

COA NO. 74802-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KATHRYN ST. CLARE

Appellant.

FILED
Jul 25, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The "to convict" instruction for each count misstated and lowered the State's burden of proof, in violation of due process.

2. Appellant was denied her constitutional right to jury unanimity on counts 1, 4, 5, 6, 7, 8 and 10.

Issues Pertaining to Assignments of Error

1. Whether the "to convict" instruction for each count of first degree animal cruelty misstated and lowered the State's burden of proof in decoupling the mens rea element of negligence from the acts of starving and dehydrating the animals?

2. Whether appellant's right to an expressly unanimous jury verdict was violated because there was insufficient evidence to prove an alternative means of committing first degree animal cruelty for seven counts?

B. STATEMENT OF THE CASE

1. Background

Kathryn St. Clare is mentally ill. CP 25, 37. She suffers from a hoarding disorder, which causes her to take in cats. CP 25, 36-37. She is devoted to the animals, but the hoarding disorder compromises her ability to recognize and ameliorate substandard conditions affecting their health. CP 25, 36-37.

St. Clare came to the attention of animal control authorities when concerned citizens noticed a large number of cats in poor sanitary conditions inside a trailer owned by St. Clare. CP 26. The cats were ultimately removed by animal control officers and euthanized. CP 27.

Initially, St. Clare was considered for Therapeutic Alternatives to Prosecution (TAP), a pre-file felony diversion program. 2RP¹ 14-15, 17. Participants are eligible when felony offenses are directly related to mental illness or drug/alcohol dependency. See Snohomish County Code 298. St. Clare is indigent and homeless. 2RP 102, 319, 353, 427; CP 1-3, 5. Her financial inability to pay restitution operated as a bar to entry into the program.² 2RP 415. So the Snohomish County Prosecutor's Office charged St. Clare with three counts of first degree animal cruelty. CP 121-22. When St. Clare did not plead guilty, the State increased the number of charges to 10 counts. CP 113-15; 1RP 3; 2RP 424. The case went to trial.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 9/24/15; 2RP - five consecutively paginated volumes consisting of 12/7/15, 12/8/15, 12/9/15, 12/10/15, 2/2/16.

² According to the Snohomish County website, "These offenders are held accountable for their crimes through participation in self-paid evaluation and rehabilitation, payment of restitution to victims, payment of other fees and fines, and successful completion of all terms and conditions of a diversion contract." (available at <http://snohomishcountywa.gov/714/Criminal-Division>).

2. Trial

On April 28, 2014, animal control received a citizen complaint about a trailer in a field. 2RP 85. The citizen was concerned there were about 25 cats inside the trailer, but reported the cats seemed to be fed and watered. 2RP 85.

On April 30, animal control officer Delgado went to the scene and smelled a strong stench of cat urine as he approached the trailer. 2RP 85-86. No one was present at the time. 2RP 86. The door to the trailer was locked. 2RP 86. Windows along the trailer were open. 2RP 86. There was air traveling through. 2RP 90. A vent on top of the trailer seemed to be open and operating. 2RP 86. From the outside, Delgado looked into the trailer and saw about 50 cats. 2RP 86-87. The inside of the trailer had shelves and tables set up. 2RP 86. There were some crates inside, which were not closed. 2RP 87, 92. Litter boxes were out for the cats. 2RP 87.

It was a fairly warm day, but Delgado did not see any sign that the animals were physically distressed. 2RP 87. The cats looked relaxed and acted normal. 2RP 90. He did not see any food bowls, although his range of view was limited. 2RP 87. One bowl looked like it had water in it. 2RP 87. Before leaving, Delgado left a note on the trailer door asking its owner to contact him so that he could obtain more information on what

was going on. 2RP 87-88. Delgado received no response. 2RP 88. When he returned to the location on May 16, the trailer was gone. 2RP 88.

On June 15, animal control received a citizen complaint regarding a trailer parked on a power line easement near Lake Stevens, "out in the full sun containing numerous cats in poor conditions." 2RP 101. On June 16, animal control officer Rench went to the location and spoke with St. Clare, who was present. 2RP 101. St. Clare told Rench that she was homeless and living out of her truck. 2RP 102.

There was an overwhelming smell of urine and fecal matter coming from the trailer. 2RP 103. St. Clare did not want Rench to look inside the trailer because she was embarrassed it was dirty and was afraid cats would escape. 2RP 102-03. She let Rench look through the windows. 2RP 103. Rench saw 40-60 cats inside. 2RP 103. Litter boxes were overflowing with feces. 2RP 103. Rench did not see any food or water inside. 2RP 103. Cats were in various conditions. 2RP 103-04. Several looked very thin, emaciated. 2RP 104. Some looked like they had green discharge coming out of their eyes and nose. 2RP 104. The cats seemed lethargic. 2RP 104. St. Clare told her the cats had feline leukemia. 2RP 104, 157. She had a hard time finding homes for the cats because they were sick and had special needs. 2RP 104. The cats were of all ages.

2RP 105. Several of the cats were not spayed/neutered and were reproducing. 2RP 105.

Rench was concerned that the trailer was parked in the full sun without shade, and there were many sick cats inside with little to no food or water. 2RP 105. The trailer was unsanitary. 2RP 106. Rench told St. Clare to clean the trailer, find homes for as many cats as possible and provide vet care to the sick cats. 2RP 106. St. Clare assured Rench the situation was temporary. 2RP 106. She was trying to find homes for them. 2RP 106. Rench told her she would check back in a few days. 2RP 107.

Rench came back on June 20. 2RP 107-08. St. Clare was present. 2RP 108-09. The trailer door was open. 2RP 108. The ammonia smell was diminished and there was more airflow coming into the trailer. 2RP 108. The trailer had been cleaned. 2RP 108. There were a lot less cats. 2RP 108. There were 17 cats in the trailer. 2RP 108. Some cats were outside the trailer wandering around. 2RP 108. St. Clare had been feeding the cats chicken and goat milk. 2RP 109. She talked about her efforts to provide alternative or holistic-type medicine to the cats, and also antibiotics. 2RP 163, 180. She was trying to address the feline leukemia problem. 2RP 163-64.

St. Clare said she had found homes for a few cats. 2RP 109. A couple cats roaming around were extremely thin. 2RP 109. Some were

missing hair. 2RP 109. One cat looked lethargic and had discharge coming from its nose and mouth. 2RP 109. St. Clare had not obtained any veterinary care. 2RP 110. Rench advised her to continue to reduce the number of cats and to get vet care for the sick and emaciated cats. 2RP 110. Rench also told her to leave the trailer door open because there was no shade and it was extremely hot out. 2RP 110. If she moved her location she was to notify Rench. 2RP 110. St. Clare again assured Rench that it was a temporary situation. 2RP 113.

Rench came back on June 30. 2RP 113. St. Clare was present. 2RP 113. She said she found homes for some more cats. 2RP 113. The conditions were about the same. 2RP 113. Rench reiterated what she told her before. 2RP 113.

On July 5, private citizen Gyda Harris came across a parked trailer full of cats in the Lake Stevens area. 2RP 188-90. A horrific smell of "cat box" emanated from the trailer. 2RP 189-90. She peeked inside and saw what she described as sick and starved cats. 2RP 190. She did not see any food or water inside. 2RP 190. There was horrendous filth. 2RP 190. She estimated there were 30 cats inside. 2RP 191. When she opened a window, about 10 cats jumped out. 2RP 191. She was there for about 30 minutes. 2RP 198.

On July 6, Harris returned to the trailer with Linda Dell Beilfus. 2RP 63, 192. Harris estimated the temperature to be mid to high 80's or near 100 degrees outside. 2RP 197, 201. Sunlight was hitting the trailer. 2RP 58. There seemed to be more cats than she remembered from the day before. 2RP 192. Beilfus estimated 50 to 100 cats were inside. 2RP 57, 59. She did not check to see if the windows were open. 2RP 58. There was no canopy. 2RP 69.

A stench emanated from the trailer. 2RP 59. It smelled like "a big old cat box." 2RP 57. Beilfus described what she saw as "starving cats of all sizes they were totally unkempt." 2RP 60. Cats appeared sick and near death. 2RP 59. She did not see any food or water inside. 2RP 60.³ Someone broke the lock on the trailer and they gave the cats some bowls of water. 2RP 59, 61, 195-96, 198. The cats just sat there. 2RP 61. One cat looked dead. 2RP 61, 196-97. Harris and Beilfus were there for about 30 minutes. 2RP 67, 198. When they came back two hours later, the trailer was no longer there. 2RP 62, 194-95. They reported their concerns to animal control. 2RP 60, 195.

On July 7, animal control officers Rench and Davis, responding to the complaint, went to where they had previously encountered the trailer.

³ Harris did not know what food or water was provided when they were not there. 2RP 200-01. Beilfus did not know how frequently the owner checked on the trailer. 2RP 67.

2RP 114. It was not there. 2RP 114. St. Clare had not given notice of where she went. 2RP 115. The trailer was subsequently found at a nearby dairy farm. 2RP 115. A stench from cat feces and urine emanated from the trailer. 2RP 204-05. When questioned about the cats being locked inside over the weekend, St. Clare said the cats were in there for only three hours at a time. 2RP 116. She denied any cat was dead. 2RP 116. She let the officers see the cats in the trailer. 2RP 117. There were around 40 to 50 cats. 2RP 118. There were more cats than the last time, including a mother with kittens that St. Clare had earlier said she found a home for. 2RP 118-19. Food, water and milk were available for the cats. 2RP 118.

According to Rench, it was "extremely hot out," "upper '80s or so." 2RP 117. Several windows and the roof vent were open, but otherwise "everything was pretty much closed up." 2RP 117. There was "no ventilation". 2RP 118. There was a strong ammonia smell. 2RP 118. Several cats were lethargic and had green discharge coming out of their eyes and nose.⁴ 2RP 118. Several looked emaciated. 2RP 123-24. Rench told her that she was extremely concerned for the cats and that St. Clare needed to do something immediately. 2RP 119. St. Clare said she would take the cats to a dairy barn in Duvall that night. 2RP 119. Rench told her

⁴ Officer Davis said 30 or 40 cats appeared to be sick with green discharge around their eyes and nostril area. 2RP 205.

to plug in a fan to provide better ventilation and cooler temperatures. 2RP 119. Rench reiterated that St. Clare needed to seek care for those cats that were sick or emaciated. 2RP 120. Rench offered to transport the cats to a shelter. 2RP 120. St. Clare did not agree to sign the cats over for transport. 2RP 120.

On July 8, Rench and Davis returned to the dairy farm. 2RP 120-21, 205. The trailer was gone. 2RP 121. St. Clare had not told Rench where she went. 2RP 121. On July 9, the trailer was located about a mile away, parked next to tall brush in unincorporated Snohomish County. 2RP 122, 20-06. The trailer was not shaded from the afternoon sun and was covered with what Rench described as "black tarps."⁵ 2RP 122. Rench was concerned because any time she had seen food and water out for the cats, it was only a "minimal amount" and "not sufficient for the number of animals in the trailer." 2RP 123.⁶ The temperature inside the

⁵ They were permeable mesh tarps. 2RP 170-71. According to St. Clare, they function as shade cloths, blocking 80 percent of the sun. 2RP 347. This was her attempt to keep the trailer cooler. 2RP 348. Rench theorized the tarps were possibly put there to hide the trailer, but conceded they may have been put up to provide shade. 2RP 171. Davis described the trailer as being covered with black plastic tarps. 2RP 205. He said St. Clare was trying to hide the trailer from view. 2RP 205. St. Clare denied moving the trailer to hide it from animal control. 2RP 347.

⁶ During one of the contacts, Rench learned St. Clare brought water in jugs to the cats. 2RP 162.

trailer was extremely hot, there was a very strong smell of ammonia, and the cats were in an overcrowded condition. 2RP 124.

On July 11, Rench obtained a search warrant and returned to the trailer's location. 2RP 124. St. Clare was not there. 2RP 125. The trailer was in the full sun, covered in black "tarps." 2RP 124-25, 262. The door to the trailer was padlocked shut. 2RP 125. There were some windows open. 2RP 125, 172. A big canopy provided some shade. 2RP 172. The cats were confined to the trailer. 2RP 125. There was a very strong smell of ammonia coming from the trailer. 2RP 128.

St. Clare arrived 15 minutes later. 2RP 127. Rench told her that they had a warrant and St. Clare turned over the key to the trailer. 2RP 127-28. The trailer had an extreme smell of cat urine. 2RP 128. Feces covered the floor. 2RP 128. Cats were lethargic. 2RP 128, 130. Some cats were panting and "appeared dehydrated." 2RP 128, 130, 173. Rench acknowledged cats possibly pant as a general sign of distress or fear rather than pain or thirst. 2RP 173-74. Officers did not see any food or water in the trailer. 2RP 128-29, 263, 274. The temperature inside the trailer was 85 degrees. 2RP 129. Several cats "looked near death." 2RP 129.

The trailer was towed to the Everett Animal Shelter. 2RP 131. 111 cats were removed from the trailer, some with cat tongs, which are poles with a grabbing claw on the front. 2RP 130, 264-65, 275.

Rench had no specific memory of all 111 cats. 2RP 138. Cats had lice. 2RP 137. Several were missing hair. 2RP 138. They had ear mites, chewed up ears, missing teeth, and discharge from the nose and mouth. 2RP 138. Feces caked their paws. 2RP 138. She said many of the cats were emaciated and extremely dehydrated. 2RP 137. Rench had no independent memory of any of the 10 cats designated as part of the State's case. 2RP 139.

Rench acknowledged it was possible that cats suffering from feline leukemia or FIV ("feline AIDS") provided with food and water on a constant basis could still look sick and become dehydrated because their bodies are unable to take advantage of food and water. 2RP 178-79. She felt a cat that is sick might require additional assistance to make sure they are eating and drinking properly. 2RP 181.

Dr. Thompson, a veterinarian at the shelter, examined all 111 cats on July 11. 2RP 135, 207-09.⁷ They were all euthanized during the course of examination. 2RP 137, 247-48.

⁷ The warrant was served at 10 a.m. that day. 2RP 176. The cats were given no food or water before the vet examined them. 2RP 176. No examination took place until after 11:30 a.m. 2RP 267. The vet said she started the examination at 9 a.m., which is inconsistent with the timeline provided by the animal control officers. 2RP 246. The examinations were finished by 5 p.m. 2RP 246.

The general condition of the cats as a whole included dried feces and/or urine on their body, ear mites, lice, hair loss,⁸ dental disease, and loose or missing teeth. 2RP 210, 218.

Three cats (Cat #6 included among them) were tested for feline leukemia and FIV. 2RP 219, 224. One tested positive for FIV and the other two tested positive for both FIV and feline leukemia virus. 2RP 219. The leukemia virus is highly contagious. 2RP 219. Both viruses suppress the immune system. 2RP 219.

Dr. Thompson described the means by which body condition and dehydration are measured. 2RP 211-18. A body condition score is a measurement for how abnormally thin or obese an animal is on a scale of 1 to 9. 2RP 211. The average cat should be a 5. 2RP 211. A cat with a body score of 1 is so emaciated it looks like skin over a skeleton. 2RP 211.⁹ A score of 2 also signifies emaciation. 2RP 215. A score of 3 means the cat is significantly or severely underweight; you can feel their ribs and might be able to see them; you can feel their hip bone and the abdomen is tucked in. 2RP 215, 232. A score of 4 is slightly underweight. 2RP 215.

⁸ Hair loss can be due to itching from lice or over grooming from stress. 2RP 210-11.

⁹ A cat with a score of 9 is so obese it looks like a bowling ball. 2RP 211.

Of the 111 cats, 7 were emaciated based on a body score of 1 or 2. 2RP 215. 14 cats were significantly underweight with a body score of 3. 2RP 215. 67 cats were slightly underweight with a body score of 4. 2RP 215. 23 were not underweight. 2RP 216. According to Thompson, of the cats that were emaciated or severely underweight, the lack of available food was by far the biggest contributor. 2RP 220-21. When cats are hoarded with a limited supply of food and water, the bigger, healthier ones consume a majority of the resources and the weaker, sicker animals are not able to compete. 2RP 217. The majority of cats that had a body condition score of 4 were the bigger cats. 2RP 217. Thompson acknowledged a cat could be so sick that it would not eat and drink even with food and water sitting right in front of it. 2RP 251-52.

There are two ways to measure dehydration. 2RP 217-18. One is called a "skin trigger," which involves tenting up the skin on the scruff of the neck. 2RP 217.¹⁰ If a cat is well hydrated, the skin goes right back down. 2RP 217. Skin that goes down slowly signifies mild dehydration. 2RP 217. Skin that stays up in a ridge means severe dehydration (10

¹⁰ Rench called it a "snap test." 2RP 142. Rench said for cats that were clearly dehydrated, the skin would stay in a folded position for a prolonged period of time when the snap test was done. 2RP 143.

percent). 2RP 217-18. 2RP 218. 5 percent is noticeably dehydrated. 2RP 214. 7 percent is more seriously dehydrated. 2RP 214.¹¹

54 of the 111 cats were noticeably or significantly dehydrated. 2RP 214. 26 were five percent dehydrated. 2RP 214. 28 were seven percent dehydrated. 2RP 214. Dr. Thompson opined the cause of dehydration for these 54 cats was having no access to water for a significant period of time, or receiving water intermittently. 2RP 220. Increased ambient temperature could contribute to dehydration. 2RP 221.

Cat #6 (designated in count 1) had a body condition score of 2, indicating emaciation. 2RP 224. Its ribs were visible through the fur. 2RP 139; Ex. 24. Feeling the cat, there was no body fat covering the ribs, spine and hip bones. 2RP 139. It was covered in feces and urine. 2RP 139. It had ear mites and lice, severe hair loss and a pot bellied appearance.¹² 2RP 139, 223-24. There was no testimony that cat #6 was dehydrated. 2RP 139, 223-27.

Cat #9 (count 4) had a body condition score of 2. 2RP 228. The cat was emaciated. 2RP 140. It was covered in feces and urine. 2RP 140.

¹¹ The other way to assess for dehydration is to check the gums. 2RP 218. Dry gums mean a cat is dehydrated. 2RP 218.

¹² A pot belly means a distended abdomen where the abdomen is bigger than it should be for the body condition score of a cat. 2RP 212. Causes of pot belly include viral disease, heart failure, parasitic intestinal disease, intestinal cancers, liver disease, and kidney disease. 2RP 212.

It had lice, ear mites and potbelly. 2RP 140, 228. There was no testimony that cat #9 was dehydrated. 2RP 139-40, 227-28.

Cat #13 (count 5) had a body condition score of 4. 2RP 229. Rench described the cat as "thin." 2RP 141. It had a muscle condition score of 2. 2RP 230. A muscle condition score measures muscle mass, with 1 being least amount of muscle mass and 3 being normal.¹³ 2RP 229-30. It had lice and ear mites. 2RP 141. Cat #13 had seven percent dehydration, which is severe. 2RP 229.

Cat #17 (count 6) had a body condition score of 4. 2RP 230. Rench described the cat as "thin." 2RP 141-42. It was covered in feces, urine and lice. 2RP 142. Yellow discharge was coming out of its eyes. 2RP 230-31. Cat #17 had seven percent dehydration. 2RP 230.

Cat #26 (count 7) had a body condition score of 4. 2RP 231. Rench described the cat as "thin." 2RP 143. Its muscle score was 2. 2RP 231. Its dehydration was five percent. 2RP 231. Cat #26 was covered in feces and urine. 2RP 143. It had mites, lice and discharge from the eyes, nose and mouth. 2RP 143-44. It had pot belly. 2RP 231.

Cat #28 (count 2) had a body condition score of 3, which signified being severely underweight. 2RP 232. The level of dehydration was

¹³ Thompson testified muscle loss is due to any chronic condition, such as kidney issues or chronic disease. 2RP 229, 243.

seven percent. 2RP 233. It was covered in feces and urine. 2RP 144. It had ear mites, lice and discharge from the eyes, nose and mouth. 2RP 144, 233. It had pot belly. 2RP 232.

Cat #55 (count 8) had a body condition score of 4. 2RP 233. Rench described the cat as "thin." 2RP 144. It had a muscle mass of 2. 2RP 233. It had five percent dehydration. 2RP 234. It was covered in urine and feces. 2RP 144. It had lice and discharge from the nose and eyes. 2RP 145. It was missing hair from most of its body. 2RP 144-45. It had pot belly. 2RP 233.

Cat #75 (count 9) had a body condition score of 3. 2RP 234. Its ribs were visible. 2RP 145. No fat covered its hind end and hips bones. 2RP 145. It had seven percent dehydration. 2RP 234. It was covered in urine and feces. 2RP 145. It had lice, ear mites and discharge from its face. 2RP 145, 234. It had pot belly. RP 234.

Cat #81 (count 10) had a body condition score of 4. 2RP 234. Its muscle condition score was 2. 2RP 234-35. It had seven percent dehydration. 2RP 235. It was covered in urine and feces. 2RP 145. It had lice, facial discharge, missing teeth and pot belly. 2RP 145, 235.

Cat #91 (count 3) had a body condition score of 3. 2RP 235. It had seven percent dehydration. 2RP 236. The underside of the cat was covered in urine and feces. 2RP 146. It had lice and discharge coming

from its nose and eyes. 2RP 146. It exhibited pot belly. 2RP 236. Cat #91 had some missing teeth and considerable dental disease. 2RP 236.

Thompson opined the 10 designated cats suffered from pain. 2RP 236. She identified lice, ear mites and upper respiratory problems with severe nasal congestion as contributors to their pain. 2RP 236. Thompson further opined any starvation or dehydration present would make these cats "pretty darn miserable." 2RP 237. Officer Rench opined the 10 designated cats suffered substantial pain over a period of time. 2RP 146-47. When asked what a reasonable person would have done in this situation, Rench said the trailer could have been cleaned, the amount of animals reduced to a manageable number, adequate amounts of food and water provided, ventilated provided, and vet care provided for the sick cats. 2RP 147.

Marcia St. John testified for the defense. She owns a dairy farm in Lake Stevens. 2RP 286. St. Clare had bought milk for her cats from St. John for a couple of years, and the two had developed a friendship. 2RP 288. They discussed homeopathic medicine and natural remedies, which St. Clare knew a lot about. 2RP 288. St. John arranged for St. Clare to park her trailer on a neighbor's property. 2RP 289. St. Clare was looking for a barn where she could house the cats. 2RP 290.

St. John observed St. Clare hauling five gallon buckets of water from St. John's house to the trailer. 2RP 294-96, 302. St. Clare got whey (cheese curds) and milk from St. John and gave it to the cats. 2RP 295.¹⁴ St. John saw St. Clare carrying bags of cat food. 2RP 295-97. According to St. John, St. Clare flushed the trailer out every day and cleaned it. 2RP 294. St. John never went into the trailer. 2RP 291. Nothing about the trailer offended her senses. 2RP 292, 299. St. Clare had shade cloth for the trailer. 2RP 292, 299. She was letting the cats out. 2RP 292. She was feeding the cats outside the trailer. 2RP 302. She was never gone for more than an hour-and-a half. 2RP 292.

Two and a half days before the cats were seized, St. John was helping her move the trailer. 2RP 290. At the new location, the trailer was moved up against a hedge so that the morning sun would not hit it. 2RP 299. Cats were running around, outside the trailer. 2RP 291. "Nothing really struck" her that they were in dire straits or starving. 2RP 290-91, 303. St. John saw St. Clare immediately after the cats were seized. 2RP 293-94. St. Clare was distraught. 2RP 294.

St. Clare testified in her own defense. She had accumulated cats through years of rescuing them. 2RP 353. She acquired her original

¹⁴ St. John described whey as full of protein and "a very good hydrator." 2RP 295.

bundle of cats before she became homeless. 2RP 363-64. The number of cats in her care grew because some were breeding. 2RP 311. She was trying to control the multiplication of cats by getting them fixed at places that did not charge for the procedure. 2RP 312. She acknowledged she was running behind in getting the females fixed, but was not deliberately allowing them to multiply. 2RP 312-13.

She let the cats outside of the trailer under her supervision, but when she was working outside she kept them in the trailer because coyotes were around. 2RP 314. She did not leave the trailer for long periods of time because of the hot weather. 2RP 320. She could not smell the trailer from a long distance away, although she may have gotten used to the smell. 2RP 320. Cat urine had seeped into the subfloor of the trailer, so it was difficult to get the smell out. 2RP 320-21.

St. Clare denied getting behind in terms of food and water. 2RP 308, 362. She was able to provide them with water and goat milk from the dairy farm. 2RP 315. She put down water "as needed," i.e., when she saw the bowls were empty. 2RP 358. She bought cat food. 2RP 315-16. She practiced raw food feeding techniques in addition to giving them dry food. 2RP 316. For a time, she provided raw chicken by spreading it on the floor for them to eat. 2RP 316-17. She kept the floor clean of feces and urine when she fed the cats in this manner. 2RP 317.

She ceased the raw food diet and switched to dry food when it became too hot and she found herself without a way to keep the raw food from spoiling. 2RP 316. She believed she took measures to ensure cats got fed without needing to compete for food. 2RP 317-18. She fed the cats dry food twice a day, as recommended by veterinarians. 2RP 318, 356-57. If they ate all the food, she sometimes gave them more. 2RP 342.

On June 16, she was getting ready to feed the cats when animal control showed up. 2RP 314. She denied a bunch of cats had green discharge coming from their eyes and nose. 2RP 322. She would have noticed it, and would have treated the condition with antibiotics, "because a lot of times if they come down with an upper respiratory, they stop eating." 2RP 322. She knew that some cats had tested positive for feline leukemia, but she had not tested all of them. 2RP 323. She gave them supplements to support their immune system. 2RP 323.

After the June 16 encounter with animal control, her biggest concern was finding a different living situation for the cats so that they would not need to live in the trailer anymore. 2RP 323. St. Clare did not take Rensch up on her offer to have the cats taken to the shelter because she knew that would mean "sending them to their death," as the shelter had a kill policy. 2RP 327-28. She tried to find another place for the cats, but

was unsuccessful. 2RP 324-27. She tried to have the cats adopted, and some were. 2RP 348-49.¹⁵

She knew feline leukemia virus is contagious among cats, but was offering supplements to keep them healthy or reverse the virus. 2RP 350. She treated every cat as if it potentially had leukemia, and made sure each had access to food and water through observation. 2RP 365. If a cat was sick, she put it in a crate with its own food and water so she could monitor intake. 2RP 365.

The day someone cut the lock on the trailer, she had come back in the middle of the day to discover the trailer door open and the cats running around outside. 2RP 328. She was upset and felt that somebody was attacking the trailer. 2RP 328. She had no power or artificial light source at that location, so she "backed off on the cleaning a little bit and just went full on trying to get the trailer out of there." 2RP 329. She continued to provide food and water to the cats. 2RP 329-30, 336. She acknowledged it was hot inside the trailer, but she did not have a power source for an air conditioner. 2RP 330. It was unnecessary to leave the trailer door open for ventilation because there were three vents and six windows that could

¹⁵ The mother and kittens that had been adopted came back because the new owners changed their mind due to the feline leukemia possibility. 2RP 349-50.

be opened. 2RP 363. She gave the cats ice water and bowls of whey. 2RP 331.

She did not think any of the cats were seven percent dehydrated, because the morning of the seizure they were jumping off the tables onto the floor wanting to eat when St. Clare put out the food. 2RP 340. A seven percent dehydrated cat would be really lethargic and when cats become dehydrated they lose their appetite. 2RP 340. She also noted some cats with upper respiratory infections lose their appetite. 2RP 340.

Having heard the testimony from other witnesses, she was rethinking " a little bit" whether she had given the cats enough food or water. 2RP 341. She thought moving the cats to a dry food diet was causing some problems. 2RP 341. The raw food diet they were previously getting allowed the cats to get most of their water need from the food itself. 2RP 342. But dry food has low moisture, and when the switch from raw food to dry food was made, water consumption markedly increased. 2RP 342. She always filled up the water bowls, and checked them whenever she went to the trailer. 2RP 342.

When animal control came to seize the animals on July 11, the water bowls were probably not full. 2RP 343. But for animal control's arrival, the cats would have gotten water when St. Clare returned as part of a normal routine. 2RP 343. She had given them water about three hours

earlier. 2RP 308, 343-44. She fed the cats a 15-pound bag of food earlier in the morning. 2RP 308, 358-59. She believed the nursing kittens only began to starve on July 11 because they were not allowed to nurse with their mothers after animal control arrived. 2RP 356. She was "behind" in cleaning that morning. 2RP 345. She last cleaned out the litter boxes 36 hours before. 2RP 359-60.

St. Clare did not feel she neglected her cats. 2RP 307. She had become overwhelmed with trying to find a suitable location for the cats and so "the cleaning had gotten behind in the trailer a bit." 2RP 308, 346-47, 362. She did not intentionally starve or dehydrate an animal. 2RP 344. She denied failing to do something that a reasonable animal owner would have done that caused an animal to starve or dehydrate. 2RP 344-45. The cats that were underweight were fed more food, but cats lose their appetite in the summer when it's hot. 2RP 352. She acknowledged the cats needed a better living condition and she had failed in that regard. 2RP 345.

3. Outcome and Sentencing

The jury found St. Clare guilty on all counts. CP 57-66. The prosecutor recommended jailing her for 30 days as punishment. CP 42; 2RP 411. The trial court sentenced St. Clare as a first time offender to zero days in confinement. CP 43; 2RP 422, 425. The court pointed out a

jail term would be directly contrary to the need to address the underlying mental health issues that generated the case. 2RP 422. Jail time would only further compromise her mental health. 2RP 422. Also, because she didn't have a job, ordering jail subject to work release would be pointless. 2RP 425.

The court was troubled that the case wound up as a criminal prosecution instead of a TAP diversion. 2RP 423. The court told St. Clare: "The fly in the ointment was that you were unable to qualify because the cost for reimbursement of the expenses incurred by the auditor's department for the animal control officers performing their functions for which they're paid whether they're taking animals into custody or not and perhaps the incremental costs to put these animals down was something that you couldn't afford. I was told that that might have been in the range of \$20,000." 2RP 423. The court continued: "So I'm troubled by the fact that our county employees, in doing their job, are seeking to pass off an expense to you knowing that you're unemployed, that you have mental health issues, and you can't possibly pay that, for which reason you're ineligible for a therapeutic program that would have

avoided all of this expense for trial, sentencing, lawyer fees, and the like."
RP 423-24.¹⁶

The court did not spare the manner in which the prosecutor's office handled the situation: "Then when charges were filed and you chose not to plead guilty, the stakes were raised. Well, then if you won't plead guilty to one or two or three charges, we'll add seven more and bring the number up to around ten which seems, by its nature, to be coercive and intended to create the specter of such a long jail term that you would necessarily plead guilty. You chose not to, you went to trial, you were found guilty, and now I think, out of some semblance of conscience, the prosecutor recognizes that a lengthy jail term is inappropriate and so is recommending 30 days in jail. None of that makes sense. From the standpoint of where we are efficiently spending limited taxpayer money and how we deal with mentally ill offenders and especially those who are also poor and cannot afford the costs of counsel, much less \$20,000 for the services provided by animal control, or much of anything else." 2RP 424.

The court recognized defenseless animals suffered and the decision to euthanize was justified. 2RP 419-20. But St. Clare intended no harm.

¹⁶ The prosecutor represented that while restitution was a substantial factor in St. Clare not entering TAP, there were other factors. 2RP 432-33. The court responded TAP was a "nonstarter" given the amount of restitution, even though she had been told to get a mental health evaluation and in fact got one. 2RP 433.

2RP 420. Her concern for the cats led her to take in more of them than she could manage until the situation was "overwhelming." 2RP 420. It was "naive" to be overly critical of her failure to cooperate with animal control when she had "no alternatives." 2RP 420. No one provided a home for the cats. 2RP 420-21. Concurring with defense counsel's assessment, the court recognized St. Clare did not cooperate with animal control to turn over the cats because she realized it would only hasten their death, which was the one result that she wanted to avoid. 2RP 421. St. Clare appeals. CP 6-22.

C. ARGUMENT

1. **THE "TO CONVICT" INSTRUCTION FOR EACH COUNT MISSTATES AND LOWERS THE STATE'S BURDEN OF PROOF ON THE MENS REA ELEMENT OF THE CRIME, REQUIRING REVERSAL OF THE CONVICTIONS.**

"It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Such is the case here. The "to convict" instruction for each count decoupled the required mens rea of criminal negligence from the actus reus of starving and dehydrating. The instructions did not make it manifestly apparent that the State was required to prove St. Clare negligently starved or dehydrated the animals,

as opposed to acting negligently in some other way towards the cats. Reversal of all the convictions is required.

- a. **The court gave a "to convict" instruction created by the prosecutor, and the jury expressed confusion about what it meant.**

A person is guilty of first degree animal cruelty "when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death." RCW 16.52.205(2). The statute defining the crime clearly shows the mental element of "criminal negligence" attaches to the actus reus of "starves" and "dehydrates." The jury, however, was not given an instruction defining the crime of first degree animal cruelty.

There is no pattern "to convict" instruction for this offense. So the prosecutor created one. CP 132-51. Trial courts should use the language of the statute in instructing the jury, where the law governing the case is expressed in the statute. State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968). But the "to convict" instruction for each count does not track the wording of the statute defining the crime of first degree animal cruelty.

The "to convict" instruction for count 1 provides:

To convict the defendant of the crime of animal cruelty in the first degree, as charged in count one, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That the defendant acted by one or more of the following means or methods:
 - (a) That during a period of time intervening between on or about April 28, 2014 and on or about July 11, 2014, the defendant starved an animal designated "Cat #6";
 - (b) That during a period of time intervening between on or about April 28, 2014 and on or about July 11, 2014, the defendant dehydrated an animal designated "Cat #6";
 - (2) The defendant acted with criminal negligence;
 - (3) As a result, the animal suffered substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering;
- and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that elements (2), (3), and (4), and either of alternative elements (1)(a) or (1)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds a least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty. CP 77 (Instruction 5)

The "to convict" instructions for the other nine counts specify the count at issue and the individual cat at issue, but are otherwise worded identically. CP 79-96 (Instructions 6-14).

The jury also received an instruction defining criminal negligence:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering or death may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly or recklessly as to that particular fact or result. CP 98 (Instruction 16).

During deliberations, the jury made an inquiry:

In instruction No. 5 thru No. 14, (1)(a) & (1)(b) it states in part "...the defendant starved an animal..." and "...the defendant dehydrated an animal..." Does the way these are worded imply intent by the defendant? CP 67.

The attorneys and the court discussed how to respond. 2RP 398-400. The court proposed to answer the question by directing the jury to rely on the instructions. 2RP 398. Defense counsel concurred. 2RP 398. The prosecutor interpreted the jury's question to be "what is the mental state that the defendant needs to have acted with?" 2RP 399. To the question of whether the jury needed to find intentional starvation/dehydration, the answer is "no." 2RP 399. The appropriate mens rea is criminal negligence. 2RP 399. The prosecutor asked the court to direct the jury to instruction 16, which defined "criminal negligence." 2RP 399. The court responded that the prosecutor's proposal added no additional clarity to the instructions they already had. 2RP 400. The court

suggested telling the jury that those instructions define the elements that need to be proven by the State. 2RP 400. The prosecutor assented. 2RP 400. The court answered the question as follows: "Those instructions define the elements of each crime which must be proven." CP 67.

- b. **The "to convict" instruction's decoupling of the mens rea element of criminal negligence from the element of acting to starve or dehydrate the animals permitted the jury to convict without finding the statutorily required element.**

Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. A conviction "cannot stand if the jury was instructed in a manner that would relieve the State of this burden." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). Where the court issues a summary instruction setting forth each element of the crime necessary to convict, the instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Defense counsel's lack of objection to the "to convict" instructions did not waive the issue for review. 2RP 259. Jury instructions that relieve the State of its burden to prove every element of an offense violate

due process. State v. Hanson, 59 Wn. App. 651, 660, 800 P.2d 1124 (1990). Such errors may be raised for the first time on appeal as manifest constitutional errors. RAP 2.5(a)(3); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

The adequacy of a "to convict" instruction is reviewed de novo. DeRyke, 149 Wn.2d at 910. Jury instructions "must more than adequately convey the law." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). "Jury instructions must make the relevant legal standard manifestly apparent to the average juror." State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) (grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's determination that jury could have applied the erroneous standard), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

The "to convict" instructions in this case are not manifestly clear. They do not even adequately convey the law. The jury should have been

clearly instructed that the State must prove St. Clare negligently starved or dehydrated the cat at issue. The "to convict" instructions that were given do not adequately convey that the mens rea element of criminal negligence attaches to the acts of starving or dehydrating the cat.

The problem is that the "to convict" instruction is written in a manner that decouples the required mental element from the starves/dehydrates element. The requirement that the State prove St. Clare starved or dehydrated the cat is found in element (1) of the instruction, without specifying the mens rea attached to either act. The negligence element floats by itself in element (2): "The defendant acted with criminal negligence." What act must be tied to the criminal negligence standard? The instruction does not give a clear answer. Element (2) is generalized. Nothing in the instruction specifically links the mens rea requirement in element (2) to the actus reus requirement set forth in element (1).

Element (2) permitted the jury to convict St. Clare if it found she acted with criminal negligence in some way that is not necessarily tied to negligently starving or dehydrating the animals. A "to convict" instruction violates due process if it leaves the jury guessing at the meaning of an element of the crime or relieves the State of the burden of proving an element. State v. Saunders, 177 Wn. App. 259, 270, 311 P.3d 601 (2013), review denied, 180 Wn.2d 1015, 327 P.3d 55 (2014).

That is a real concern here because there is plenty of evidence that St. Clare acted negligently toward the cats *in some sense*.¹⁷ For example, a jury could find St. Clare was negligent in (1) failing to get vet care for the cats; (2) allowing the cats to be exposed to the highly contagious feline leukemia virus; (3) allowing the cats to be infested with lice and mites; (3) keeping the cats confined in overcrowded conditions; (4) confining the cats in unsanitary conditions; (5) keeping too many cats; (6) letting the cats breed. The instruction permitted the jury to convict St. Clare if it found she acted negligently in some manner without deciding whether she acted negligently in regard to starving or dehydrating the cats. Such an outcome means the State was relieved of its burden of proving every element of the crime.

This is not simply an abstract argument. The record shows the jury was confused by the wording of the "to convict" instructions. The jury wondered what the mental element for "starved" and "dehydrated" was. It asked if "starved" and "dehydrated" implied intent. CP 67. This shows the jury did not link the acts of starving and dehydrating the cat with the

¹⁷ Because criminal negligence is based on an objective "reasonable person" standard, a person may be criminally negligent despite mental impairment. State v. Warden, 80 Wn. App. 448, 456, 909 P.2d 941, aff'd, 133 Wn.2d 559, 947 P.2d 708 (1996).

element of criminal negligence. If it had, there would be no reason to question whether element (1) implied intent because the requisite mens rea (criminal negligence) was already supplied by element (2). A reasonable interpretation of the jury's struggle to understand the "to convict" instruction is that it viewed the mental requirement of element (2) as a free floating requirement that stood on its own and did not attach to element (1), necessitating query as to whether the mental state of intent attached to element (1). The jury struggled to understand what the requisite mens rea was for the acts of starving and dehydrating. The jury's inquiry shows the "to convict" instruction did not adequately convey the law and that the law was not made manifestly apparent to the average juror.

As it turned out, the trial court did not clarify the matter. Telling the jury that "[t]hose instructions define the elements of each crime which must be proven" does not tell the jury anything more than they already know, or did not know. CP 67. After receiving this answer from the court, the jury may have ultimately concluded no mens rea attached to element (1).

The instruction defining criminal negligence did not cure anything. Nothing in that instruction ties negligence to starving or dehydrating the cats. Instead, it only links negligence to the failure to "be aware of a substantial risk that substantial and unjustifiable physical pain that extends

for a period sufficient to cause considerable suffering or death may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." CP 98. In this manner, the instruction defining criminal negligence compounds the infirmity in the "to convict" instructions by inviting the jury to find negligence based on any act linked to substantial and unjustifiable physical pain, without regard to whether the State proved St. Clare acted with criminal negligence in starving or dehydrating the cats. Again, this is a real danger because the jury could readily find St. Clare negligently caused the animals to suffer for reasons that stand apart from starvation and dehydration. That would not be the crime of first degree animal cruelty that was charged.

c. The remedy is reversal of the convictions because the State cannot prove the error is harmless beyond a reasonable doubt.

"It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove every element of an offense. State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). An instructional error infringing upon a defendant's constitutional rights is presumed to be prejudicial, and the State has the burden of affirmatively proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); Smith, 131 Wn.2d at 263. The error is not

harmless if "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The error of an omitted or misstated element is harmless only when (1) uncontroverted evidence supports the element at issue and (2) the reviewing court concludes beyond a reasonable doubt that the jury verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

St. Clare put on a defense. She denied starving or dehydrating the cats. 2RP 344-45. She introduced evidence that allowed a rational juror to conclude she did not negligently starve or dehydrate the designated cats and as a result caused them pain for an extended period of time. She testified she provided food to the cats twice a day and gave them water as needed. 2RP 295-97, 302, 308, 315-16, 318, 329-31, 336, 342-44, 356-59, 365. St. John corroborated that St. Clare provided food and water (including milk) to the cats. 2RP 294-97, 302. Whether she starved or dehydrated the animals with criminal negligence was controverted.

Dr. Thompson acknowledged a cat could be so sick that it would not eat and drink even with food and water sitting right in front of it. 2RP 251-52. Beilfus testified that, after breaking the trailer lock on July 6, the cats just sat there when water was put in front of them. 2RP 61. Rench

acknowledged it was possible that cats suffering from feline leukemia or FIV provided with food and water on a constant basis could still look sick and become dehydrated because their bodies are unable to take advantage of food and water. 2RP 178-79. She felt a cat that is sick might require additional assistance to make sure they are eating and drinking properly. 2RP 181. That is a reasonable conclusion, but failure to seek proper veterinary care is only second degree animal cruelty, on which the jury was not instructed.¹⁸ In order to hold the error harmless, the reviewing court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Brown, 147 Wn.2d at 341 (quoting Neder, 527 U.S. at 19). That conclusion cannot be reached here. The convictions must be reversed.

2. VIOLATION OF THE RIGHT TO A UNANIMOUS JURY VERDICT REQUIRES REVERSAL OF SEVEN CONVICTIONS.

First degree animal cruelty may be committed by the alternative means of starvation or dehydration. For counts 1 (cat #6), 4 (cat #9), 5 (cat #13), 6 (cat #17), 7 (cat #26), 8 (cat #55), and 10 (cat #81), there was

¹⁸ RCW 16.52.207(2)(a) provides "[a]n owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence . . . Fails to provide the animal with necessary . . . medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure."

insufficient evidence to support a finding of one or the other of these alternative means. Reversal of these seven convictions is required because there is no particularized expression of jury unanimity on each of the alternative means of proving these offenses.

- a. **A conviction must be reversed where there is insufficient evidence to support an alternative means of committing a crime on which the jury was instructed.**

In criminal prosecutions, the accused has a constitutional right to "an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); Wash. Const., art. 1, § 21. It is well established a unanimity error amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Peterson, 174 Wn. App. 828, 849 n.5, 301 P.3d 1060, review denied, 178 Wn.2d 1021, 312 P.3d 650 (2013); State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991).

In certain situations, the right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. Ortega-Martinez, 124 Wn.2d at 707. "If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is

unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." Id. at 707-08. But "if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Id. at 708. The sufficient evidence test is satisfied only if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." In re Detention of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).¹⁹

b. Starvation and dehydration are alternative means of committing first degree animal cruelty, and there is insufficient evidence to support one of the means on the challenged counts.

First degree animal cruelty may be committed by the alternative means of starvation or dehydration. Peterson, 174 Wn. App. at 832, 851. The "to convict" instructions presented the jury with these alternative means of committing the charged offense. CP 77-96. Looking at the evidence in the light most favorable to the State, the evidence establishes

¹⁹ In conducting this analysis, the terms "substantial evidence" and "sufficient evidence" are used interchangeably. See Ortega-Martinez, 124 Wn.2d at 708 (sufficient evidence); Halgren, 156 Wn.2d at 811 (substantial evidence).

one or the other alternative for seven of the designated cats but not both alternatives.

In determining whether the right to jury unanimity has been violated, "[t]he test is whether sufficient evidence exists to support each of the alternative means presented to the jury." State v. Kinchen, 92 Wn. App. 442, 451, 963 P.2d 928 (1998). "If the evidence is insufficient to support any one of the means submitted to the jury, the conviction will be reversed." Kinchen, 92 Wn. App. at 451. Sufficiency of the evidence is a question of law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Examination of cat #6 (count 1) and cat #9 (count 4) revealed a body condition score of 2, indicating emaciation. 2RP 140, 224, 228. Sufficient evidence supported the starvation means of committing the offense for cats 6 and 9. But there was no testimony that cat 6 was dehydrated. 2RP 139, 223-27. There was no testimony that cat 9 was dehydrated. 2RP 139-40, 227-28. No one testified that the skin pinch or gum check tests, which show the presence of dehydration, were done on either cat as part of the examination process or, if they were, what the results were. In the absence of testimony that testing showed dehydration, there is no evidence that cats 6 and 9 were actually dehydrated. No witness, lay or expert, testified that either cat displayed any sign of

dehydration. No evidence showed lack of water caused the cat to suffer substantial and unjustifiable physical pain extending for a period sufficient to cause considerable suffering. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

The mere fact that witnesses did not see available water at a certain time on a particular day for the general group of cats does not show these two particular cats were dehydrated. Affirmative evidence shows St. Clare provided water. 2RP 294-96, 302, 308, 315, 329-31, 336, 342-44, 358. The State provided no evidence establishing when cats 6 and 9 last drank and how much they drank prior to their removal by animal control on July 11. St. Clare testified she provided water earlier in the morning of July 11, before animal control arrived. 2RP 308, 343-44.

Witnesses did not see water out for the general population of cats at discrete points in time. 2RP 60, 128-29, 190, 198, 263, 274. But it is speculation that St. Clare did not give them water before or after those witnesses left the scene. At other points in time, animal control officer saw water was available on April 28 and July 7. 2RP 87, 118. Verdicts must be supported by substantial evidence, not guesswork. State v. Prestegard, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001). It is conjecture

that St. Clare failed to provide cats 6 and 9 enough water to prevent dehydration that caused considerable suffering.

There is also insufficient evidence to conclude St. Clare committed the crime based on the alternative means of starvation for cat #13 (count 5), cat #17 (count 6), cat #26 (count 7), cat #55 (count 8) and cat #81 (count 10). These five cats all had a body condition score of 4. 2RP 229-31, 233-34. A score of 1 or 2 indicates emaciation. 2RP 211, 215. A score of 3 means the cat is significantly or severely underweight; you can feel, their ribs and might be able to see them; you can feel their hip bone, the abdomen is tucked in. 2RP 215, 232. A score of 4, on the other hand, indicates the cats were only slightly underweight. 2RP 215. Being slightly underweight does not equal a starved state. The average cat should be a 5. 2RP 211. So these cats were a little less than the ideal weight for an average, healthy cat. Dr. Thompson made a point of contrasting the bigger cats with a body condition of 4 or more with the smaller and weaker cats that would have trouble competing for limited food resources. 2RP 217.

No one gave any testimony on cat 17's muscle score. 2RP 230-31, 141-42. Cats 13, 26, 55 and 81 had a muscle condition score of 2. 2RP 230-31, 233-35. This score measures muscle mass, with 1 being least amount of muscle mass and 3 being normal. 2RP 229-30. So these cats

did not have normal muscle mass. They were below average in that regard. But there was no testimony that a muscle score of 2 equates to a starved state. And Dr. Thompson testified muscle loss is due to any chronic condition, such as chronic disease. 2RP 229, 243. The photos admitted into evidence at most show these cats to be thin, but do not show visible rib lines or any other obvious indication of a starved state. Ex. 32-38, 42-44, 48-70.

The mere fact that witnesses did not see available food at a certain time on particular days not show these particular cats were not getting fed. 2RP 60, 103, 128-29, 190, 263, 274. No evidence from the State established when cats 13, 17, 26, 55 and 81 last ate or how often they ate prior to their removal by animal control on July 11. Affirmative evidence shows St. Clare provided food to her cats and that she last did so shortly before animal control came to seize the cats. 2RP 295-97, 302, 308, 315-16, 318, 342, 356-59, 365.

Again, the existence of a fact required for conviction cannot rest upon guess, speculation, or conjecture. Colquitt, 133 Wn. App. at 796. Further, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Rich, 184 Wn.2d at 903 (quoting State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)). On this record, it is speculation that these particular cats were starved.

There was no jury instruction requiring jury unanimity on the alternative means. On the contrary, the "to convict" instructions informed jurors that they did not need to be unanimous on the alternative means of committing the offense. Further, there was no special verdict specifying which of the alternative means the jury found. "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing Ortega-Martinez, 124 Wn.2d at 708). The seven convictions at issue must be reversed because sufficient evidence does not support one of the alternative means for the specified counts.

3. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344

P.3d 680 (2015). The concerns expressed in Blazina are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

St. Clare qualified for indigent defense services in the trial court and continued to qualify for indigent defense services on appeal. CP 1-3; 2RP 427. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). Further, the record shows she is homeless, living out of her vehicle. 2RP 102, 319, 353; CP 5. She sporadically works odd jobs for room and board and handouts. 2RP 292, 416; CP 5. She's been "basically couch surfing" for the last couple of years. 2RP 417. The State indicated its intent to seek \$18,000 in restitution. CP 5. Because she was "very much indigent," defense counsel requested the court to waive all non-mandatory costs. 2RP 417. The court waived those costs because she was screened eligible for appointed counsel. 2RP 427.

Under the circumstances, this Court should soundly exercise its discretion by denying any request for appellate costs. See State v. Cardenas-Flores, __ Wn. App. __, __ P.3d __, 2016 WL 3264358, at *10 (slip op. filed June 14, 2016) (waiving appellate costs in light of defendant's indigent status, and presumption under RAP 15.2(f) that she

remains indigent "throughout the review" unless the trial court finds that her financial condition has improved).

D. CONCLUSION

For the reasons set forth, St. Clare requests reversal of the challenged convictions.

DATED this 25th day of July 2016

Respectfully Submitted,

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