

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

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Court of Appeals
Division I
State of Washington

BRIEF OF RESPONDENT

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I. ISSUES

1. Can the defendant raise his challenge to the “to-convict” jury instruction for the first time on appeal, when the instruction included all of the crime’s essential elements and correctly stated the burden of proof?

2. If so, should this Court reject the challenge because neither logic nor case authority supports the defendant’s contention that the criminal negligence element was confusing or inaccurate?

3. Are “starves” and “dehydrates” true alternative means of committing animal cruelty in the first degree, or are they “means within a means” because they are codependent facets inhering in the same basic act of providing sustenance for an animal?

4. Did sufficient evidence support each of the convictions, when the jury heard evidence that all 10 of the cats represented in the charging document suffered both starvation and dehydration?

II. STATEMENT OF THE CASE

The defendant was charged by amended information with 10 counts of animal cruelty in the first degree in violation of RCW 16.52.205(2). The State alleged that the defendant acted with criminal negligence in her care of 10 specific cats, resulting in a state of starvation or dehydration sufficient to cause substantial and

unjustifiable physical pain enduring long enough to cause considerable suffering or death. CP 113-115.

A jury convicted the defendant of all ten counts after hearing evidence in a trial spanning four days. RP 1; CP 57-66.

A. THE EVIDENCE AT TRIAL.

1. The Investigation Leading Up To The July 11th Seizure Of The Defendant's Trailer And Cats.

Snohomish County animal control officers first learned about the situation leading to these felony charges on April 28, 2014, when they received a citizen complaint about 25 cats living in a silver trailer on a neighboring property. RP 85. Officer Delgado visited the trailer on April 30. He found the trailer's door padlocked shut with the windows and roof vents open. No one else was present. Through the windows Officer Delgado saw the interior of the trailer had been "completely gutted out" except some shelves and tables, litter boxes, and animal crates. He estimated the trailer contained approximately 50 cats. Although he noted no signs of distress from the cats, he did not see any food, and he saw just one bowl of water. RP 86-87. It was warm that day, and he was concerned about the trailer receiving proper ventilation as the heat of the summer was bound to increase in the coming months. He left a notice on the front door requesting contact from the owner, but

never received any response. When he returned on May 16, the trailer was gone. RP 87-88.

Another citizen complaint surfaced on June 15. Lead investigator Angela Rensch, an 11 year veteran animal control officer with hundreds of animal cruelty investigations under her belt, reviewed the complaint and became concerned about dehydration and heat stroke affecting the cats because temperatures had risen to the mid-80s. The next day, June 16th, she located the trailer under a power line easement near Lake Stevens. RP 97-98, 101. She also saw a green Toyota pickup and met the defendant, Kathryn St. Clare, who explained that she was concerned about animal control arriving and assured Officer Rensch the situation was only temporary.

The defendant refused to open the trailer for inspection, explaining that she was embarrassed that it was dirty and she didn't want the cats to escape. Officer Rensch could smell an overwhelming ammonia smell coming while she was still a good distance away from the trailer, commonly caused by decaying urine or fecal matter. Through the trailer's windows she observed roughly 40-60 cats inside, litter boxes overflowing with feces, and no food or water in sight. RP 102-103. Several of the cats appeared

emaciated. Some had green discharge coming from their eyes and nose. All of them seemed lethargic, laying around in "piles on top of each other." RP 104.

The defendant told Officer Rensch that the cats had feline leukemia, and although she was trying to find homes for them, it was difficult to get people to take on a sick cat. Some of the cats were breeding, so the trailer included a few litters of young kittens as well. RP 104-105. The trailer had no running water or electricity to power a fan for ventilation. Officer Rensch had concerns for the health of the cats, so she told the defendant that she needed to reduce the population to "around 10," provide veterinary care for the sick ones, and provide sanitary conditions with adequate food and water. Officer Rensch offered to transport the cats to an animal shelter free of charge, but the defendant did not agree to that. RP 106-107.

Officer Rensch returned four days later on June 20th. The trailer had been cleaned and there were only 17 cats in the trailer, which now had its door unlocked and open. The ammonia smell was reduced and the ventilation much improved. The defendant was present and claimed she was feeding her cats goat milk and raw chicken from a nearby farm. She claimed to have found homes

for many of the cats. Nonetheless, Officer Rench still determined the overall conditions were unacceptable. She told the defendant to keep the door trailer's door open for ventilation purposes, continue to reduce the population of cats, and provide vet care for the diseased and emaciated cats. Once again the defendant would not allow officers to inspect the inside of the trailer. RP 109-110.

Officer Rench visited the defendant's trailer again on June 30th. The conditions were relatively unchanged from the last visit, except the defendant said she had found homes for 8 more cats. Officer Rench told the defendant to further reduce the number of animals, provide vet care, food and water, and to move the trailer to a healthier location. The defendant agreed to inform Officer Rench when and where she moved the trailer. RP 113.

On July 5th the defendant's trailer again drew the attention of a concerned citizen, Gyda Harris. She was on a walk when she noticed the horrific smell and meowing coming from the trailer. She looked inside the window of the trailer and saw many cats that appeared to be sick and starved, with no evidence of food or water in view. She described the scene as an "atrocious... [that] took a long time to get out of my head.". When she opened one of the trailer's

windows, approximately 10 cats jumped out and escaped. RP 188-191.

The next day, July 6th, Linda Beilfus, Gyda Harris, and another concerned citizen approached the trailer. The weather was warm and the trailer was in the direct sun with no shade. The trailer door was padlocked shut. RP 57-58, 194. One of the women broke the padlock and opened the trailer, but the smell was too awful for them to go inside. Ms. Beilfus estimated the trailer contained 50 to 100 cats. She compared the conditions to a "concentration camp. Probably one of the worst things I've ever actually seen live." RP 59. Despite the door being unlocked, only one of the cats had the energy to escape. The rest were "dazed and sick." Some had "goo" coming out of their eyes, and they were skinny. One of the cats appeared to be dead. Many of the cats were panting with their mouths open. The women saw no evidence of any food or water available to these cats, so they went to the store to buy bowls and water for them. RP 59-60. Even after the cats were offered water, they just "sat there." They were just all listless and panting and sweaty and matted." RP 61. The temperatures during this period were in the mid to upper 80s every day, and Ms. Harris estimated

the temperature inside the trailer "probably near a hundred." RP 197.

The next day, July 7th, Officer Rench had heard about the new citizen complaints and responded back to the trailer's previous location. The trailer wasn't there, and the defendant hadn't informed Officer Rench about the move as she had agreed to do. Another officer located the trailer about ¼ mile away on the goat farm. RP 115. The defendant was present and admitted the cats had been locked in the trailer for 3 hours at a time while outside temperatures were in the upper 80s. Officer Rench observed that several of the trailer's windows were open, but the door was closed. This time the trailer contained approximately 40-50 cats, including a mother cat with kittens which the defendant previously said had been rehomed. Officer Rench did observe some food, water and milk available for the cats to eat and drink. RP 118-19. However, it was only a minimal amount, "definitely not sufficient for the number of animals inside the trailer." RP 123. The overall conditions were not healthy as several of the cats were lethargic with green discharge coming from their eyes and mouths. A strong ammonia smell dominated inside the trailer. The defendant said she planned to move the trailer to a dairy barn in Duvall that night. Officer Rench

told her to reduce the number of cats and seek vet care. Officer Rench repeated her offer to transport the cats to a shelter and waive all associated fees, but the defendant refused. RP 114-120.

The next day, July 8th, Officer Rench discovered that the trailer had been moved from the goat farm, yet the defendant had not informed animal control about this move as she had agreed to do. The owner of the goat farm, Maria St. John, would only tell officers that the trailer "just drove west." RP 120-21. Yet the defendant and Ms. St. John would both later testify that Ms. St. John knew exactly where the trailer had been moved to, because Ms. St. John had helped move it there herself. RP 299, 348.

One day later, on July 9th, officers located the defendant's trailer parked in an open field in Everett, in an area with no trees or shade. The trailer was covered in black tarps. RP 122.

On July 11th Officer Rench obtained a search warrant authorizing removal of the defendant's cats from the trailer. It was still located in the open field in Everett, in full sun with no shade. The trailer was covered in more black tarps and the door was padlocked shut. The cats were trapped inside. Although the defendant was not present when officers first arrived at the trailer, she appeared 15 or 20 minutes later. After receiving a copy of the

search warrant and waiving her Miranda rights, the defendant estimated that officers would find approximately 70 cats inside the trailer. RP 123-27. Ultimately, officer removed 111 cats from inside the trailer. RP 130. Officer Rensch was overwhelmed by what she discovered; she could detect a strong smell of ammonia from some distance away. RP 128. Looking through the windows she could see “[c]ats just everywhere. Every little nook and cranny, stacked on top of each other.” RP 128. There was feces all over the floor. The cats were visibly panting, lethargic, and there was no food or water visible inside the trailer. Upon entering the trailer, Officer Rensch saw cats “stacked on crates, locked in crates.” The stench of ammonia and feces was so strong it was burning her eyes and made it hard for her to breathe. It was extremely hot inside the trailer, and there was no food or water to be found. RP 129.

Despite hundreds of animal cruelty investigations, this case was the first time Officer Rensch had ever seen a cat pant. All of the cats appeared dehydrated. RP 130. The officers transported the trailer to the Everett Animal Shelter where they continued to inspect it. During this time the officers used an ammonia reader to ascertain the levels of that chemical inside the trailer. The alarm on that device was sounding, requiring officers to wear respirators and

hazmat-type suits to enter the trailer. Officer Rench said the conditions inside the trailer were unsafe for both humans and animals. RP 131. After a thorough search of the trailer officers found some empty water or food bowls but did not otherwise find any food or water available in the trailer. RP 134, 263, 274. The defendant admitted that she only had one water bowl in the trailer that day. RP 358.

Officers systematically removed all 111 cats from the trailer, taking care not to infect the cats that were already at the shelter. Each cat was examined by a veterinarian, Dr. Thompson. RP 135. Officer Rench and Dr. Thompson assigned numbers to each cat, photographed next to their number on a whiteboard. RP 136. They selected 10 cats in the worst conditions, and documented those that "qualified for the felony animal cruelty of starvation and dehydration." RP 136. All 111 cats were euthanized upon the recommendation of Dr. Thompson. RP 137.

2. The Medical Evaluation Of The 10 Charged Cats.

Dr. Thompson used multiple tests to evaluate the medical condition of all 111 cats. As a baseline she observed that all of the cats were in "varying degrees of being underweight and varying degrees of dehydration." RP 214.

Dr. Thompson used a body condition scoring system, generally accepted by veterinarians, to evaluate the relative thinness or obesity of each cat. The scale goes from 1 to 9, with a 1 being so emaciated it is literally like skin over a skeleton. A score of 9 is morbidly obese, "as round as a bowling ball." According to Dr. Thompson, "a cat should be a 5, right in the middle." RP 211. For this group of 111 cats, 7 were emaciated with scores of 1 or 2. 14 more were "severely underweight" with scores of 3. RP 215. Dr. Thompson agreed that a body condition score of 4 represents a cat being "slightly underweight," but she still said this was an unhealthy body condition score. RP 215-16. She said in general the cats with a body condition score of 4 were naturally larger cats. This observation is consistent with the hoarding dynamic when multiple animals are competing for scarce resources due to overpopulation. See RP 217.

Body condition scoring was not the only test Dr. Thompson used to evaluate the defendant's cats' health. She also used a muscle condition score to evaluate whether there was sufficient muscle mass in the animals' thighs, back, and hips. This test produces a score of 1 to 3, where a score of 3 represents "your typical average muscle build." A cat with a muscle condition score

of 1 might have almost no muscle at all, with its thigh consisting of "just bone and flabby." RP 229-30. She testified that the process of starvation leads to degraded muscle mass (and by inference lower muscle condition scores), which leaves less protein available in the body. Instead of breaking down food for protein, the body "starts breaking down muscle protein to stay alive." This process contributed to the suffering and pain of each of the ten charged cats. RP 236-37.

Dr. Thompson also paid attention to whether the cats had a symptom called "potbelly." This condition is defined as a distended abdomen which is bigger than it should be for the cat's body condition score. It can result from accumulation of liquid or gas in the abdomen and indicates the presence of disease. RP 212.

According to Dr. Thompson, the cause of the dehydration for those cats suffering from it was "no access to water for a significant period of time. Or it was just they got water intermittently, and the rest of the time had none." RP 220. High ambient temperature in the trailer also contributed to the dehydration. In addition, the high ammonia content in the air inside the trailer would reduce the cats' ability to smell, which can decrease their water intake. RP 221.

Dr. Thompson also testified that the emaciated (body condition 1-2) and severely underweight (body condition 3) cats were caused by “a lack of available food” as by far the biggest contributor. RP 220-21.

The prosecutor asked Dr. Thompson for an opinion on whether the ten charged cats suffered pain. RP 236. She said yes, and specifically described how starvation played a role in creating that pain – by the body breaking down muscle protein instead of protein from food, and also because the general lack of available protein results in a reduced ability to heal other medical conditions such as dental problems. The lack of iron (anemia) caused by starvation causes lethargy. Dr. Thompson was then specifically asked whether “the starvation and/or any starvation or dehydration that was present would be causing any type of suffering for these cats.” She replied, “Yes. The nonscientific description, they’d be pretty darn miserable.” RP 236-37. This misery was not something that could be cured by one decent meal or a serving of water – the cats would have required “hospitaliz[ation] under intensive treatment” for anywhere from two weeks to two months in order to recover. RP 237-38.

Dr. Thompson also clarified that lack of available food or water is not the exclusive cause of starvation or dehydration; those conditions can also be caused when a cat becomes reluctant to eat or drink due to a medical condition or illness. RP 252. Sick animals may require additional assistance to make sure they are eating and drinking properly. Yet in this situation, the overpopulation of the trailer produced a hoarding dynamic where the stronger individual animals would consume a majority of the food and the weaker animals would not be able to compete for resources. RP 181-82. This factor is common in animal cruelty investigations involving the hoarding of too many animals. Cats who are sick or weak can be harmed by their owners' failure to provide more than a single source of food or water, even if the quantity offered through that single source (or bowl) is theoretically sufficient to feed and hydrate all of the animals. RP 181-82. Dr. Thompson endorsed this theory as well. RP 217.

Officer Rench is trained in assessing dehydration. RP 142. She observed Dr. Thompson perform a "snap test", whereby the dehydrated cats would have skin remain in a tent fold instead of elastically snapping back into place. RP 143. Dr. Tompson described this test in percentage terms – a cat who is 5 percent

dehydrated is “noticeably” dehydrated, whereas a 7 percent dehydrated cat is “more serious” or “severely dehydrated.” RP 214, 229. In Officer Rench’s opinion, all 10 charged cats had been suffering substantial pain. RP 146-47. The specific conditions associated with each cat, as testified by Officer Rench and Dr. Thompson, are as follows:

Cat #6 (Count 1) This cat was “extremely emaciated,” with a body condition score of 2. Its ribs were completely visible through the fur, with no body fat over the ribs, spine, and hip bones. The cat had a potbelly, attributed to malnutrition and disease, and tested positive for both feline leukemia and FIV (feline infectious virus). RP 94, 139, 224. Ex. 24.

Cat # 28 (Count 2) — This cat was severely dehydrated (7%), covered in urine and feces, thin, excessive discharge from the eyes, nose, and mouth. This cat had lice and ear mites. The body condition score was 3 (severely underweight), and the cat had a potbelly. Ex. 39, 40, 41. RP 144, 232-33.

Cat #91 (Count 3) — This cat was severely dehydrated (7%), thin, covered in urine and feces, had lice, and discharge coming from its nose and eyes. The body condition score was 3 and the cat had a potbelly. In addition, this cat was missing teeth

and showed signs of extensive dental disease. RP 146, 235-36. Ex. 51-55.

Cat #9 (Count 4) – This cat was a five week old kitten. It was “emaciated” with a body condition score of 2. The cat had potbelly. It was also covered in lice, feces and urine, and had ear mites and lice as well. RP 140, 228. Ex. 30.

Cat #13 (Count 5) – This cat was severely dehydrated, covered in feces, and urine. It had ear mites and lice. The body condition score was 4, and it had depleted muscle mass with a muscle condition score of 2 out of 3. RP 140-41, 229. Ex. 32.

Cat #17 (Count 6) – This cat was severely dehydrated (7%) with a body condition score of 4 and a muscle condition score of 2. It was covered in feces and urine and had green discharge coming from the nostrils and mouth. This cat was also covered in lice. RP 142, 230. Ex. 34 & 35.

Cat #26 (Count 7) – Officer Rench described this cat as severely dehydrated, thin, covered in urine and feces, with ear mites, lice, and discharge from the eyes, nose, and mouth. RP 143-44. Dr. Thompson said this cat was dehydrated 5%, and had a potbelly. Its body condition score was 4, and its muscle condition score was 2. RP 231. Ex. 36.

Cat #55 (Count 8) — This cat was severely dehydrated, covered in feces, thin, and missing hair over most of its body (due to parasites or stress and excessive licking). It also had lice, and discharge from the nose and eyes. RP 144-45. Ex. 42-44. Its body condition score was 4, and its muscle condition score was 2. This cat had a potbelly. RP 233-34. Ex. 42.

Cat #75 (Count 9) This cat was severely dehydrated and severely underweight. Its ribs were visible, with no fat over its hind end and hip bones. The cat was covered in urine and feces, had lice and ear mites, and discharge coming from its face. RP 145. Its body condition score was 3, and it had a potbelly. This cat was 7% dehydrated. RP 234. Ex. 45.

Cat #81 (Count 10) –. This cat was severely dehydrated. Officer Rench noted the visible skin fold from performing the snap test, indicative of the severe dehydration. The cat was covered in urine and feces, had lice, and discharge coming from its face. RP 145. The body condition score was 4, the muscle condition score was 2, and the cat had potbelly. Dr. Thompson measured the dehydration at 7%, and noted that this cat was missing 50% of its hair. RP 234-35. Ex. 48-50.

3. The Defense Case.

At the close of the State's case the defendant moved to dismiss all charges pursuant to State v. Green, arguing that the conjunctive charging language in the Information required the State to prove that the defendant had caused each charged cat's death. In making this motion the defendant's attorney conceded that a reasonable juror "might find that she neglected them until there was suffering." RP 282. The court denied the motion to dismiss. RP 283-84.

The only justification the defendant provided for the condition of the cats was that it was temporary. RP 153. The defendant admitted knowing that upper respiratory infections can cause cats to stop eating. RP 322. She also admitted that some of her cats had feline leukemia. RP 323, 364. The defendant acknowledged that dehydration and starvation are interrelated with one another: in her own words, "when cats become dehydrated, they lose their appetite." RP 340. She also admitted that hearing Dr. Thompson's testimony made her "double think" that she wasn't giving enough food and water to her cats. RP 341. In retrospect, she theorized that her switch to dry cat food "caused some problems," because they required more water after the switch. RP 341-42. She admitted

that she “failed” to get her cats “into better living conditions” because she knew her trailer was falling apart. RP 345.

The defendant, contrary to CrR 6.15, failed to provide any proposed jury instructions. RP 259. The defendant did not raise any objections to the jury instructions proposed by the State or adopted by the trial court. Id.

III. ARGUMENT

A. THE DEFENDANT’S CHALLENGE TO THE “TO CONVICT” JURY INSTRUCTION, RAISED FOR THE FIRST TIME ON APPEAL, DOES NOT IMPLICATE A MANIFEST CONSTITUTIONAL ERROR.

The defendant argues that the “to convict” instructions, to which he offered no objection at trial, “misstated and lowered the State’s burden of proof, in violation of due process.” Br. App. 1. He explains that the to-convict instructions did not “adequately convey that the mens rea element of criminal negligence attaches to the acts of starving or dehydrating the cat.” Br. App. 32.

Generally the court will not review an error raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The rule is designed to promote the efficient use of judicial resources. “The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and

a consequent new trial.” State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

An alleged error that was not raised in the trial court may be reviewed if it constitutes a “manifest constitutional error.” The failure to instruct a jury on every element of the charged crime, for example, would be constitutional in nature. State v. Grimes, 165 Wn. App. 172, 186, 267 P.3d 454 (2011). Other examples of “manifest” constitutional errors in jury instructions include: directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). In contrast, failure to instruct on a lesser included offense, and failure to define individual terms are instructional errors which fall short of manifest error. Id. at 688.

The “to convict” instruction must include all of the elements of the crime charged. State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937 (2009). An “element” is defined as “the constituent parts of a crime—usu[ally] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction.” Id. at 754 quoting Black’s Law Dictionary 559 (8th ed.

2004). The statutory elements of a crime constitute the essential elements. A constitutionally adequate "to convict" instruction need not contain all pertinent law such as the definition of terms. Id. "The court not only may, but 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).

Here, the court instructed the jury as follows:

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 that at 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 77-78. The court provided identical instructions for all ten counts, changing only the identified victim cat to correspond with the charging document. CP 79-96.

Although there is no pattern instruction for animal cruelty in the first degree, the language of the instruction matches the language of the statute in all material respects:

A person is guilty of animal cruelty in the first degree 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); see CP 113-115.

It is apparent from the language of the court's instruction that every essential element of the crime was included, and that the appropriate standard of proof, "beyond a reasonable doubt" was

referenced not once but twice. Further, the defendant's assertion that the negligence standard was inappropriately "decoupled" from the first element of the crime is disproved by the repeated use of the word "acted" in both elements. Read as a whole, element one defines the criminal act (*actus reus*) and element two defines the requisite mental state (*mens rea*) accompanying the defendant's *actions*.

The defendant's current allegation that the connection between the mens rea and the actus reus could have been more clearly annunciated is not accurate, much less an issue of constitutional magnitude. If this instruction was error at all, it could have been corrected or clarified if the defendant had only followed his obligation under CrR 6.15(c) to provide his own proposed jury instructions, and to object to any proposed instructions before they were given. The alleged error is not reviewable for the first time on appeal. RAP 2.5(a)(3).

B. THE "TO CONVICT" INSTRUCTION WAS AN ACCURATE AND CLEAR STATEMENT OF THE LAW.

The defendant argues that the "to convict" instruction was insufficiently clear regarding "What act must be tied to the criminal negligence standard?" Br. App. 32. Contrary to the defendant's

assertion that the instruction does not answer this question, the trial court thought the instruction was clear. RP 400. The plain language of the instruction shows that the trial court was correct - there is no room for confusion or ambiguity because, again, the second element sets a criminal negligence standard to be applied to the defendant's *actions*. The only action referenced anywhere else in the "to convict" instruction is in the first element of the crime: "that the defendant *acted* by one or more of the following means or methods:...the defendant starved an animal...the defendant dehydrated an animal." CP 77. No other action is referenced which could justifiably confuse a reasonable juror.

The defendant cites no case authority in which a "to convict" instruction was later deemed erroneous because the mens rea element was set forth as its own separately numbered element. The only authority he does cite to support this portion of his argument is State v. Saunders, 177 Wn. App. 259, 270, 311 P.3d 601 (2013), Br. App. 32-35. In Saunders this Court determined that the definition of "restrain" was *not* an essential element that needed to be included in the "to convict" instruction in a kidnapping case. Id. at 269. Neither the result nor the subject matter in Saunders aids this Court's current task of determining whether the "to convict"

instruction accurately set forth the criminal negligence element of animal cruelty. To the extent that the concept of criminal negligence requires further definition, the trial court provided it in a separate definitional instruction:

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; WPIC 10.04 (modified). The court also provided definitions of the terms “knowingly,” “intentionally,” and “recklessly.” CP 99-101. Just as the defendant’s trial attorney had no objection to the court providing these further definitional instructions, the defendant on appeal has assigned no error to them. Br. App. 1. See State v. Gentry, 125 Wn.2d 570, 648, 888 P.2d 1105 (1995).

The “to convict” instructions in this case accurately set forth the essential elements of the crime of animal cruelty in the first degree and the standard of proof the State must meet to obtain a

conviction. RCW 16.52.205(2); CP 77. In arguing otherwise, the defendant speculates about what the jury was thinking when it asked whether the terms “starved” and “dehydrated” implied intent. Br. App. 33; CP 67. Everyone agreed that the answer to that question was “No.” RP 398-400.

The record of a criminal trial is not designed to conduct a thorough inquiry into how a specific jury apprehended a particular jury instruction. See State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)(“Here, the jury’s question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached.”). “Questions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.” Id.

C. STARVATION AND DEHYDRATION ARE NOT ALTERNATIVE MEANS OF COMMITTING ANIMAL CRUELTY IN THE FIRST DEGREE.

This Court has previously held “that starvation, dehydration, and suffocation are different ways of committing the crime of animal cruelty in the first degree and are not merely descriptive or definitional but rather, separate and essential terms of the offense.” State v. Peterson, 174 Wn. App. 828, 851, 301 P.3d 1060 (2013). In Peterson this Court relied on the law of the case doctrine, and

little else, to determine that starvation and dehydration are alternative means. Id. (citing State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). However, as this Court concluded just this year, Hickman's law of the case doctrine no longer guides appellate review of a "to convict" jury instruction. State v. Tyler, 195 Wn. App. 385, ¶ 31 (2016).

Rather, the State Supreme Court's subsequent guidance on alternative means crimes calls for a reconsideration of this issue. See State v. Owens, 180 Wn.2d 90, 97, 323 P.3d 1030 (2014) ("alternative means should be distinguished based on how varied the actions are that could constitute the crime."); State v. Sandholm, 184 Wn.2d 726, 734, 364 P.3d 87 (2015) ("when the statute describes minor nuances inhering in the same act, the more likely the various "alternatives" are merely facets of the same criminal conduct.").

In Sandholm the court addressed whether the DUI statute created alternate means of committing the crime while "under the influence of or affected by" either intoxicating liquor or drugs, RCW 46.61.502(1)(b), or a combination of intoxicating liquor and drugs, RCW 46.61.502(1)(c). The court held that the statute created a single means of committing the crime, "driving while under the

'influence of' or 'affected by' certain substances that may impair the driver." Sandholm, 184 Wn.2d at 735. The court described the two subsections of the statute as "facets of the same conduct, not distinct criminal acts." Id.

In Owens this court found there were eight alternative means of committing trafficking in stolen property: "knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others, or (8) knowingly trafficking in stolen property." Owens, 180 Wn.2d at 97. Because there was insufficient evidence to support at least one means the conviction was reversed. Id. at 94. The Supreme Court reversed this decision, relying on the reasoning in State v. Lindsey, 177 Wn. App. 233, 241-242, 31 P.3d 61 (2013), review denied, 180 Wn.2d 1022 (2014). There the court found that the statute listed only two alternative means of committing the crime. The first seven terms were all facets of a single means of committing the crime describing the act of facilitating or participating in a theft so that the items can be sold. Id. at 97-98. These terms were slight variations on the same act, and therefore constituted only a single means of committing the crime.

These cases demonstrate that where a statute “describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” Sandholm, 184 Wn.2d at 734. Like the statute at issue in Owens, RCW 16.52.205(2) sets out a single means of committing the crime.¹ The two disputed terms at issue in this case, “starves” and “dehydrates,” each relate to the defendant’s criminally negligent failure to provide animals under her care with the basic sustenance required for survival. It is a matter of common understanding that one cannot adequately care for an animal without providing both adequate food and adequate water. Over time, failure in one respect will almost always negate compliance with the other. Most animal owners correctly address the caloric and hydration needs of their animals together in a unified approach, in recognition that food and water work together to maintain an animal’s survival. This is not only a matter of common understanding, but something the defendant understood as well. RP 340 (“[W]hen cats become

¹ Although the issue is not before this court, the State would agree that subsections (1), (2), and (3) of RCW 16.52.205 each represent alternative means of committing the crime. However, this court’s task is to determine whether the two verbs “starves” and “dehydrates” represent alternative means within subsection (2), or alternatively, whether they are a “means within a means.”

dehydrated, they lose their appetite.”). In light of these cases this court should reconsider whether the words “starves” and “dehydrates” are truly alternative means when they are included in the “to convict” instruction. It is more consistent with Sandholm and Owens to declare these “means within a means” because they are minor nuances inhering in the same act of providing the basic necessities of life to an animal under one’s care.

D. THE DEFENDANT’S RIGHT TO A UNANIMOUS JURY VERDICT WAS NOT VIOLATED.

If the court agrees that “starves” and “dehydrates” are not alternative means of committing the offense then the court need not analyze the unanimity issue. Sandholm, 184 Wn.2d at 733.

The defendant argues there was insufficient evidence to support a dehydration theory as to counts 1 and 4, and insufficient evidence to support a starvation theory as to counts 5, 6, 7, 8, and 10. Br. App. 40-43. Evidence is sufficient to sustain a conviction if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can

be drawn therefrom" State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the verdict, and most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

1. The Jury Heard Sufficient Evidence Of Dehydration As To Counts 1 And 4.

Officer Rench testified that she is trained and experienced in assessing dehydration as a part of her animal cruelty investigations. RP 142. She also told the jury about the conditions affecting all 111 cats that were trapped inside the defendant's trailer on July 11, 2014. She saw no food or water in the trailer. The cats were visibly panting and lethargic. RP 128. It was "extremely hot" inside the trailer, and the stench of ammonia was so strong that it was actually burning Officer Rench's eyes and making it hard for her to breathe. RP 129. Dr. Thompson corroborated the significance of Officer Rench's observations when she testified that the high ambient temperature in the trailer was "the main culprit" contributing to dehydration. Also, the high concentration of

ammonia acted as a respiratory irritant and decreased the cats' ability to smell, which in turn "can also decrease water intake." RP 221. Officer Rench, in her capacity as a trained and experienced investigator of animal cruelty, provided the following testimony about all 111 cats: "They were lethargic, laying around, visibly panting, which that is a first time I've ever actually seen a cat pant. Excessively hot. They appeared dehydrated." RP 130. She also testified that all 10 charged cats had been suffering substantial pain. RP 147. She said that the 10 charged cats were selected because they were in the worst condition, and they "qualified for the felony animal cruelty of starvation and dehydration." RP 136. Without specifying any specific cat, she said "they were extremely dehydrated." RP 137. Finally, the defendant herself admitted that she left all 111 cats alone in the trailer for 3 ½ hours on July 11, 2014, with only one *empty* water bowl for all of them. RP 358. This evidence is more than sufficient to sustain the convictions as to counts 1 and 4 regarding dehydration.

2. The Jury Heard Sufficient Evidence Of Starvation As To Counts 5, 6, 7, 8, And 10.

The defendant's main contention as it relates to the starvation evidence is that a body condition score of 4 was

insufficient to establish starvation because it means a cat is only "slightly underweight." Br. App. 42; RP 215. This contention does not withstand the reasonable inferences that were well within the jury's power to draw. A 400 pound man could starve for weeks, leaving him at 300 pounds. A doctor might reasonably call that man starving and overweight at the same time. This illustrates the point that body condition scores are not a bright-line, pass-fail determination of whether a cat has starved. While it is true that the "starvation challenged cats" (counts 5, 6, 7, 8, 10) all had body condition scores of 4, each of them also had deficient muscle condition scores of 2. RP 229-31, 233-35. The jury heard Dr. Thompson testify that the degraded muscle mass afflicting these cats was both an observable symptom of starvation and a primary cause of their pain and suffering. RP 236-37 (explaining her opinion that "the ten cats that [the prosecutor] specifically just went over...were suffering from any type of pain"). This is because lack of available food causes the body to attack its own muscles in an effort to find consumable protein, a process which would have left all of the charged cats "pretty darn miserable." Id.

The defendant admitted that she significantly underestimated how many cats were actually living in her trailer.

RP 352-353. As the prosecutor argued in closing, this allowed the jury to conclude that the defendant must have been providing insufficient food quantities if based on nothing more than this underestimation. RP 372-373. The defendant acknowledged in her own testimony that listening to the evidence at trial caused her to "double think" whether she provided enough food to her cats. RP 341. While the defendant was justified to second-guess her feeding practices, the jury heard the same evidence and was entitled to determine beyond a reasonable doubt that she had starved each of her 111 cats.

IV. CONCLUSION

For the reasons stated above, the defendant's convictions should be affirmed.

Respectfully submitted on November 9, 2016.

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

THE STATE OF WASHINGTON,

Respondent,

v.

KATHRYN ST. CLARE,

Appellant.

No. 74802-5-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

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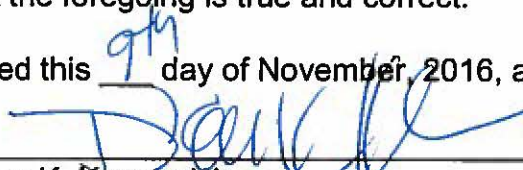
The undersigned certifies that on the 9th day of November, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer J. Sweigert, Nielsen, Broman & Koch, Grannisc@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of November, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office