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MAY 01 2017  
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SUPREME COURT

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SUPREME COURT NO. \_\_\_\_\_  
COA NO. 74802-5-1

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KATHRYN ST. CLARE,

Petitioner.

FILED  
Apr 26, 2017  
Court of Appeals  
Division I  
State of Washington

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

The Honorable George N. Bowden, Judge

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PETITION FOR REVIEW

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**A. IDENTITY OF PETITIONER**

Kathryn St. Clare asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

St. Clare requests review of the published decision in State v. Kathryn S. Clare, Court of Appeals No. 74802-5-I (slip op. filed March 27, 2017), attached as appendix A.

**C. ISSUE PRESENTED FOR REVIEW**

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?

**D. STATEMENT OF THE CASE**

**1. Background**

Kathryn St. Clare suffers from a hoarding disorder, which causes her to take in stray 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, a pre-file felony diversion program geared toward those who are mentally ill or who have a drug/alcohol dependency that contributed to their offense. 2RP<sup>1</sup> 14-15, 17; Snohomish County Code 298. St. Clare's financial inability to pay restitution operated as a bar to entry into the program. 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.

## **2. Trial Evidence**

St. Clare was homeless and living out of her truck. 2RP 102. At various times during the spring and summer of 2014, a large number of cats were observed inside St. Clare's movable trailer. 2RP 85-87, 103. On several occasions, conditions appeared adequate and the cats were not distressed when animal controls officers checked on the situation. 2RP 87, 90, 108-09, 113. On other occasions, those looking into the trailer saw cats that appeared ill and distressed, living in unsanitary conditions in a

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<sup>1</sup> 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.

hot trailer, apparently without food or water. 2RP 57-60, 103-06, 117-18, 123-24, 188-91. Animal control officers seized the cats on July 11. 2RP 124, 130-31. On that day, the trailer was very hot, it smelled overwhelmingly of cat urine, and the floor was covered in feces. 2RP 128. Cats were panting and lethargic. 2RP 128, 130, 173. There was no food or water in the trailer. 2RP 128-29, 263, 274.

Veterinarian Lisa Thompson examined the 111 cats taken from the trailer. 2RP 135, 207-09. The cats were malnourished and dehydrated to varying degrees. 2RP 214-15, 220, 224-36. Their general condition included dried feces and/or urine on their body, ear mites, lice, hair loss, dental disease, and loose or missing teeth. 2RP 210, 218, 224-36.

St. Clare had told animal control officer Rench that the cats had feline leukemia. 2RP 104, 157. Three cats tested positive for either for feline leukemia and FIV; the others were not tested. 2RP 219, 224. 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. Thompson testified both viruses suppress the immune system. 2RP 219. She 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.

Thompson opined the number of underweight cats in the group indicated that adequate food had not been provided. 2RP 220-21. She believed the cats either had no access to water for a significant period of time or only received water intermittently. 2RP 220. Some of the cats were seven percent dehydrated, which is serious dehydration. 2RP 214. Thompson also opined the cats suffered pain. 2RP 236-37. She identified lice, ear mites and upper respiratory problems with severe nasal congestion as contributors. 2RP 236. When asked what a reasonable person would have done in this situation, Officer Rench said the trailer could have been cleaned, the amount of animals reduced, adequate food, water and ventilation provided, and vet care given. 2RP 147.

The defense put on a case. Nearby dairy farm owner Marcia St. John testified how St. Clare obtained water, whey and milk from her farm to give to the cats. 2RP 294-96. St. John saw St. Clare carrying bags of cat food. 2RP 295-97. She fed the cats outside the trailer. 2RP 302. St. Clare was looking for a barn where she could house them. 2RP 290. Two and a half days before the cats were seized, St. John saw the cats while helping St. Clare move her trailer. 2RP 290. "Nothing really struck" her that they were in dire straits or starving. 2RP 290-91, 303.

St. Clare testified she had accumulated cats through years of rescuing them. 2RP 353. The number of cats in her care grew because



some were breeding. 2RP 311. She acknowledged running behind in getting the females spayed. 2RP 312-13. She kept the cats in the trailer when she left because of the threat posed by coyotes. 2RP 314. She did not leave the trailer for extended periods of time. 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 provided them with water and goat milk from the dairy farm. 2RP 315, 331, 342. She put down water "as needed," i.e., when she saw the bowls were empty. 2RP 358. She provided food. 2RP 315-18, 329-30, 342, 356-57. 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. She acknowledged it was hot inside the trailer but the vents and windows provided ventilation. 2RP 330, 363.

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 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. St. Clare

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.

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 her 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.

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

The prosecutor created and proposed the "to convict" instructions, for which there is no pattern instruction. CP 132-51. 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 prosecutor interpreted the jury's question to be "what is the mental state that the defendant needs to have acted with?" 2RP 399. The prosecutor asked the court to direct the jury to instruction 16, which defined "criminal negligence." 2RP 399. The court remarked that the

prosecutor's proposal added no additional clarity to the instructions they already had. 2RP 400. The court answered the question as follows: "Those instructions define the elements of each crime which must be proven." CP 67.

#### **4. Outcome and Appeal**

The jury convicted St. Clare as charged. CP 57-66. The court sentenced St. Clare as a first-time offender to zero days in confinement. CP 43; 2RP 422, 425.

On appeal, St. Clare argued in part that the "to convict" instruction for each count was constitutionally defective because the instruction could be read as detaching the culpable mental state of negligence from the action of starving or dehydrating the animals. Brief of Appellant at 1, 26-37. The Court of Appeals rejected the argument, finding no error in the instruction. Slip op. at 1.

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**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.**

Jury instructions, including "to convict" instructions, must more than adequately convey the law — they must make the relevant legal standard manifestly apparent to the average juror. State v. Smith, 174 Wn.

App. 359, 369, 298 P.3d 785 (2013); State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006); 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), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). The "to convict" instruction, meanwhile, is of singular importance 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).

The "to convict" instruction in St. Clare's case could be read as decoupling the mens rea element of negligence from the element of acting to starve or dehydrate the animals, thus permitting the jury to convict without finding the statutorily required element that the starvation or dehydration be done with negligence. Despite established case law, the Court of Appeals did not measure the adequacy of the "to convict" instruction under the rigorous standard that the instruction must make the law manifestly clear to the jury. It also erected an improper standard for determining whether an error is a manifest constitutional error that can be raised for the first time on appeal. This case present a significant question

of constitutional law and an issue of substantial public importance warranting review under RAP 13.4(b)(3) and (b)(4).

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.

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. "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 detached the required mens rea of criminal negligence from the actus reus of starving and dehydrating. 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.

To be manifestly clear, element (1) of the instruction could have been phrased "with criminal negligence," the defendant "starved" or "dehydrated" the animal. Or the instruction could have used the phrase "negligently starved" and "negligently dehydrated" in element (1). The instruction could have been easily fixed to make the law clear to the jury.

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 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.

The Court of Appeals nonetheless believed the instruction was sufficient because it "includes each statutory element and correctly states the burden of proof. If the phrasing was confusing, that confusion could have been corrected through objection at trial. And because any possible misunderstanding of the instruction only heightened the State's burden of proof, St. Clare fails to show prejudice from the alleged error." Slip op. at 7.

Contrary to the Court of Appeals' suggestion, it is not good enough to simply list a culpable mental state without relating it to the criminal action. To properly state the statutory elements, the instruction needed to explicitly link the mens rea of negligence with the actus reus of starved

and dehydrated. The failure to do so allowed the jury to read the instruction in such a manner that it could convict St. Clare so long as it found she starved or dehydrated the animals without a culpable mental state but acted negligently in some other fashion, as opposed to convicting only if it found she negligently starved or dehydrated the animals. The Court of Appeals failed to assess the adequacy of the instruction under the standard that requires instructions to make the law manifestly apparent to the average juror.

St. Clare's attorney did not object to the instruction at trial, so the Court of Appeals recited the manifest constitutional error standard under RAP 2.5(a)(3) in its opinion. Slip op. at 4. In this regard, the Court of Appeals complaint that confusion from the instruction "could have been corrected through objection at trial" is problematic. Slip op. at 7. This statement implies the instructional error was not a manifest constitutional error because an objection could have fixed the problem. The Court of Appeals used the wrong legal standard.

Of course, the error could have been corrected through objection at trial. The same can be said of almost any manifest constitutional error under RAP 2.5(a)(3). Whether an objection could have corrected the error is not the test for whether a constitutional error is manifest. Under RAP 2.5(a)(3), the asserted error must be "manifest from the record." State v.

Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). "[T]he appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). 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). The instruction here did not follow the language of the statute. See RCW 16.52.205(2) ("with criminal negligence, starves, dehydrates"). The trial court here could have corrected the error because the instruction does not track the statutory language of the defined offense. That is a red flag that could and should have been noticed.

St. Clare also takes issue with the Court of Appeals' notion that any juror confusion benefited her by heightening the State's burden of proof. Slip op. at 7. According to the Court of Appeals, a "to convict" instruction that is not manifestly clear and confused the jury as to what the State must prove to convict served to help the accused. That is speculation. 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. It could just as easily be said that after receiving this answer from the court, the jury may have ultimately

concluded no mens rea attached to element (1), leaving the jury free to find guilt because St. Clare acted negligently in some manner.

The Court of Appeals purported to be omniscient in being certain about what the jury was thinking. There is a question of whether it is appropriate to even consider what the jury may have been thinking. Supreme Court precedent on the issue is conflicting. Compare State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (refusing to consider jury question as evidence that jury was confused) with State v. Johnston, 156 Wn.2d 355, 364-65, 127 P.3d 707 (2006) (instructional error not harmless in light of facts and jury inquiry on true threat standard); State v. Cronin, 142 Wn.2d 568, 580-81, 14 P.3d 752 (2000) (erroneous instruction on accomplice liability not harmless where jury inquired about its meaning). St. Clare's case gives this Court the opportunity to clarify the law in this regard.

**F. CONCLUSION**

For the reasons stated above, St. Clare requests that this Court grant review.

DATED this 26th day of April 2017.

Respectfully submitted,

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# APPENDIX A



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distressed. On other visits, more cats were visible, they appeared ill and distressed, and conditions appeared unsanitary.

Animal control officers searched the trailer pursuant to a warrant on July 11, 2014. They found 111 cats. The condition of individual cats varied, but as a group, the cats were malnourished and dehydrated. Many of the cats had lost hair and teeth. The feline leukemia virus, which is highly contagious, appeared to have spread throughout the group. After examination, a veterinarian made the decision to euthanize all of the cats.

St. Clare was charged with ten counts of first degree cruelty to animals under RCW 16.52.205(2), each count based on a separate cat. At trial, the State's witnesses testified to the condition of the cats. Linda Beilfus, a neighbor who had reported the trailer to animal control, testified that when she visited in early July the trailer was parked in the sun. Through the windows, she could see many cats confined inside. The cats were panting, listless, and appeared to be starving. No food or water was visible.

An animal control officer, Angela Rench, testified that when she contacted St. Clare in June, there were 40 to 60 cats inside the trailer. The cats were lethargic and many were emaciated. The trailer was parked in the sun. It appeared that the cats had no food or water.

Rench and other animal control officers testified to the search of the trailer on July 11. The officers stated that the trailer was very hot, it smelled overwhelmingly of cat urine, and the floor was covered in feces. The cats were



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panting and lethargic. There was no food or water in the trailer. The officers made a video recording of the search. The officers testified that they impounded the trailer and transported it to an animal shelter. At the shelter, the officers removed the cats one by one for examination by a veterinarian.

The veterinarian, Lisa Thompson, testified that she examined each of the 111 cats. The cats were malnourished and dehydrated to varying degrees. Thompson stated that the number of underweight cats in the group indicated that adequate food had not been provided. She testified that the number of dehydrated cats indicated that the cats either had no access to water for a significant period of time or only received water intermittently. Thompson also testified to the conditions of the individual cats listed in the charges. Photos of the individual cats and the video from the search of the trailer were admitted into evidence.

The jury convicted St. Clare as charged. She appeals.

#### DISCUSSION

St. Clare asserts that the trial court erred because the “to convict” instruction was inadequate. The State contends that the instruction accurately states the law and that St. Clare may not challenge the instruction for the first time on appeal.

Jury instructions are generally adequate if, when read as a whole, they “properly inform the jury of the applicable law.” State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) (quoting State v. Clausung, 147 Wn.2d 620, 626, 56 P.3d

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550 (2002)). The adequacy of instructions is a question of law that this court reviews de novo. Id. (citing State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)). Because the State has the burden of proving each element of the crime charged, an adequate "to convict" instruction must state each element of the crime. State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937 (2009) (citing Mills, 154 Wn.2d at 7). The elements of the crime usually consist of the actus reus, mens rea, and causation. Id. at 754. (citing BLACKS LAW DICTIONARY 559 (8th ed.2004)).

In general, a party may not raise an error for the first time on appeal. RAP 2.5(a). The policy underlying this rule is to encourage the parties to point out, at trial, errors that the trial court may correct. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (citing State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). An exception exists for manifest errors that affect a constitutional right. RAP 2.5(a)(3). To meet this exception, the appellant must show that the claim "implicates a constitutional interest as compared to another form of trial error." O'Hara, 167 Wn.2d at 98. Courts have found error affecting a constitutional right where the "to convict" instruction shifts the burden of proof to the defendant or omits an element of the crime charged. Id. at 100-01 (citations omitted). To raise such a claim for the first time on appeal, the appellant must also demonstrate that the error resulted in actual prejudice. Id. at 99 (citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

In this case, St. Clare was charged with first degree cruelty to animals under RCW 16.52.205(2). As relevant here, a person is guilty of that crime when "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; ..." RCW 16.52.205(2).

At trial, the State proposed jury instructions, including a "to convict" instruction and an instruction defining criminal negligence. The trial court adopted these with minor changes. St. Clare did not object to the instructions.

The court instructed the jury that:

To convict the defendant of the crime of animal cruelty in the first degree, as charged in [counts one through ten], 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 the specific period of time], the defendant starved [a particular cat];
  - b. That [during the specific period of time], the defendant dehydrated [a particular cat];
- (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.

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Clerk's Papers (CP) at 77-78.

St. Clare contends that the "to convict" instruction misstated and lowered the State's burden of proof. She also appears to assert that the "to convict" instruction omitted an element of the crime charged. These arguments are without merit.

The "to convict" instruction states three times that the jury may only convict if it finds that the State proved each element beyond a reasonable doubt. The instruction does not misstate or lower the State's burden of proof. The instruction sets out four numbered elements stating the specific act that must be proven, the state of mind, the result of the act on the animals, and the location. The instruction does not omit any element of the crime.

However, St. Clare asserts that an inquiry from the jury demonstrates that the instruction was confusing and failed to adequately convey the law. During deliberations, the jury submitted an inquiry concerning the "to convict" instruction. The jury referred to parts (1)(a) and (1)(b), where it states that the defendant starved or dehydrated an animal, and asked: "Does the way these are worded imply intent by the defendant?" CP at 67. After discussion with the parties, the court responded that the referenced instructions "define the elements of each crime which must be proven." CP at 67.

St. Clare contends that the phrasing of the "to convict" instruction failed to make clear the required mental state that applied to the act of starving or dehydrating an animal. She argues that the jury may have found that she was criminally negligent by some other act, and the State thus did not have to prove

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that she acted negligently by starving or dehydrating the animals. We reject this argument.

The instruction informed the jury that, to convict St. Clare, it had to find that she starved or dehydrated the cats and that she acted with criminal negligence. Although the inquiry gives evidence that the jury may have been unsure of the mental state that attached to starving or dehydrating the cats, any confusion heightened, rather than lowered, the State's burden of proof. If the jury mistakenly believed that the first element implied intent, it found that St. Clare starved or dehydrated the animals intentionally, rather than with criminal negligence. St. Clare's argument that the jury may have found that she was criminally negligent by some other act is speculative and unsupported by any citation to the record. Moreover, even if the jury had made such a finding, it would have been irrelevant, because it was in addition to finding that St. Clare had starved or dehydrated the cats.

We reject St. Clare's challenge to the "to convict" instruction. The instruction includes each statutory element and correctly states the burden of proof. If the phrasing was confusing, that confusion could have been corrected through objection at trial. And because any possible misunderstanding of the instruction only heightened the State's burden of proof, St. Clare fails to show prejudice from the alleged error.

St. Clare next argues that the trial court erred when it failed to instruct the jury on unanimity. Relying on State v. Peterson, 174 Wn. App. 828, 851, 301 P.3d 1060 (2013), St. Clare argues that first degree animal cruelty is an

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alternative means crime that may be committed either by starving, dehydrating or suffocating an animal.<sup>1</sup> St. Clare correctly points out that where a crime may be committed by alternative means and the evidence is not sufficient as to each of those means, a defendant has a right to “jury unanimity on the means by which the defendant is found to have committed the crime.” State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2s 231 (1994) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)). She also concedes, as she must, that if the evidence is sufficient to support each of the alternative means submitted to the jury, no particularized expression of unanimity is required because “we infer that the jury rested its decision on a unanimous finding as to the means.” Id. at 708 (citing State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987)).

St. Clare was convicted of ten counts of cruelty to animals in the first degree. She asserts that, in seven of the ten charges, the evidence was insufficient as to one of the alternative means. She therefore contends that she was entitled to an expression of jury unanimity as to the means by which she committed the crime and the trial court’s failure to instruct the jury on unanimity was reversible error. But because we disagree that the evidence is insufficient as to each of the means by which St. Clare is alleged to have committed the crimes, we reject her argument.

Evidence is sufficient to support a criminal conviction if, viewing the evidence in the light most favorable to the State, a rational fact finder could have

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<sup>1</sup> The State asks us to reconsider our holding in Peterson that RCW 16.52.205(2) creates alternative means of committing first degree animal cruelty. But in light of our disposition of this case, we need not address that issue.

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found the essential elements of the offense beyond a reasonable doubt. Green, 94 Wn.2d at 221. To convict St. Clare, the jury had to find beyond a reasonable doubt that, acting with criminal negligence, she starved or dehydrated a particular cat and thereby caused the cat to suffer “[s]ubstantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering.” RCW 16.52.205(2). Whether an animal has suffered unjustifiably due to dehydration or starvation is a matter of “ordinary experience which the jury could determine without the aid of expert testimony. . . .” Peterson, 174 Wn. App. at 855.

St. Clare contends that there was insufficient evidence to support the alternative means of dehydration as to two of the charged cats, identified as cats 6 and 9. She asserts that the State failed to produce evidence that these specific cats were in a dehydrated state. We disagree because, from the evidence in the record, a reasonable juror could have concluded that the cats suffered unjustifiably from a lack of water.

The veterinarian, Thompson, testified that cats 6 and 9 were emaciated. She did not testify as to the level of hydration of these two cats. But, speaking of the cats as a group, Thompson stated that many of the cats were noticeably dehydrated. She testified that, to account for the number of dehydrated cats in the group, the cats either had no access to water for a significant period of time or they only received water intermittently. Thompson stated that the heat and the high level of ammonia in the trailer would both have exacerbated the cats’ need for water.

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Beilfus and Rench also testified to the cats' lack of water. Beilfus stated that the cats were confined to the trailer on a hot day, there was no water visible, and the cats were panting. Rench testified that, during a June visit, the trailer was parked in the sun, the cats were confined to the trailer with no water, and the cats were listless. Rench stated that when she searched the trailer in July, the trailer was extremely hot, the cats had no water, and the cats were lethargic and panting. The jury viewed the video of the July search.

Viewing this evidence in the light most favorable to the State, a rational trier of fact could have found that St. Clare acted with criminal negligence in dehydrating the cats, resulting in substantial and unjustifiable pain that caused considerable suffering.

St. Clare also argues that there was insufficient evidence to support starvation as to cats 13, 17, 26, 55, and 81. She asserts that Thompson's testimony establishes that these cats were only slightly underweight, not starving.

Thompson described the cats' body condition using a score from one to nine, with five representing a healthy weight. A body condition score of one indicates severe emaciation, while a score of nine indicates obesity. Thompson also evaluated the cats using a muscle condition score of one to three, with three representing average muscle condition. She stated that an animal that receives inadequate food breaks down muscle proteins to stay alive, suggesting a correlation between poor muscle condition and inadequate nutrition.

Thompson testified that cats 13, 17, 26, 55, and 81 each had a body condition score of 4 and a muscle condition score of 2, indicating that they were



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mildly underweight and had poor muscle mass. Considering the number of underweight cats in the entire group, Thompson stated that adequate food had not been provided. Beilfus described the cats as "starving" and stated that, when she visited the trailer, the cats had no food. Rench testified that, on her June and July visits, no food was visible and the cats appeared emaciated. Rench and other animal control officers stated that, when they searched the trailer in July, the cats had no food. The jury viewed photos of the individual cats charged.

From this evidence, a reasonable juror could have found that cats 13, 17, 26, 55, and 81 experienced considerable suffering due to lack of food. We conclude that, regardless of whether RCW 16.52.205(2) establishes starvation and dehydration as alternative means, the evidence was sufficient to support St. Clare's conviction.

St. Clare next asks that we decline to award costs of appeal to the State. Appellate costs are awarded to the prevailing party unless this court directs otherwise or "unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs." RAP 14.2. Where an offender has been found indigent by the trial court, that finding of indigency remains in effect, ... "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2.

St. Clare was found indigent by the trial court. If the State has evidence indicating that her financial circumstances have significantly improved since the

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trial court's finding, it may file a motion for costs with the commissioner. We decline to rule on the issue of costs.

St. Clare raises further arguments in a statement of additional grounds. She contends that animal control officers were at least partly responsible for the cats' dehydration because they did not provide the animals water and kept the animals confined in the hot trailer until they were examined by the veterinarian. St. Clare thus appears to challenge the sufficiency of the evidence supporting the conclusion that she dehydrated the cats. Because this argument was raised by counsel, we decline to consider it again.

Finally, St. Clare asserts that the veterinarian did not euthanize the cats because they were starving or dehydrated but because the shelter lacked adequate resources to care for the cats. We decline to reach this argument because it is immaterial to St. Clare's conviction.

Affirmed.

WE CONCUR:

Trickey, AJ

Speeman, J.

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*State v. St. Clare, No. 74802-5-1*

Dwyer, J. (concurring) — I agree that the judgment should be affirmed. I also agree that the crime of animal cruelty in the first degree is an alternative means crime. However, because this court, in State v. Peterson, 174 Wn. App. 828, 301 P.3d 1060 (2013), misidentified the means by which the crime can be committed, and because the majority opinion perpetuates the error, I find it necessary to decline to join the majority opinion.

In its entirety, former RCW 16.52.205 (2006)<sup>1</sup> reads:

*(1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering, or forces a minor to inflict unnecessary pain, injury, or death on an animal.*

*(2) 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.*

*(3) A person is guilty of animal cruelty in the first degree when he or she:*

*(a) Knowingly engages in any sexual conduct or sexual contact with an animal;*

*(b) Knowingly causes, aids, or abets another person to engage in any sexual conduct or sexual contact with an animal;*

*(c) Knowingly permits any sexual conduct or sexual contact with an animal to be conducted on any premises under his or her charge or control;*

*(d) Knowingly engages in, organizes, promotes, conducts, advertises, aids, abets, participates in as an observer, or performs any service in the furtherance of an act involving any sexual*

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<sup>1</sup> The quoted section is the wording of RCW 16.52.205 that was in effect at the time of the offense. The section was amended in 2015. That amendment made no change of consequence to the quoted language.

conduct or sexual contact with an animal for a commercial or recreational purpose; or

(e) Knowingly photographs or films, for purposes of sexual gratification, a person engaged in a sexual act or sexual contact with an animal.

(4) Animal cruelty in the first degree is a class C felony.

(5) In addition to the penalty imposed in subsection (4) of this section, the court may order that the convicted person do any of the following:

(a) Not harbor or own animals or reside in any household where animals are present;

(b) Participate in appropriate counseling at the defendant's expense;

(c) Reimburse the animal shelter or humane society for any reasonable costs incurred for the care and maintenance of any animals taken to the animal shelter or humane society as a result of conduct proscribed in subsection (3) of this section.

(6) Nothing in this section may be considered to prohibit accepted animal husbandry practices or accepted veterinary medical practices by a licensed veterinarian or certified veterinary technician.

(7) If the court has reasonable grounds to believe that a violation of this section has occurred, the court may order the seizure of all animals involved in the alleged violation as a condition of bond of a person charged with a violation.

(8) For purposes of this section:

(a) "Animal" means every creature, either alive or dead, other than a human being.

(b) "Sexual conduct" means any touching or fondling by a person, either directly or through clothing, of the sex organs or anus of an animal or any transfer or transmission of semen by the person upon any part of the animal, for the purpose of sexual gratification or arousal of the person.

(c) "Sexual contact" means any contact, however slight, between the mouth, sex organ, or anus of a person and the sex organ or anus of an animal, or any intrusion, however slight, of any part of the body of the person into the sex organ or anus of an animal, or any intrusion of the sex organ or anus of the person into the mouth of the animal, for the purpose of sexual gratification or arousal of the person.

(d) "Photographs" or "films" means the making of a photograph, motion picture film, videotape, digital image, or any other recording, sale, or transmission of the image.

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(Emphasis added.)

This section sets forth a complete statement of the crime of animal cruelty in the first degree. It also unquestionably provides that the offense is one that may be committed by alternative means. But what are those means?

Case law is helpful to making this determination.

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.

State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

This analysis has a logical limitation.

[A] defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of her conviction. Likewise, where a disputed instruction involves alternatives that may be characterized as a "means within [a] means," the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply. In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988) (refusing to accept defendant's claim that the jury should be additionally instructed on the subalternatives of the statutory alternatives at issue).

Smith, 159 Wn.2d at 783. To be clear, "a 'means within a means' scenario does not trigger jury unanimity protections." Smith, 159 Wn.2d at 787.

The alternative means of committing the crime of animal cruelty in the first degree are three in number. They are set out in subsections 1, 2, and 3 of former RCW 16.52.205. Each of these subsections begins with the words, "A person is guilty of animal cruelty in the first degree when . . . ." In each subsection, thereafter follows the words describing the means set forth therein.

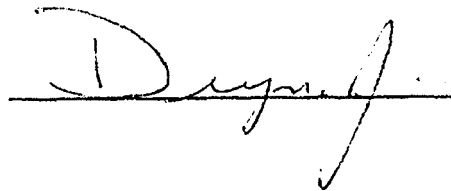
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The error made in Peterson is that the court confused certain subalternatives ("means within a means") for actual alternative means. The words set forth in subsection 2 ("starves, dehydrates, or suffocates") are "means within a means." The jury unanimity guarantee does not attach to these subalternatives.

Subsection 1, viewed broadly, criminalizes torturing animals. Subsection 2, viewed broadly, criminalizes withholding life's necessities (air, food, water) from animals. Subsection 3 criminalizes sexual perversion with animals. These are the alternative means.

This court, in Peterson, got it wrong. The majority opinion perpetuates the error.

But a unanimous jury convicted the defendant based on the single means alleged—a violation of former RCW 16.52.205(2). Therefore, I concur in affirming the judgment.

A handwritten signature in black ink, appearing to read "D. J. Dwyer", written over a horizontal line.

**NIELSEN, BROMAN & KOCH, PLLC**  
**April 26, 2017 - 4:36 PM**  
**Transmittal Letter**

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Case Name: Kathryn St. Clare

Court of Appeals Case Number: 74802-5

FILED  
Apr 26, 2017  
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Division I  
State of Washington

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