JUDGE

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# BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

**Cases**

TABLE OF AUTHORITIES (continued)

PAGE

## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court's refusal to instruct the jury on self defense denied Clay Martin Hull of his constitutional right to a fair trial?

2. Whether sufficient evidence supported both of the alternative means of proving animal cruelty in the first degree?

3. Whether the court misapprehended its authority to impose an exceptional sentence below the standard range?

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Self-defense is not a defense to the offense of animal cruelty in the first degree, as the defense may only excuse the use of force against a person. The court did not err in denying Hull's request for a self-defense instruction, but instead instructing the jury on the necessity defense.

2. Sufficient evidence supported both alternative means of committing the offense of animal cruelty in the first degree, that Mr. Hull both intentionally caused physical injury to the animal, and intentionally inflicted substantial pain on the animal.

3. The trial court did not abuse its discretion in declining to impose a mitigated sentence. The court understood that it had the authority to impose a mitigated sentence, and indeed considered possible mitigating factors before determining that none of the factors were supported by the evidence.

## II. STATEMENT OF FACTS

The State offers the following as a supplement to the Appellant's Statement of the Case.

Shawn Moody testified at trial that, by means of a surveillance camera, he could see a male individual standing next to a pickup truck urinating. The individual drove off in the truck, then stopped again and got out. **(RP 417-18)**

After getting out of the truck, the individual walked back toward Moody's house and fired what seemed to be "a whole clip of 9 millimeter at my house." **(RP 419)**

Moody heard another gunshot at his neighbor's house, and saw his neighbor's dog bleeding in the neighbor's yard. **(RP 421)**

Moody observed a number of shell casings in the road, and could see that his house and truck had been struck. **(RP 421-23)**

Mr. Moody testified that the neighbor's dog, a Doberman, was in its yard at the time of the shooting. **(RP 428)**

There was a female passenger in the shooter's truck, but Moody did not observe any other vehicles accompanying it. **(RP 429)**

The surveillance camera is equipped with night vision capabilities. **(RP 441)**

Ms. Minerva Perez resides at 1114 E. Adams, in one of two houses on that lot. **(RP 476-77)**

Her brother, who resides in the other house, owns two Doberman dogs. On the night in question, she heard gunshots outside, and observed two individuals near a truck outside her fence. **(RP 478-79)**

She saw that one of her brothers' dogs had been shot; it appeared calm and was not barking. She has never seen the dogs jump the fence. **(RP 483-84)**

Ulises Perez is Minerva's brother. He testified at trial that both of the houses at E. 1114 Adams are enclosed by one fence. It is four feet tall in the front, and six feet in the back. **(RP 492-95)**

On the night in question, he was not present, but had left all the gates closed. His female Doberman, on whom the shot was inflicted, had never jumped the fence. **(RP 495-96)**

When he arrived home, he found that his dog was "bleeding everywhere". **(RP 498; Ex. 6-10)**

The dog took two months to recover from its wound, but was still limping at the time of Mr. Perez' testimony. **(RP 501)**

Investigators found a portion of a bullet jacket inside the Perez yard. There was apparent damage to the fence nearby. Officer McKinney testified that a bullet and its jacket can become separated after impact. **(RP 535-37; Ex. 12-13)**

The officer also observed blood spatter a couple feet away from the bullet jacket fragment. **(RP 538-39; Ex. 11)**

The blood spatter was just inside the fence, and there was a trail that led to the house. No blood was observed outside the fence **(RP 540-41)** Eight shell casings were recovered, all outside the fence, as well. **(RP 541)**

Based on his training and experience, the officer determined that the dog had an entrance wound behind the right shoulder, and another wound in the chest. "The dog was breathing agonally (phonetic), having a difficult time breathing, shaking, didn't seem to be able to get a full breath in or a full breath out." **(RP 541-43)**

Laura Peterman, who was accompanying Mr. Hull on the night in question, testified that she did not see or hear any dog prior to Mr. Hull's

relieving himself. He got back in his truck, drove up the street and stopped again after Ms. Peterman saw a dog run at the front of the truck. Seconds later, she heard 5-6 shots. **(RP 579-80)**

Upon returning to the truck, Mr. Hull stated that "[t]hat he was going to clean up the neighborhood that his son was going to be forced to grow up in." **(RP 580)**

Ms. Peterman responded: "[u]hm, I told him that he just needed to go home. And he said we'll see about that, because your ex might be next." **(RP 581)**

In a subsequent phone call, Mr. Hull told Ms. Peterman that she should say a dog attacked him, otherwise he might go to jail and lose his medical benefits. **(RP 583-84)** He also texted that he had shot a dog that came close to him. **(RP 585-86); Ex. 21)**

At sentencing in this matter, the court examined the statute setting forth "enumerated mitigating circumstances", while recognizing that the statutory factors were illustrative and not intended to be an exclusive list of mitigating factors. **(RP 1114)**

The court examined each factor in turn, discussing at length how each would not apply to the facts of this case. The court ultimately concluded that it could not find a way to impose a sentence below the standard range. **(RP 1114-17)**

With respect to Mr. Hull's traumatic brain injury, a mitigating factor asserted by his counsel, the court considered but rejected it:

> Well, but then you'd have to prove that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired. That position has not been taken and that hasn't been established in the facts here. And that's where that arises.
>
> **(RP 1116)**

III. ARGUMENT

**1. The court did not deprive Hull of his constitutional right to a fair trial. Self-defense is a defense to the use of force against a person, not an animal, and he was not entitled to a self-defense instruction.**

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010), *citing* State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). A defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense. Id., *citing* State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Jury instructions are appropriate if they allow the parties to argue their theories of the case, do not mislead the jury, and do not misstate the law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). An

appellate court reviews jury instructions *de novo* as to whether they adequately state the applicable law, in the context of the jury instructions as a whole. Id.; State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

"Not every omission or misstatement in a jury instruction relieves the State of its burden so as to require reversal." State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006). Errors in jury instructions are harmless if they do not contribute to the jury's guilty verdict. Id., *citing* Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L.Ed. 2d 35 (1999).

Hull maintains on appeal that he was entitled to the instruction here as he had the right to act in self-defense against an attack by an animal. The authorities he cites, however, do not support his position.

> RCW 9A.16.020 provides, in relevant part, that:
>
> The use, attempt, or offer to use force upon or toward the **person of another** is not unlawful in the following cases:
>
> . . .
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary . . .
>
> (Emphasis added)

The language of the Washington Pattern Instruction 17.02 is also clearly limited to lawful "force upon or toward the **person of another**".

Simply put, a dog is not a "person" as contemplated by either the statute or the pattern instruction. Hull's reliance on case authorities is misplaced, as well.

"To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary." State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) *cited by* Werner, 170 Wn.2d at 337-38.

In Werner, the Supreme Court held that the defendant was entitled to a self-defense instruction when faced with snarling aggressive dogs Id., at 337-38. The case is easily distinguishable on its facts. In that case, the owner of the dogs was present, refused to call off the dogs, and indeed moved toward the defendant, causing the pit bull to follow. The defendant, Werner, was charged with first degree assault against Galpin, the owner of the dogs. The Court concluded that the instruction would have been appropriate:

> Werner stated that he was afraid. That fear was arguably reasonable, given that he was facing seven snarling dogs,

> including several pit bulls and a Rottweiler. *See*, *e.g.,* State v. Hoeldt, 139 Wn. App. 225, 226, 160 P.3d 55 (2007) (pit bull can be a deadly weapon under RCW 9A.04.110(6)). There is evidence that Galpin refused requests to call off the dogs. By that conduct, Werner could reasonably have believed that Galpin personally posed a threat through the agency of a formidable group of canines that were under his control.
>
> Id., at 337-38.

Werner, then, does not support a self-defense instruction where animal cruelty is alleged; the dogs posed an apparent threat as potential weapons to be used by a person.

The California case cited by Hull is not on point. In People v. Lee, 131 Cal. App. 4th 1413, 32 Cal. Rptr. 3d 745 (2005), the Court of Appeal of California did indeed hold that a person has a right to use reasonable self-defense when confronted with an aggressive dog, and was therefore entitled to a self-defense instruction when charged with discharge of a firearm with extreme negligence. Id., at 1427.

It is apparent, however, that the language of the California pattern instructions did not specify that the attacker had to be a person. Id., at 1424. The court determined that the trial court erred in refusing to give the instruction, as "[c]onceptually, there is nothing in the elements of self-defense, as set forth in the rejected instructions . . . that requires the threat to come from a human agency."

As discussed above, the statute and pattern instructions in Washington *do* require that the threat is presented by a human actor.

In State v. Burk, 114 Wash. 370, 195 P. 16 (1921), the State charged the defendant with killing protected elk. The defendant argued that the trial court erred in preventing him from arguing to the jury that he was legally entitled to kill the elk because they had been destroying his crops and livestock over a period of time and his repeated past efforts to drive them from his premises had failed to keep them away. Id. The Supreme Court agreed, holding that Burk "had a constitutional right to show, if he could, that it was reasonably *necessary* for him to kill these elk for the protection of his property." Id., at 376, (emphasis added).

The Supreme Court's decision in State v. Vander Houwen, 163 Wn.2d 25, 177 P.3d 93 (2008) is so narrowly written as to be distinguishable, as well. There the Court decided:

> We hold that when a property owner charged with unlawful hunting or waste of wildlife presents sufficient evidence that he exercised his constitutional right to protect his property from destructive game, the burden shifts to the State to disprove this justification. Here, Vander Houwen easily met his burden by showing previous significant and recurring damage to his orchards and inaction by the Department in assisting him in protecting his property. Since Vander Houwen stated facts sufficient for a justification instruction, the State had the burden to prove that Vander Houwen's actions were not justified.
>
> Id., at 36.

This Court should reject Hull's invitation to expand the narrow holding of Vander Houwen to the facts of this case.

Also, overwhelming evidence indicated that Mr. Hull exited his vehicle once to relieve himself, then stopped the truck a second time when he fired multiple shots at the Doberman. The evidence at the scene showed that the dog was inside its yard when shot, and that at least one shot was fired through the owner's fence. Even if the court erred in refusing the instruction, the omission was harmless in light of the evidence as a whole.

**2. Sufficient evidence supported both alternative means. The animal suffered substantial pain.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court

must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

When a single offense may be committed in more than one way, a jury must unanimously agree on guilt, but not the means by which the crime was committed so long as there is sufficient evidence to support each alternative means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994), *cited in* State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995).

Mr. Hull argues that there was no evidence that established that the dog suffered "substantial pain", citing that portion of the record where the dog was described as calm, and made a full recovery, and that further, the state presented no veterinary expert testimony. This ignores the testimony of Officer McKinney, however, who described that immediately after the shooting, the dog was shaking, and was breathing "agonally". This was a

result of a bullet would which entered from behind the right shoulder blade, and exited through the chest. **(RP 543)**

"agonally" is the adverb form of the adjective "agonal":

> 1. Pertaining to or associated with agony (especially death agonies;
>
> 2. Being anguished.

(www. Websters-online.dictionary.org)

A reasonable trier of fact, then, could infer that the dog- shot, bleeding, and breathing with difficulty- suffered substantial pain. There was sufficient evidence to support the jury's verdict as to either alternative means.

### 3. The court properly exercised its discretion in declining to impose a mitigated sentence.

It is correct that a trial court that where a trial court refuses to exercise its discretion, or is mistaken about its authority to impose an exceptional sentence:

> We can therefore review a court's decision to impose a standard range sentence in "circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and defendant cannot appeal that ruling. Here, the trial court refused to exercise its discretion to consider an exceptional sentence because it erroneously believed it lacked the authority to do so.

State v. McGill, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002), *citing* State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Here, Mr. Hull quotes the judge's statement found at page 1117 of the verbatim record, arguing the court did not understand that it could impose a downward departure in sentencing. The colloquy which occurred before that statement, however, indicates a clear consideration of the facts of the case and full exercise of the court's discretion. Rather than deciding that it lacked the authority to enter such a sentence, the court determined that no mitigating factor was supported by the evidence, including the defendant's prior traumatic brain injury.

## IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions and sentence.

Respectfully submitted this 15th day of August, 2013.

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## *Certificate of Service*

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant by electronic filing with the court, and pursuant to GR 30(b)(4).

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Dated at Yakima, WA this 15th day of August, 2013.

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