NO. 308839-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CHERINA EVERMAN-JONES,

Appellant.

BRIEF OF APPELLANT CHERINA EVERMAN-JONES

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4. Cherina Everman-Jones claims that the Superior Court of Spokane County, State of Washington, erred in cause no. 11-1-

A. ASSIGNMENTS OF ERROR

1. The Superior Court of Spokane County, State of Washington, erred in cause no. 11-1-02618-4 by accepting the prosecution's proposed findings of fact over Cherina Everman-Jones objections and by entering these findings of fact that were either incomplete, misleading, and/or not supported by the record and/or authorized by law at the February 2, 2012 suppression hearing and refusing to enter Cherina Everman-Jones proposed findings of fact.. [April 20, 2012 Presentment RP 17-24; CP 286-288, 303-307, 314-316, 303-307].

2. The Superior Court of Spokane County, State of Washington, erred in cause no. 11-1-02618-4 in denying Cherina Everman-Jones motion to suppress and return the seized dog [CP 12-114] after the animal control officer without authority of law entered a constitutionally protected area (Cherina Everman-Jones backyard) and gathered evidence and also seized Cherina Everman-Jones dog without a warrant as required by law. [February 2, 2012 Motion RP 3-15; Testimony RP 2-43; CP 314-316]

3. The Superior Court of Spokane County, State of Washington, further erred on March 26, 2012 by denying Cherina Everman-Jones motion to dismiss count II [March 26, 2012 Trial RP 156-163] and entering an order allowing Count II to proceed to the jury. [CP 321-322].

4. The Superior Court of Spokane County, State of Washington, erred in cause no. 11-1-02618-4 by denying Cherina Everman-Jones motion to arrest judgment and dismiss [CP 280-285] and after the court dismissed Count 1 [CP 321-322} and the jury returned a not guilty verdict of Count II [CP 271], the court also erred by accepting the verdict of the jury that Cherina Everman-Jones was guilty of Second Degree Animal Cruelty which was never charged by Information or Amended Information and over objection by Cherina Everman-Jones. [March 26, 2012 Trial RP 262; April 25, 2012 Motions RP 316-319].

5. The Superior Court of Spokane County, State of Washington, further erred on April 26, 2012 in entering, in cause no. 11-1-02618-4, the gross misdemeanor judgment and sentence, against Cherina Everman-Jones, based upon the erroneous acceptance by the court of the foregoing verdict [April 25, 2012 Sentencing RP 320-339; CP 327-331].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Cherina Everman-Jones assignment of errors to finding of fact 2, 3, 5-10, 12-14 and related conclusions of law 1, 2 and 3 are misleading, incomplete and not supported by sufficient evidence from the record. [April 20, 2012 Presentment RP 17-24; CP 314-316, 286-288, 303-313] [ASSIGNMENT OF ERROR NO. 1].

2. Whether Cherina Everman-Jones constitutional rights under the Fourth Amendment to the United States Constitution, and Article I, sections 7 of the Washington State Constitution and statutory rights under RCW 16.52.085 were violated, when the Superior Court denied her motion to suppress, return her dog and dismiss.. [ASSIGNMENT OF ERROR NO. 2].

3. Whether Cherina Everman-Jones right to due process and a fair trial were violated when the Superior Court of Spokane County, State of Washington, on March 26, 2012 denied Cherina Everman-Jones motion to dismiss count II [March 26, 2012 Trial RP 156-163] and entering an order allowing Count II to proceed to the jury. [CP 321-322] and allowed the jury's conviction of Animal Cruelty in the Second Degree to be entered when there was not sufficient evidence to convict. [ASSIGNMENT OF ERROR NO. 3].

4. Whether Cherina Everman-Jones constitutional rights under Article I, section 22, of the Washington State Constitution were violated when the Superior Court of Spokane County, State of Washington, in cause no. 11-1-02618-4 denied Cherina Everman-Jones motion to arrest judgment and dismiss [CP 280-285] and after the court dismissed Count 1 [CP 321-322} and the jury returned a not guilty verdict of Count II [CP 271], the court also erred by accepting the verdict of the jury that Cherina Everman-Jones was guilty of Second Degree Animal Cruelty which was never charged by Information or Amended Information and over objection by Cherina Everman-Jones. [March 26, 2012 Trial RP 262; April 25, 2012 Motions RP 316-319]. [ASSIGNMENT OF ERROR NO. 4].

5. Whether Cherina Everman-Jones constitutional rights were violated when the Superior Court of Spokane County, State of Washington, on April 26, 2012 entered, in cause no. 11-1-02618-4, the gross misdemeanor judgment and sentence, against Cherina Everman-Jones, based upon the erroneous acceptance by the court of the foregoing verdict [April 25, 2012 Sentencing RP 320-339; CP 327-331]. [ASSIGNMENT OF ERROR NO.5].

C. STATEMENT OF THE CASE

1. Factual Background. On or about August 10, 2011, about 1245pm, Animal Control Officer Montano received a telephone complaint that there was a dog tied up with its bones sticking out and it was very thin. Animal Officer Montano responded at 1331 hours to a double wide trailer located at 5910 West Spring Road in Marshall, Washington which she found out belonged to Cherina Everman-Jones, a single mother of two children[February 2, 2012 Testimony of Montano; RP 4-5; March 26, 2012 Trial, RP 211-212; CP 98]. Animal Officer Montano pulled into the driveway and got out of her dog catcher truck and while standing next to her truck she could see a large black and white dog tied in the backyard. From this distance, the dog appeared very thin and she reportedly could see the ribs, lumbar vertebrae and pelvic bone from a distance. Montano then walked to the front door and knocked but nobody answered. [CP 97, 109, exhibit 1-2 at hearing]. Montano further saw that the dog was not dying and was in fact responsive to throwing stuff, standing without problems, wagging its tail and not having any trouble moving. [February 2, 2012 Testimony of Montano, RP 27-28, 35-36, CP 109]. "From this vantage point, I

could see that there was a thin dog." Therefore, from this legal "open view" location in the driveway, the officer could only ascertain that the dog was thin. [February 2, 2012 Testimony of Montano, RP 13, 32]. Officer Montano could not see into the entire backyard without stepping off the driveway and walking into the backyard. [February 2, 2012 Testimony of Montano, RP 29]. Although Montano could see from the driveway that there was shade from the house for the dog, she claimed she had immediate concern for the dog being tied in the backyard with direct sunlight in areas so she had to get a "closer look" than what was seen in plain view. [February 2, 2012 Testimony of Montano, RP 30-32, CP 25-27]. Without a warrant or consent from the owner, the animal officer stepped into the backyard to get a better assessment of it. [February 2, 2012 Testimony of Montano, RP 8]. While Montano was in the backyard, she took several pictures and went to the back porch patio where she also noticed several dog bowls and one with several inches of clean water. Montano agreed that the empty bowl could have been used for feeding and the dog could have been fed that morning but she never looked under the bowl to see if there was any evidence of feeding that morning. [February 2,

2012 Testimony of Montano, RP 30]. The animal control officer also put her hands on the dog and claimed she was able to feel bones and skin. After searching the backyard, she was able to ascertain that the condition of the dog was worse than when she was standing closer to her truck. [February 2, 2012 Testimony of Montano, RP 8-9, 13-16, 29-32, CP 32-34, 37-38, 97-98, 110-114]. Additionally, the Officer stated that the dog was not whimpering or wincing in pain at any time. [CP 88]. At this point, she decided to remove the dog. According to Officer Montano's August 10, 2011 report, she wrote that "Given the immediate poor condition of the dog I determined for her safety to remove her and take her to a veterinary clinic. I loaded the dog into my truck..." [February 2, 2012 Montano Testimony, RP 8-9, CP 80-82, 97]. However, five days later on August 15, 2011, after going to the prosecutor's office, Montano, for the first time mentions in an additional report filed the same day the words "life threatening condition" and changed her reason for the first time to "It should be noted that at the time of removal the dog was severely emaciated and in, life-threatening condition. I had immediate concern for the dog given her poor body condition and the fact that the dog was tied in the

backyard in direct sun without proper shelter". [CP 114]. The dog was able to walk and even jump up on the truck with its paws up. [February 2, 2012 Testimony of Montano, RP 15, 27]. When asked under oath at the suppression hearing if Montano thought the dog was near death when she seized her, she could only say that she didn't know for sure what was causing the dog's physical condition. In response to the next question of could you have taken thirty minutes and gotten a telephonic warrant, she admitted that "We have not done telephonic search warrants in our department." [February 2, 2012 Testimony of Montano, RP 41]. This dog named Harley is naturally built thin where its back part of the body is smaller than its head. [February 2, 2012 Testimony of Montano, RP 39, CP 37-51]. Officer Montano had dog food in her truck during and after seizing Ms. Everman-Jones dog but never fed the dog while at the residence. [February 2, 2012 Testimony of Montano, RP 39-40]. In fact, it was an additional 40 minutes after leaving the residence before the animal was fed. [CP 86]. Next, Officer Montano took the dog to the Vet office where Harley was examined by Dr. Fosberg. There were no emergency medical steps taken by the vet and he indicated that all the dog needed was

food. [CP 69, 86]. Dr. Fosberg agreed that the condition of the dog at the time he saw her on August 10, 2011 was not in any way an immediate life threatening condition. He explained that Harley's condition "did not appear to be a life threatening situation to me, it just needed more groceries and um needed treatment for the ear infection, which was again non-life threatening". [CP 70, 74]. Dr. Fosberg documented the examination of Harley in his written summary and wrote that the complaint was a "thin" dog and besides an abnormal body appearance and an ear infection, everything from Harley's heart to digestive track was "normal". [CP 104]. However, Officer Montano continued to seize the dog and take Harley to the pound and caged her. [CP 103].

2. Procedural History. On August 19, 2011, Cherina Everman-Jones was charged by Information under no. 11-1-02618-4 with Animal Cruelty in the First Degree under intentionally inflict substantial pain on an animal. [CP 1]. Thereafter, on February 2, 2012 Cherina Everman-Jones was charged by amended Information with a second count of Animal Cruelty in the First Degree under criminal negligence, starve an animal which as a result caused substantial and unjustified physical pain that

extended for a period sufficient to cause considerable suffering. [CP 160].

On February 2, 2012, the Honorable Spokane County Superior Court Judge Salvatore Cozza presided over the suppression hearing based on the motion and attached exhibits filed by Ms. Everman-Jones to Suppress Evidence and Dismiss and Return her Dog. At this hearing, the parties and court agreed and allowed defense to admit evidence and exhibits that were filed and attached to the defense motion in lieu of further testimony. [February 2, 2012 Motion Hearing, RP 5-6; CP 12-114]. Animal Control Officer Montano testified at this hearing [February 2, 2012 Testimony of Montano, RP 2-43] and afterwards, the court denied the defendant's motion. Honorable Judge Cozza stated that this motion involves the "concept of expectation of privacy and the medieval definition of "curtilage"" and basically the animal control officer did not break or enter when she walked from the front yard and travel around the house and into Ms. Everman-Jones backyard to get a "better assessment" under "plain view". As to the "immediate life threatening condition" issue required by RCW 16.52.085(1), the court ruled that this allows officer discretion. And the taking of the dog without a warrant was appropriate. [February 2, 2012 Judge's Oral Ruling, RP 2-5].

On April 20, 2012, a presentment hearing was conducted regarding the court's ruling at the suppression hearing. The court refused to sign the Defense proposed Findings of Fact and Conclusion [CP 303-313] and denied the defense objections to the state's proposed findings and agreed to and signed the prosecutor's proposed Findings of Fact and Conclusion of Law [CP 286-288, 314-316] over the defense objections that the State's Proposed Findings were incomplete, out of context, misleading and not supported by the evidence. [April 20, 2012 Presentment, RP 17-24].

A jury trial was held March 21, 22, 26, and 27, 2012 [March 21, 22, 26 and 27, 2012 Trial RP 1-340]. At the conclusion of the State's case, the court granted the defense motion to dismiss Count I on the basis that that there was not ample evidence presented that Ms. Everman-Jones acted intentionally. However, the court denied the defense motion to also dismiss Count II on the same basis. [March 26, 2012 Trial RP 156-163, CP 321-322].

By the time of jury deliberations on March 27, 2012 the only charge leveled against Ms. Everman-Jones was count II – Animal Cruelty in the First Degree under criminal negligence, starve an animal which as a result caused substantial and unjustified physical

pain that extended for a period sufficient to cause considerable suffering. [March 26, 2012 Trial RP 156-163, CP 321-322]. [CP 160]. Nevertheless, the instructions to the jury included the uncharged crime of Animal Cruelty in the Second Degree [CP 262, 266], despite the fact Ms. Everman-Jones had not been charged with such crime under the February 2, 2012 amended information [CP 160]. Ms. Everman-Jones' counsel had earlier taken exception and made objection to these particular instructions at issue. [March 26, 2012 Trial RP 262-263, March 27, 2012 Trial RP 279-280].

After retiring for deliberations, the jury returned a verdict of not guilty to Count II Animal Cruelty in the First Degree [CP 271], and guilty to the lesser offense of Animal Cruelty in the Second Degree [CP 272].

On April 25, 2012, the court presided over Cherina Everman Jones Motion for Arrest of Judgment and Relief from Judgment. [April 25, 2012 Defense Motion RP 316-321; CP 280-285]. The court denied Ms. Everman-Jiones motion to arrest judgment and relief from judgment. [CP 326]. The court agreed that the case of *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) which allowed

the joint decision of defense counsel and defendant to forego a lesser included as an all or nothing strategy was an issue and was properly brought up at the time. However, the judge stated that he did not believe that the Supreme Court case that the defense submitted mandated dismissal, although he did believe that it can be argued in the manner the defense used and argued. After this denial, the court sentenced Cherina Everman-Jones to 364 days in jail with 354 days suspended with 10 days confinement, 24 months' probation, $1,500 mandatory fine, several thousand dollars in restitution to be determined later and forfeiture of her dog, Harley [April 20, 2012 Sentencing RP 319-339; CP 327-332]. Ms. Everman-Jones lost her job due to this conviction and has been found indigent. This appeal follows.

D. STANDARD OF REVIEW

Errors of law, including errors of a constitutional magnitude, are reviewed de novo. See generally, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001); see also, State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993); State v. Dunn, 125 Wn.App. 582, 690, 105 P.3d 1022 (2005); State v. Medina, 112 Wn.App. 40, 48, 48 P.3d 1005 (2002). Thus, errors in jury instructions in the

context of uncharged crimes are of constitutional magnitude and are reviewed de novo. See generally, State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 135 L.Ed.2d 1084, 116 S.Ct. 2568 (1996). Also, in a criminal case, an error of constitutional magnitude involving a significant constitutional right is presumed prejudicial, and requires reversal on appeal unless the prosecution establishes such error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

E. ARGUMENT

1. Cherina Everman-Jones assigns and claims error to finding of fact 2, 3, 5-10, 12-14 and related conclusions of law 1, 2 and 3 and also argues that the court's findings of fact are misleading, incomplete and not supported by sufficient evidence from the record. [April 20, 2012 Presentment RP 17-24; CP 314-316, 286-288, 303-313] [Issue No. 1].

On April 20, 2012, a presentment hearing was conducted regarding the court's ruling at the suppression hearing. The court refused to sign the Defense proposed Findings of Fact and Conclusion [CP 303-313] and denied the defense objections to the state's proposed findings and agreed to and signed the

prosecutor's proposed Findings of Fact and Conclusion of Law [CP 286-288, 314-316] over the defense objections that the State's Proposed Findings were incomplete, out of context, misleading, irrelevant, prejudicial since some of findings had nothing to do with the issues or Ms. Everman-Jones and several findings were not supported by the evidence. [April 20, 2012 Presentment, RP 17-24]. Therefore, Ms. Everman-Jones assigns error to the specific findings of fact and conclusions of law as listed below. [2, 3, 5-10, 12-14 and related conclusions of law 1, 2 and 3]. As a result, Ms. Everman-Jones asks this court to strike the court's findings of fact and conclusion of law and review the entire record including her exhibits and argument. Finally, Ms. Everman-Jones argues that the suppression hearing held on February 2, 2012 involved (3) three issues

Assignment of Error for Findings of Fact No. 2 involves the statement that Officer Montano saw from the driveway a severely emaciated dog and she could clearly see the dog's ribs and etc. However, the report and testimony indicated that the officer could only see a "thin dog" and that it only **appeared** that she could see the dog's ribs and etc. from that distance. "From this

vantage point, I could see that there was a thin dog." Therefore, from this legal "open view" location in the driveway, the officer could only ascertain that the dog was thin. [February 2, 2012 Testimony of Montano, RP 13, 32]. Officer Montano could not see into the entire backyard without stepping off the driveway and walking into the backyard. [February 2, 2012 Testimony of Montano, RP 29]. This error is important in that the officer clearly testified and noted that she had to leave the driveway and walk into the backyard to get a better look and feel the dog which is in an area where expectation of privacy exists resulting in trespass. The officer had to step off the normal travel by reasonable persons such as the mailman in order to get a better assessment as the officer states. [February 2, 2012 Testimony of Montano RP 8-9, 13-16, 29; CP 25, 32-34, 37-38, 97, 110-113]. However, the law requires a warrant in order for an animal control officer to trespass. [RCW 16.52.085(1) (2)] [CP 100]. Additionally, the law clearly states that "This section does not condone illegal entry onto private property'. Therefore, the findings are important on this issue to document that the officer had to trespass and step into the backyard where it was then that she saw a severely emancipated

dog and gathered evidence. The court even appeared confused by the findings as written since the officer at one time was in the driveway which would be open view but travelled in Ms. Everman-Jones backyard which is a different legal analysis. The court ruled that every action by the officer was in "plain view" which Ms. Everman-Jones argues is not the case. If these findings approved by the court stand unchanged and are considered verities of the case, then it appears that the officer was still on the driveway which she was not. This finding needs to be changed according to the true record.

Assignment of Error for Findings of Fact No. 3 states that the dog was chained in the backyard where everyone from the street could clearly see and that there was no obstruction of view into the backyard. However, the record shows that the officer could not clearly see in the entire backyard because the house was blocking a person's view and the officer had to walk in the backyard to view and touch the dog. [February 2, 2012 Testimony of Montano RP 29]. Additionally, the dog's chain was long enough to cover almost the entire backyard including the back porch with

feeding and water bowls and shade and shelter from the sun. [February 2, 2012 Testimony of Montano RP 29-30].

Assignment of Error for Findings of Fact No. 5 only mentions the facts that the prosecutor wants submitted to the appeals court and fails to state the fact that the officer had to travel off the driveway and into Ms. Everman-Jones backyard without a warrant and travelled all around the backyard and onto Ms. Everman-Jones back porch to examine bowls, take pictures and gather evidence. Also, these findings purposely leave out the facts that the dog was standing, walking, wagging its tail, attentive to commands and not dying in the yard. Montano saw that the dog was not dying and was in fact was responsive to throwing stuff, standing without problems, wagging its tail and not having any trouble moving. [February 2, 2012 Testimony of Montano, RP 27-28, 35-36, CP 109]. It also fails to mention the fact that the officer could not take 30 minutes and get a telephonic warrant as required by law since her department does not do telephonic warrants. [February 2, 2012 Testimony of Montano, RP 41]. Also, the word suffering should be deleted since the dog did not whimper or wince in pain at any time. [CP 88]. Finally, all evidence gathered in

violation of the law should have been suppressed and not listed as findings. Specifically, any evidence the officer gathered after she stepped off the driveway and roamed the backyard and back porch should not be listed as findings other than what evidence was gathered by law enforcement and where and under what circumstances. Then and only then would such findings document that the officer was trespassing and entering an area of expectation of privacy.

Assignment of Error for Findings of Fact No. 6 in that the findings are incomplete and misleading since the dog was on a lengthy chain and allowed to travel almost the entire backyard including to the back porch where there was shelter from the sun and shade around the house that the chain could reach. Montano testified she went to the back porch patio where she also noticed several dog bowls and one with several inches of clean water. Montano agreed that the empty bowl could have been used for feeding and the dog could have been fed that morning but she never looked under the bowl to see if there was any evidence of feeding that morning. [February 2, 2012 Testimony of Montano, RP 29-30]. These findings of fact were left out and should have been

part of the findings of fact and not just the facts that support the prosecutor's case.

Assignment of Error for Findings of Fact No. 7-9 in that these findings are irrelevant, misleading and prejudicial since the officer clearly testified that she had already made the decision to seize the dog and had actually already placed the dog in her dog catcher truck when she talked to the neighbor and father of Ms. Everman-Jones. Therefore, this has no relevance on the officer's actions at issue. This conversation was heated and it appears that the prosecutor just wants the cursing and conflict to be part of the findings for prejudicial purposes only. This meeting and discussion had nothing to do with Ms. Everman-Jones or the he officer stepping off the driveway and trespassing in the backyard and seizing the dog without a warrant as required by law. Officer Montano testified at the suppression hearing that "I decided to remove the dog. I had loaded the dog into my truck. I then wanted to try to make contact with a neighbor to see if anyone knew who the owner of the dog was or when they would be home." This is when she met the neighbor and father of Ms. Everman-Jones who as she described "seemed agitated to be talking to me. There was

hostility..." [February 2, 2012 Testimony of Montano RP 9-11; CP 98]. Therefore, Officer Montano had already seized the dog without a warrant and the only relevance would be that Ms. Everman-Jones was the owner of the dog. The remaining findings regarding this conversation are irrelevant and should be stricken.

Assignment of Error for Findings of Fact No.10 in that the officer never stated at the time of taking Ms. Everman-Jones' dog that the dog was in immediate life threatening condition. According to Officer Montano's August 10, 2011 report, she wrote that "Given the immediate poor condition of the dog I determined for her safety to remove her and take her to a veterinary clinic. I loaded the dog into my truck..." [February 2, 2012 Montano Testimony, RP 8-9, CP 80-82, 97]. However, five days later on August 15, 2011, after going to the prosecutor's office, Montano, for the first time mentions in an additional report filed the same day the words "life threatening condition" and changed her reason for the first time to "It should be noted that at the time of removal the dog was severely emaciated and in, life-threatening condition. I had immediate concern for the dog given her poor body condition and the fact that the dog was tied in the backyard in direct sun without proper

shelter". [CP 114]. Finally, Ms. Everman-Jones assigns error to the No. 10 findings portion that says "there was no shelter" and left out the fact that the dog had shade and shelter from the sun as illustrated in the pictures the officer took at the time in issue showing the shade from the house and the back porch. [CP 109-112, 29-34].

Assignment of Error for Findings of Fact No.12-15 in that the vet stated that there were no immediate medical procedures needed when the officer brought in the dog. In fact, Dr. Fosberg stated that the dog was not in "immediate life threatening condition". Dr. Fosberg also found from his examination of Harley that besides the dog being just thin and needing groceries and having a minor ear infection, the dog was normal. These facts were unchallenged and part of the record at the suppression hearing; but left out of the court's findings. These findings of fact are very important since the statute allows a vet to examine the dog and verify immediate life threatening condition; however, the officer continued to take the dog to the pound even after Dr. Fosberg verified that Harley was not in an immediate life threatening condition. According to RCW 16.52.085 (2), the officer may

authorize an **examination** of a domestic animal allegedly neglected or abused in violation of this chapter **by a veterinarian to determine whether the level of neglect or abuse in violation of this chapter is sufficient to require removal of the animal.** This section does not condone illegal entry onto private property.(emphasis added). Therefore, the findings need to correctly document the vet's examination which does not support the officer's search and seizure without a warrant without "immediate life threatening condition" as required by law. [CP 69, 70, 74, 86, 103-104]. Officer Montano should not have taken the dog without a warrant in the first place and should not have trespassed without a warrant. Finally, the officer should have returned the dog after the vet made such findings and offered assistance or at least applied for a warrant when there is no "immediate life threatening condition". The findings should correct the mis-statements as stated above since the findings suggested are reflected from the clear unchallenged record that is a major issue in this case. The findings of fact in No. 15 is irrelevant and out of the scope of the suppression motion. The fact that the dog gained so much weight after the seizure and search without a

warrant is not timely and has nothing to do with the issue at the suppression hearing. Thus, it should be stricken.

Assignment of Error for Conclusions of Law No. 1-3 in that Ms. Everman-Jones claims that based on the above assigned errors in the court's findings of fact and the following constitutional and statutory violations in Assignment of Errors No. 2, the court's conclusion of law No. 1-3 is error.

Assignment of Error Legal Authorities and Argument

Ms. Everman-Jones has submitted detailed assignment of errors to specific findings of fact. Thus, Ms. Everman-Jones has challenged the findings as required by law and now asks the court to strike the trial court's findings and amend according to the record as stated above or conduct an independent review of the record while considering the above arguments. It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal. *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 24 L. Ed. 2d 440, 90 S. Ct. 461 (1969); *Tomlinson v. Clarke, 118 Wash. 2d 498, 501 (Wash. 1992)*, 825 P.2d 706 (1992). This court has held that this rule also applies to facts entered following a suppression motion. *State v. Christian*, 95

Wn.2d 655, 656, 628 P.2d 806 (1981). Therefore, defendant's failure to assign error to the facts entered by the trial court precludes appellant review of these facts and renders these facts binding on appeal. In the present case, Ms. Everman-Jones has submitted specific assignment of errors to the numbered findings signed by the court, thus, the trial court's findings of fact should not be considered verities of the case. Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Halstien*, at 129. There is a line of cases holding that although the trial court's findings following a suppression motion are of great significance to the reviewing court, the fundamental constitutional rights involved require the appellate court to undertake an independent evaluation of the evidence. *See, e.g., In re McNear*, 65 Wn.2d 530, 537, 398 P.2d 732 (1965) (first Washington case involving suppression of evidence seized during search which holds that the appellate court must make an independent evaluation of evidence); *State v.*

Mennegar, 114 Wn.2d 304, 309-10, 787 P.2d 1347 (1990); *State v. Daugherty*, 94 Wn.2d 263, 269, 616 P.2d 649 (1980), *cert. denied*, 450 U.S. 958, 67 L. Ed. 2d 382, 101 S. Ct. 1417 (1981); *State v. Mak*, 105 Wn.2d 692, 712-13, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986). In the present case, Ms. Everman-Jones has assigned specific errors to specific findings of fact and conclusions of law and has shown how the trial court's findings are not substantially supported by the record. She now asks that this court consider her proposed findings plus additional findings as stated above. Finally, Ms. Everman-Jones asks this court to undertake an independent evaluation of the evidence since this suppression issue involves fundamental constitutional and statutory rights.

2. Cherina Everman-Jones claims that the officer violated her constitutional and statutory rights when the officer entered her backyard and seized her dog without a warrant. [Issue No. 2].

Ms. Everman-Jones claims that Officer Montano conducted an illegal search without a warrant in violation of the State and Federal constitutions by entering the areas of the curtilage which were obviously not impliedly open to the public. Honorable Judge Cozza stated that this motion involves the "concept of expectation

of privacy and the medieval definition of "curtilage"" and basically the animal control officer did not break or enter when she walked from the front yard and travel around the house and into Ms. Everman-Jones backyard to get a "better assessment" under "plain view". As to the "immediate life threatening condition" issue required by RCW 16.52.085(1), the court ruled that this allows officer discretion. And the taking of the dog without a warrant was appropriate. [February 2, 2012 Judge's Oral Ruling, RP 2-5]. However, Ms. Everman-Jones argues that the well establish law protecting citizens from law enforcement entering areas of the curtilage not impliedly open to the public is not medieval and is a constitutional right as well as a statutory right. Plus, "immediate life threatening condition" and warrant requirements under RCW 16.52.085 is not discretionary to law enforcement.

The Fourth Amendment of the United **States** Constitution and article 1, section 7 of the **state** constitution protect citizens from unwarranted government intrusion onto their private property. **State v. Seagull, 95 Wash. 2d 898, 632 P.2d 44 (1981)**; **State** v. Johnson, 75 Wash. App. 692, 879 P.2d 984 (1994); **State** v. Ridgway, 57 Wash. App. 915, 790 P.2d 1263 (1990). The **State's** long tradition of protecting its citizens from unconstitutional searches places "important emphasis on a person's right to

exclude others from his or her private property." Johnson, 75 Wash. App. at 702.

The warrantless entry by government agents onto private property is unconstitutional if the agents unreasonably intrude into the citizen's "private affairs." Johnson, 75 Wash. App. at 703. Mere entry alone, however, is insufficient to constitute a violation. An agent's license to intrude is bounded by the same limits as those of a reasonably respectful person. **Seagull, 95 Wash. 2d at 902**; **State** v. Vonhof, 51 Wash. App. 33, 39, 751 P.2d 1221 (1988). The substantial and unreasonable departure from an impliedly open access area, such as a path or walkway, or the use of intrusive viewing methods, such as peering for long periods of time into windows, exceed the authorized limits. **Seagull, 95 Wash. 2d at 903**; Vonhof, 51 Wash. App. at 39. Warrantless searches and seizures are generally *per se* unreasonable under both the federal and state constitutions. U.S. CONST. amend. IV; WASH. CONST. art. I, § 7; *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Under the open view doctrine, "police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house." *State v. Seagull*, 95 Wn.2d

898, 902, 632 P.2d 44 (1981) (footnote omitted). Officers must, however, conduct themselves in the same manner as a "reasonably respectful citizen." *Id.* Courts will look to the particular facts of each case in deciding what is reasonable. *Id.* Furthermore, "an officer's observation of evidence from a lawful vantage point is not, standing alone, a search subject to constitutional restrictions." ***State v. Ferro, 64 Wn. App. 181, 182, 824 P.2d 500 (citing Seagull, 95 Wn.2d at 901), review denied, 119 Wn.2d 1005 (1992).***

The defense expects the state to argue that the taking of the owner's dog in the present case without a warrant was allowed under the caretaking functions exception allowed for law enforcement. However, the statute absolutely covers such exceptions and clearly states that only under "immediate life threatening condition" can law enforcement remove an owner's dog without a warrant. Additionally, the statute clearly states that a warrant is required in order for an animal control officer to enter private property. Therefore, whether under the caretaking function or conducting a criminal investigation, police must respect private property. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981).

According to **RCW 16.52.085**. Removal of animals for feeding -- Examination -- Notice – Euthanasia:
(1). If a law enforcement officer or animal control officer has probable cause to believe that an owner of a domestic animal has violated this chapter or a person owns, cares for, or resides with an animal in violation of an order issued under RCW 16.52.200 (4) and no responsible person can be found to assume the animal's care, **the officer may authorize, with a warrant, the removal of the animal to a suitable place for feeding and care**, or may place the animal under the custody of an animal care and control agency. In determining what is a suitable place, the officer shall consider the animal's needs, including its size and behavioral characteristics. An officer may remove an animal under this subsection without a warrant only if the animal is in an **immediate life-threatening condition**. (emphasis added).
(2) If a law enforcement officer or an animal control officer has probable cause to believe a violation of this chapter has occurred, the officer may authorize an examination of a domestic animal allegedly neglected or abused in violation of this chapter by a veterinarian to determine whether the level of neglect or abuse in violation of this chapter is sufficient to require removal of the animal. **This section does not condone illegal entry onto private property.**

In the present case, Officer Montano conducted a warrantless search of Ms. Everman's premises by stepping off the curtilage and seizing her dog in violation of state and federal constitutions and RCW 16.52.085. Therefore, all such evidence should be suppressed and the dog returned and this case dismissed. The dog was not in an "immediate life threatening condition" and could stand and jump up on the officer's truck. No emergency immediate treatment was needed and the vet even agreed that the dog was not in danger of immediate life threatening condition. In fact, the officer did not even feed the dog until sometime later when she in

fact had food in her truck. Additionally, Ms. Everman-Jones asks this court to consider the facts and record as stated in the above Assignment of Error No. 1. Clearly, the officer could have complied with the statute and obtained at least a telephonic warrant as required by law. Officer Montano choose not to obtain the warrant and not only conduct a warrantless search but also seize the dog in violation of RCW 16.52.085. As a result, this case should be dismissed and the dog returned.

EXAMPLES OF CASES WHERE CONDITIONS WERE WORSE THAN THE PRESENT CASE AND A WARRANT WAS REQUESTED

In State v. Zawistowski, 119 Wn. App. 730; 82 P.3d 698; 2004 , Officers obtained a warrant even in worse conditions than the present. In Zawistowski, the humane society had served a warrant on defendants' property and seized five horses. When seized, the horses appeared severely underweight, there was little vegetation on the ground inside their paddock or suitable food on the property, and they had little or no protection from the elements. Pierce County Humane Society had served a warrant on the Zawistowski property and seized five horses, including Princess Tarzana and Silver. Pierce County had received complaints about

the horses' condition from several neighbors and other individuals. When seized, the horses appeared severely underweight, there was little vegetation on the ground inside their paddock or suitable food on the property, and they had little or no protection from the elements.

The State's evidence indicated a poorly maintained paddock with little vegetation or shelter, and it described several ailments that the horses were suffering. Specifically, the State's veterinarian testified that Princess Tarzana and Silver suffered from poor dentition and that they were severely underweight. The State also introduced various photographs of the horses, which generally depicted skinny animals with protruding bones. The evidence also reflected a paucity of suitable equine food at the Zawistowski property. Officer Montano should have obtained a warrant in the present case since the conditions were not an immediate life threatening condition.

EXAMPLE OF OFFICER MONTANO GETTING A WARRANT IN SIMILAR CASES

In State v. Nelson and Renteria, 152 Wn.App. 755, 219 P.3d 100, (2009 Div III), the same officer involved in the present case,

Officer Montano, witnessed worse conditions than in the present case and applied for a warrant as required by statute. In that case, Officer Montano noticed conditions of dogs suffering from multiple puncture wounds and one dog's ear was ripped in half, dogs with no water and dogs chained to areas not near a shelter. According to the facts stated in Nelson and Renteria, in June 2006, an animal protection officer was dispatched to a house on East Utah Avenue in Spokane, Washington, following reports of a dogfight. By the time the officer arrived, the owner of the two pit bull dogs, Peter Nelson, had already arrived and stopped the fight. Both dogs suffered multiple puncture wounds, and one dog's ear was ripped in half. Police did not file charges. In April 2007, Spokane County animal protection officer Nicole Montano responded to a complaint that a man was beating a dog at the same East Utah Avenue address. Ms. Montano went to the edge of the property and saw eight pit bulls in the backyard. Two of the dogs did not have access to water, and several of the dogs were either on heavy chains or kenneled together or separately. Ms. Montano then searched Spokane County records and found that there was no licensed kennel at the East Utah Avenue address. But two dogs at the

address were licensed, one each to Alfredo Renteria and Peter Nelson. Mr. Renteria had licensed numerous pit bulls at the east Utah Street address since 2001. Police applied for and were granted a warrant to search the property. In each of these cases, Ms. Everman believes that the conditions were worse than in the present case; however, the officers still obtained a warrant pursuant to statute.

Finally, dictionary.com defines immediate as:

1. occurring or accomplished without delay; instant: *an immediate reply.*
2. following or preceding without a lapse of time: *the immediate future.*
3. having no object or space intervening; nearest or next: *in the immediate vicinity.*
4. of or pertaining to the present time or moment: *our immediate plans.*
5. without intervening medium or agent; direct: *an immediate cause.*
and life-threat·en·ing as: ***adjective*** endangering life: *a life-threatening illness.*

Therefore, by definition and common meaning an immediate life threatening condition requires a condition that is instant and/or without lapse of time endangering life. In the present case, there was no immediate life threatening condition preventing Officer Montano from obtaining a warrant as required by statute especially

a telephonic warrant. Officer Montano even had dog food in her truck and did not believe the dog needed immediate food until some time later showing additional reasons for the officer's true subjective belief that the dog was not in threat of instant death without delay.

TELEPHONIC SEARCH WARRANT PROCEDURES ARE FAST AND VERY EASY

Ms. Everman-Jones next argues that Officer Montano should have at least requested a telephonic warrant and without such warrant this case must be dismissed. The Washington state and the federal constitutions permit the issuance of a search warrant only upon the existence of probable cause. See, e.g., *State v. Myers, 117 Wn.2d 332, 337, 815 P.2d 761 (1991)*. Both provisions generally require that the facts establishing probable cause for a search "be presented while under oath, to a neutral magistrate, for impartial review and that the magistrate make the crucial probable cause determination." Id. The issuance of telephonic warrants is constitutionally permissible. See CrR 2.3(c). But CrR 2.3 requires some form of recording of the telephonic hearing as evidence in support of the finding of probable cause.

The contents of a telephonic hearing may be reconstructed under CrR 2.3, so long as the reconstruction does not impair the reviewing court's ability to determine what was considered by the magistrate in issuing the warrant. *Myers, 117 Wn.2d at 343.* In the present case, lOfficer Mantano did not even attempt to obtain a telephonic warrant as authorized and required by law. The excuse that her department does not use telephonic warrants should be no reason for violating the law. [February 2, 2012 Testimony of Montano, RP 41]. Therefore, this case must be dismissed as argued above.

3. Cherina Everman-Jones alleges that the court erred by denying defense motion to dismiss the remaining count II Animal Cruelty in the First Degree and that there was not sufficient evidence to convict her of an uncharged and lesser charge of Animal Cruelty in the Second Degree and the Superior Court of Spokane County, State of Washington, erred on March 26, 2012 by denying Cherina Everman-Jones motion to dismiss count II [March 26, 2012 Trial RP 156-163] and entering an order allowing Count II to proceed to the jury. [CP 321-322] [Issue no.3].

Ms. Cherina Everman Jones first alleges that the court erred by refusing to dismiss the remaining Count II Animal Cruelty in the First Degree when there was insufficient evidence to convict. A person is guilty of **animal cruelty** in the first degree when, except as authorized by law, he or she, with criminal negligence, starves,

an **animal** and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering. Ms. Everman-Jones believes that there was no testimony or evidence presented by the state that proved the exact wording of the elements of the charge. Even Officer Montano testified that the dog was not wincing or whimpering in pain and was not having any trouble standing, walking, jumping or being attentive. [February 2, 2012 Testimony of Montano, RP 27-28, 35-36, CP 109].

Next, Ms. Everman-Jones claims that there was insufficient evidence to convict her of the uncharged and lesser crime of Animal Cruelty in the Second Degree. In reviewing a challenge to the sufficiency of the evidence, the courts will consider the evidence and all reasonable inferences from it in the light most favorable to the State. *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010). Evidence is sufficient to support a conviction if any rational fact finder could have found that the defendant committed the crimes charged beyond a reasonable doubt. *McPhee*, 156 Wn. App. at 62. A defendant admits the truth of all the State's evidence by challenging its sufficiency. *McPhee*, 156 Wn. App. at 62. In analyzing the sufficiency of the evidence, circumstantial evidence is equally reliable as direct evidence. *State v. Thomas*, 150 Wn.2d

821, 874, 83 P.3d 970 (2004). A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal. RCW 16.52.207. In the present case, the state did not present sufficient evidence that Ms. Everman-Jones inflicted unnecessary suffering or pain upon her dog. As the record reflects, Ms. Everman-Jones purchased special food for her dog and fed him twice a day. [March 26, 2012 Trial RP 212-220] [CP 53-59]. The dog regularly played with her children and other dogs. [CP 39-43, 48-49]. Even Officer Montano testified that the dog was not wincing or whimpering in pain and was not having any trouble standing, walking, jumping or being attentive. [February 2, 2012 Testimony of Montano, RP 27-28, 35-36, CP 109]. Therefore, there was not sufficient evidence presented that Harley was inflicted with unnecessary suffering or pain and no one testified to those exact words.

4. Cherina Everman-Jones claims that the Superior Court of Spokane County, State of Washington, erred in cause no. 11-1-02618-4 by denying Cherina Everman-Jones motion to arrest judgment and dismiss [CP 280-285] and after the court dismissed Count 1 [CP 321-322} and the jury returned a not guilty verdict of Count II [CP 271], the court also erred by accepting the verdict of the jury that Cherina Everman-Jones was guilty of Second Degree Animal Cruelty which was never charged by Information or Amended Information and over

objection by Cherina Everman-Jones. [March 26, 2012 Trial RP 262; April 25, 2012 Motions RP 316-319] [Issue no.4].

Ms. Everman-Jones argues that this case must be dismissed since the jury found the defendant not guilty of the only charge that defendant was arraigned and it was a defense strategy to object to a lesser included as an all or nothing strategy based upon the evidence and the original charges. Under Article I, section 22, of the Washington State Constitution, an accused must be informed by the State of the criminal charges against him and he cannot be tried for an offense not charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); see also, State v. Markle, 118 Wn.2d 424, 432, 823 P.2d 1101 (1992); State v. Perez, 130 Wn.App. 505, 507, 123 P.3d 135 (2005), review denied, 157 Wn.2d 1018 (2006); State v. Allen, 116 Wn.App. 454, 463, 66 P.3d (2003); State v. Vanderpen, 71 Wn.App. 94, 103, 856 P.2d 1106 (1993). Hence, the court may not instruct the jury on an uncharged offense as the court erroneously did in this case. See, State v. Bray, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988). the State may have relied on several cases requiring such lesser included preventing ineffective assistance of counsel claims. See State v.

Grier, 150 Wn. App. 619,640.208 P.3d 1221 (2009). overruled. 171 Wn.2d 17,246 P.3d 1260 (2011); In re Personal Restraint of *Drace,*157 Wn.App. 81, 236 P.3d 914 (2010). review granted, 171 Wn.2d 1035 (2011); State v. Breitung. 155 Wn. App. 606, 230 P.3d 614 (2010), review granted, 171 Wn. 2d 1016 (2011); State v. Smith, 154 Wn. App. 272, 278-279, 223 P.3d 1262 (2009); State v. Pittman, 134 Wn. App. 376, 390,166 P.3d 720 (2006). and State v. Ward,125 Wn. App. 243, 250, 104 P.3d 670 (2004). However, our Supreme Court recently addressed the approach the appeals courts have taken in the cited cases and rejected this three-part test formulated to adjudge the legitimacy of trial counsel's decision to forgo a lesser included instruction. State v. Grier, 171 Wn.2d 17,32,246 P.3d 1260 (2011). The court held that this test undermined the fundamental presumption that counsel provided effective representation. Grier, 171 Wn.2d at 38-40. As the Grier Court observed, the decision to forego a lesser included instruction is a joint decision between defense counsel and the defendant. Thus, since the jury found the defendant not guilty of the only crime charged, it is a violation of the defendant's due process right to a

fair trial and double jeopardy to allow the jury to proceed to another charge over the defense objection.

Finally, the uncharged crime of Animal Cruelty in the Second Degree has a statutory defense of financial hardship which could not have been brought up at trial since the uncharged crime was only presented when the trial was complete and the jury was read the instructions. According to RCW 16,52.207(4) In any prosecution of animal cruelty in the second degree under subsection (1) or (2)(a) of this section, it shall be an affirmative defense, if established by the defendant by a preponderance of the evidence, that the defendant's failure was due to economic distress beyond the defendant's control. Therefore, Ms. Everman-Jones was prejudiced by this presentment of such uncharged crime at the end of the trial. Ms. Everman-Jones was a single mother of two children who was struggling financially similar to other single moms.[March 26, 2012 Trial RP 211-212].h However, the record is incomplete with this fact since it was not allowed to be an issue during trial and considered as an attempt for jury sympathy.

5. Cherina Everman-Jones alleges that her constitutional rights were violated when the Superior Court of Spokane County, State of Washington, on April 26, 2012 entered, in

cause no. 11-1-02618-4, the gross misdemeanor judgment and sentence, against Cherina Everman-Jones, based upon the erroneous acceptance by the court of the foregoing verdict [April 25, 2012 Sentencing RP 320-339; CP 327-331]. [ASSIGNMENT OF ERROR NO.5].

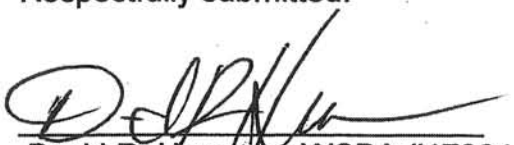
Finally, Ms, Everman-Jones alleges that the trial court erred by entering the judgment and sentence order for the gross misdemeanor. Ms. Everman-Jones asks this court to consider all legal arguments in this appeal brief as further basis that is entered into this section by reference thereto.

F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, Cherina Everman-Jones, respectfully requests that the conviction, as well as the judgment and sentence, which were entered in this matter, be reversed and the underlying charge be dismissed with prejudice. Additionally, Ms. Everman-Jones asks that her dog be returned.

DATED this 28th day of January, 2013.

Respectfully submitted:



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CHERINA EVERMAN-JONES

No. 308839

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. **CHERINA EVERMAN-JONES,** Defendant.	**Superior Court No.: 11-1-02618-4** **DECLARATION OF SERVICE**

On this day Declarant deposited in the mails of the United States of America properly stamped and addressed envelopes containing the Appellant's Brief and Motion and Certificate for Extension of Time to Submit Appellant's Brief to the following parties:

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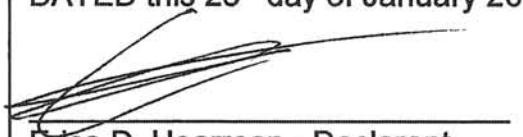

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