89777-8

Court of Appeal No. 308839-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CHERINA EVERMAN-JONES, Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The appellant, Cherina Everman Jones, by and through her attorney asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The appellant requests that this court review the entire decision of the Court of Appeals filed on December 10, 2013. A copy of the decision is in the Appendix at pages A-1 through A-20.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred when it upheld the Superior Court of Spokane County, State of Washington, action in cause no. 11-1-02618-4 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 Court of Appeals erred when it upheld the Superior Court of Spokane County, State of Washington action in cause number 11-1-02618-4 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 Court of Appeals further erred when it upheld the Superior Court of Spokane County, State of Washington action on March 26, 2012 and 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].

4. The Court of Appeals erred when it upheld the Superior Court of Spokane County, State of Washington action in cause no. 11-1-02618-4 which denied Ms. 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 Court of Appeals erred when it upheld the Superior

Court of Spokane County, State of Washington action on April 26, 2012 which 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].

D. 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].

E. ARGUMENT

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); State v. Miller, 131 Wash. 2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Therefore, this court should grant review since the Court of Appeals erred as described below and a significant question of law under the Constitution of the State of Washington or of the United States is involved plus this petition involves a substantial public interest that should be determined by the Supreme Court, all as described below. Additionally, the decision of the Court of Appeals is in conflict with several decisions of the Supreme Court as cited in this petition.

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.

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 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 (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).

2. Cherina Everman-Jones claims that the Court of Appeals erred in allowing the officer to violate 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.

According to **RCW 16.52.085**. Removal of animals for feeding -- Examination -- Notice – Euthanasia:

(1). ....., **the officer may authorize, with a warrant, the removal of the animal to a suitable place for feeding and care.....** 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..... **This section does not condone illegal entry onto private property.** (emphasis added).

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.

THE COURT OF APPEALS IGNORED THE US SUPREME COURT DECISION WHICH RECENTLY ADDED A BRIGHT LINE

RULE

In Florida v. Jardines, 133 S.Ct. 1409, 185 L. Ed. 2d 495 (2013),

the US Supreme Court recently addressed this same curtilage

issue and held that:

[The curtilage] enjoys protection as part of the home itself . . .when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from Governmental intrusion. This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.
We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is as old as the common law, so too is the identity of home and what Blackstone called the curtilage or homestall, for the house protects the privileges and all its branches and appurtenants. This area around the home is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened.
Jardines at 1414..

Most important, the U.S. Supreme Court clearly made a bright line rule that:

We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." Breard v. Alexandria, 341 U. S. 622, 626, 71 S. Ct. 920, 95 L. Ed. 1233, 62 Ohio Law Abs. 210 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts

and trick-or-treaters. (emphasis added). Id at 1414.

Additionally, Article 1 Section 7 of the Washington State Constitution provides greater protection than the Fourth Amendment to the U.S. Constitution. State v. Boland, 115 Wn.2d 571; 800 P.2d 1112; 1990. Finally, Ms. Everman-Jones' backyard clearly represents a reasonable expectations of privacy. California v. Ciraolo, 476 U.S. 207; 106 S. Ct. 1809; 90 L. Ed. 2d 210; 1986. Thus, Ms. Everman-Jones asks this court to find that a significant question of law under the Constitution of the State of Washington or of the United States is involved plus this petition involves a substantial public interest that should be determined by the Supreme Court. Additionally, the decision of the Court of Appeals is in conflict with several decisions of the Supreme Court as cited above. Law enforcement conducted a search for evidence without probable cause and the statements and all other related evidence must be suppressed as the U.S. Supreme Court ruled in Jardines, "suppress the evidence, holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause". Please note that the court of appeals ignored the fact that the animal control officer only saw a thin barking dog in the backyard and had to cross onto the curtilage from the driveway in order to gather additional information. The animal control officer should have requested a warrant as required by law.

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 next 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].

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); State v. Markle, 118 Wash. 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 Wash. App. 454, 463, 66 (2003) 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. State v. Bray, 52 Wash. App. 30, 34, 756 P.2d 1332 (1988).

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

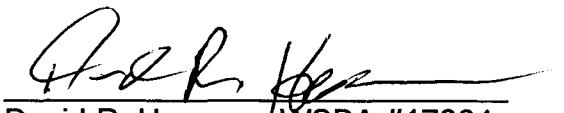
Based upon the foregoing points and authorities, the appellant, Ms. Cherina Everman-Jones, respectfully requests this court accept review of the Court of Appeals decision as described above and that her conviction, as well as the judgment and sentence, which were entered in this matter, be reversed and the underlying charge be dismissed with prejudice. Finally, if the court finds that any single listed error as stated above is harmless error or does not amount to the required resultant prejudice for reversal, the cumulative effect of the above listed errors should amount to reversal error under the cumulative error doctrine. Lastly, this court should grant review since the Court of Appeals erred as described above and a significant question of law under the Constitution of the State of Washington or of the United States is involved plus this petition involves a substantial public interest that should be determined by the Supreme Court. Additionally, the decision of the Court of Appeals is in conflict with several decisions of the Supreme Court as cited above. The Court of Appeals totally ignored RCW 16.52.085 and most importantly the US Supreme Court decision and bright line rule in Jardines which states that when law enforcement knock on a citizen's door and receive no answer, they must leave just as girl scouts do every day.

Based upon the foregoing points and authorities, the

appellant, Cherina Everman-Jones, respectfully requests that this court accept review and reverse the conviction, as well as the judgment and sentence, which were entered in this matter, and dismiss the underlying charge 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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December 10, 2013

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CASE # 308839
State of Washington v. Cherina Everman-Jones
SPOKANE COUNTY SUPERIOR COURT No. 111026184

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

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FILED
DECEMBER 10, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CHERINA EVERMAN-JONES, also known as CHERINA L. EVERMAN, Appellant.	)	No. 30883-9-III UNPUBLISHED OPINION

KULIK, J. — Cherina Everman-Jones appeals her conviction for second degree animal cruelty, arguing the trial court erred in denying her motion to suppress. She contends an animal control officer conducted an unlawful search when she entered areas of curtilage not open to the public. And she argues that the officer lacked authority to seize her dog without a warrant under RCW 16.52.085 because there was no evidence the dog was in an immediate life-threatening condition. Finally, Ms. Everman-Jones contends insufficient evidence supports her conviction and that the trial court erred in denying her motion to arrest judgment. We disagree with Ms. Everman-Jones and affirm the trial court.

FACTS

In August 2011, Nicole Montano, an animal control officer for Spokane County Regional Animal Protection Service (SCRAPS), was dispatched to a house on West Spring Road in Marshall, Washington, following a complaint about the condition of a dog at that address. From the house's driveway, she could see a very thin dog tethered in the backyard. The dog's hip bones, ribs, and spine were prominently visible from that distance. She knocked at the front door, but got no answer. She then went to the backyard to get a closer look at the dog. She observed "a completely emaciated dog" with no fat deposits and a loss of muscle mass. Report of Proceedings (RP) at 24. The top of its skull was sunken in. The dog had water, but no food and no shelter. After examining the dog, Officer Montano removed it. She explained at trial, "I had a completely emaciated dog, tethered in the yard. The emaciation was life threatening at the time which warranted the removal." RP at 25. She was also "concerned that the dog was dehydrated and would not be able to survive the elements. I did not know when the owner would be home." RP at 25-26. She took photographs of the dog and transported it to Legacy Animal Medical Center for evaluation. The State charged Ms. Everman-Jones

by amended information with two counts of first degree animal cruelty.[1]

Before trial, Ms. Everman-Jones filed a motion to return the dog and to suppress evidence and dismiss. She argued that Officer Montano conducted an illegal search by "entering the areas of the curtilage which were obviously not impliedly open to the public." CP at 18. She also argued that the officer violated RCW 16.52.085, which only authorizes warrantless removal of an animal when the animal is in an "immediate life-threatening condition." CP at 19. She maintained that the dog was not in such condition as evidenced by its ability to stand and jump on the officer's truck and the fact that no emergency treatment was needed.

The State responded that the dog was in "open view" and, therefore, Ms. Everman-Jones had no expectation of privacy. It pointed out that the backyard was a wide open space without buildings, fences, or trees and therefore Officer Montano did not invade the curtilage when she went to the backyard to check on the dog. Finally, the State argued

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[1] Count I alleged in part, "That the defendant, CHERINA L. EVERMAN-JONES, in the State of Washington, on or about August 10, 2011, did intentionally inflict substantial pain on an animal." Clerk's Papers (CP) at 160.

Count II alleged in part, "That the defendant, CHERINA L. EVERMAN-JONES, in the State of Washington, on or about August 10, 2011, did, with 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 at 160.

that Officer Montano was entitled to remove the dog under RCW 16.52.085 because she believed the dog was in an immediate life-threatening condition.

The trial court denied Ms. Everman-Jones's motion to suppress, concluding (1) the search was legal because the dog was kept chained in open view in her backyard, and (2) the dog was properly removed without a warrant under RCW 16.52.085 because "under the totality of the circumstances the officer believed the dog was in an immediate life-threatening condition." CP at 316.

At trial, Officer Montano testified to the events discussed above. She also stated that the dog weighed 67.5 pounds upon arrival at SCRAPS and ate "ravenously." RP at 32, 34. By November 2011, the dog had gained 31 pounds.

Dr. Mark Fosberg, a veterinarian for 30 years, testified that he examined the dog and determined that it was "a very thin, emaciated dog. On a body score we scale a one to five, we found a one." RP at 73. He noted "very thin muscles over the neck, the head, the shoulders, the back muscles, the pelvis and the rear legs." RP at 73. He attributed this severe muscle wasting to inadequate nutrition. Dr. Fosberg explained that the dog, an adult Great Dane mix, should have weighed between 100 and 140 pounds. He opined that the emaciation was due to starvation and that the dog was experiencing "[m]oderate to severe" pain as a result of the starvation. RP at 82.

After the State rested, the defense moved to dismiss both counts, arguing there was no evidence that Ms. Everman-Jones intentionally inflicted substantial pain on the dog. She also argued that there was no evidence to support count II or the lesser included offense of second degree animal cruelty because any evidence of pain was speculative. The trial court dismissed count I, finding the evidence did not establish that Ms. Everman-Jones acted intentionally.

Ms. Everman-Jones called several witnesses who testified that she regularly fed her dog. Her sister, Rachel McCully, testified that Ms. Everman-Jones fed the dog in the morning and afternoon and described the dog as healthy and happy. Lyle Polack, a family friend, testified that he observed the dog during a family camping trip the summer the dog was removed. He stated that the dog was fed twice a day and given treats between meals. Diana Everman, Ms. Everman-Jones's mother, testified that she lives next door to her daughter, visits daily, and observed her daughter feed the dog twice a day. She stated that she never saw the dog suffering or in pain.

Ms. Everman-Jones testified that she fed the dog twice a day and purchased a high calorie dog food for it. She stated there were no signs that the dog was in pain or suffering.

The jury was instructed on one count of first degree animal cruelty and the lesser included charge of second degree animal cruelty. It returned a guilty verdict on the lesser included charge.

After trial, Ms. Everman-Jones moved to arrest judgment, arguing she was prejudiced by the inclusion of the lesser included instruction because she was unable to prepare a defense for it. Specifically, she argued that "it was error for the state and the jury to be allowed to consider another charge over the defendant's objection that the defendant was not charged." CP at 285. The court denied the motion, noting the lesser included instructions "are always in the mix." RP at 319. Ms. Everman-Jones appeals.

ANALYSIS

Suppression Motion. Ms. Everman-Jones challenges numerous trial court findings of fact and conclusions of law relating to the suppression motion. They will be addressed in turn below.

Upon a trial court's ruling on a suppression motion, we review challenged findings of fact for substantial evidence, challenged conclusions of law de novo, and determine whether the findings support the conclusions. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence is "'defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *Korst v. McMahon*, 136

Wn. App. 202, 206, 148 P.3d 1081 (2006) (quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). This is a deferential standard, which views reasonable inferences in the light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 879-80. The party challenging a finding of fact bears the burden of showing that the record does not support it. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000).

Ms. Everman-Jones first assigns error to finding of fact 2, which states: "When Officer Montano arrived at that location she saw from the driveway a severely emaciated dog. She could clearly see the dog's ribs, lumbar vertebrae, pelvic bones and all bony prominences." CP at 314. Ms. Everman-Jones argues that the "testimony indicated that the officer could only see a 'thin dog' and that it only appeared that she could see the dog's ribs . . . from that distance." Appellant's Br. at 15 (emphasis omitted). She argues that it was not until the officer trespassed into the backyard that she saw the emaciated dog.

Officer Montano's testimony undermines Ms. Everman-Jones's argument. The officer testified, "*[f]rom my truck*, I was able to see that the dog was in poor condition. It was completely emaciated. I noticed its hip bones, rib bones, its abdomen was sunken in, and I was able to see part of its spinal processes." CP at 204 (emphasis added). Finding of fact 2 is supported by substantial evidence.

Next, Ms. Everman-Jones contends that finding of fact 3 is not supported by sufficient evidence because the house blocked part of the officer's view of the backyard. Finding of fact 3 stated, "the dog was chained in the defendant's backyard in open view of anyone passing by on the public road. There were no fences, trees, plants or other objects obstructing the view of the dog." CP at 315. This finding is supported by substantial evidence. Officer Montano testified that the dog was in open view of anyone passing by on the public road, and that there were no trees or other objects obstructing the view. The fact that the dog might not be visible from all angles does not undermine this finding.

Ms. Everman-Jones also assigns error to finding of fact 6, arguing that it is "incomplete and misleading." Appellant's Br. at 19. This finding states that: "Officer Montano noted that the dog had no shelter; the dog was exposed to the heat (80 degrees) and sun; the dog had no food." CP at 315. Ms. Everman-Jones contends that this finding

ignored the fact that the dog could travel to the back porch for shelter from the sun and that Officer Montano never looked under the bowl to see if there was evidence that the dog had been fed that morning. Ms. Everman-Jones misapprehends the court's role in reviewing findings of fact. It is not our task to evaluate whether a finding is incomplete; rather, our role is confined to determining whether substantial evidence supports the challenged findings. Here, Officer Montano testified that the dog was in the direct sun on a hot summer day, without protection from the elements, and the dog food bowl was empty. This testimony provides substantial evidence to support the court's finding.

Next, Ms. Everman-Jones assigns error to findings of fact 7 through 9, arguing that they are "irrelevant, misleading and prejudicial since the officer clearly testified that she had already made the decision to seize the dog . . . when she talked to the neighbor and father of Ms. Everman-Jones." Appellant's Br. at 20. These findings state that Officer Montano made contact with a neighbor, who turned out to be Ms. Everman-Jones's father, that the father told the officer he did not care about the dog, and that the officer should just take the dog. These findings mirror the officer's testimony, who stated that when she asked Ms. Everman-Jones's father about the dog, he responded that he did not "'give a shit about the dog'" and that she should just take it. CP at 209-10. Moreover,

these findings are relevant as they show the officer had no one with whom to leave the dog.

Ms. Everman-Jones also challenges finding of fact 10, which states: "Officer Montano removed the dog given the life threatening condition of the dog as well as for safe keeping as there was no shelter for the dog." CP at 315. Again, substantial evidence supports this finding. Officer Montano testified that the dog was "tied in direct sun," had lost a significant amount of muscle mass, and had "no discernable [sic] fat." CP at 207. She testified that after evaluating the "totality of the situation," she concluded that "this was a life threatening situation for this animal." CP at 210. She testified that she had responded to numerous calls over the years, in which a dog had died after being tethered in a yard without protection on a hot day. She opined that in view of the conditions she observed on the day in question, the dog was in imminent threat of death.

Finally, Ms. Everman-Jones assigns error to findings of fact 12 through 15, arguing that (1) the court ignored the fact that Dr. Fosberg concluded the dog was not in a life-threatening situation, and that (2) finding of fact 15, which notes that the dog gained 26 pounds in 21 days, is irrelevant. The challenged findings state that (1) Dr. Fosberg scored the dog's body condition at a 1 on a scale of 1 to 5, which he considered emaciated, (2) that Dr. Fosberg stated the dog was emaciated due to starvation, (3) the

dog weighed 67.5 pounds when weighed at Dr. Fosberg's office, and (4) the dog gained 26 pounds in 21 days.

Again, contrary to Ms. Everman-Jones's assertion, we do not evaluate whether the court ignored certain facts. Although Ms. Everman-Jones has a different view of the facts and the condition of the dog, the only issue before us is whether sufficient evidence supports the court's findings and whether those findings support the conclusions. Here, substantial evidence supports the court's findings. Officer Montano testified that upon examination, Dr. Fosberg concluded that the dog was emaciated and starving. The evidence also established that the dog quickly put on weight as soon as it was provided adequate amounts of food. Whether Dr. Fosberg later determined that the dog was not in an immediate life-threatening condition is immaterial for our purposes.

We conclude that substantial evidence supports the challenged trial court findings.

Search and Seizure. Ms. Everman-Jones challenges the trial court's conclusions of law that the warrantless search and seizure were lawful. Conclusion of law 1 stated: "There was no illegal search. The defendant had no expectation of privacy regarding her dog that she kept chained in her backyard, in open view." CP at 316. Ms. Everman-Jones contends that without evidence the dog was in an immediate life-threatening condition, Officer Montano's warrantless search and removal of the dog from the curtilage of her

property exceeded constitutional limits. The State responds that Officer Montano's entry was legitimate under the open view doctrine because the backyard was open to a public street traversing Ms. Everman-Jones's property and the dog was plainly visible.

We review a trial court's conclusions of law resulting from a suppression hearing de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A warrantless search is unreasonable unless it falls under one of Washington's recognized exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). The State bears the burden of establishing the validity of a warrantless search. *Garvin*, 166 Wn.2d at 250.

Although an individual maintains an expectation of privacy in his or her home's curtilage, police with legitimate business may enter those curtilage areas impliedly open to the public without first obtaining a warrant.[2] *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). In doing so, an officer must act as a "reasonably respectful citizen" would. *Id.* A curtilage area includes an access route to a house such as a driveway or

[2] "The curtilage is that area 'so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.'" *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990) (quoting *United States v. Dunn*,

walkway leading to a residence, or the porch of the residence itself. *State v. Ferro*, 64 Wn. App. 181, 183, 824 P.2d 526 (1992).

Additionally, under the "open view doctrine," when an officer is lawfully present in an area, his detection of items using the senses does not constitute a search. *Seagull*, 95 Wn.2d at 901 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 2.2, at 240 (1978)). The *Seagull* court explained:

> "[T]he observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public. . . . The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution."

Id. at 902 (quoting *State v. Kaaheena*, 59 Haw. 23, 28-29, 575 P.2d 462 (1978)). "However, 'a substantial and unreasonable departure' from an area of curtilage impliedly open to the public will be deemed to exceed the scope of the implied invitation and to intrude on a constitutionally protected expectation of privacy." *State v. Hoke*, 72 Wn. App. 869, 874, 866 P.2d 670 (1994) (quoting *Seagull*, 95 Wn.2d at 903). Whether a portion of the curtilage is impliedly open to the public depends on the facts of each case. *Seagull*, 95 Wn.2d at 903.

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480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)).

Here, Officer Montano had a legitimate interest in investigating the allegations of animal neglect. She was standing in an open driveway when she saw the dog in the backyard. The backyard area was unfenced and open, and her means of intrusion were not particularly intrusive. In *State v. Graffius*, the court found that officers did not violate the defendant's right of privacy by intentionally looking into a partially open garbage can located on a gravel parking area because the marijuana inside the garbage can was in open view. *State v. Graffius*, 74 Wn. App. 23, 27-28, 871 P.2d 1115 (1994). In reaching this conclusion, the court considered several factors, including whether the officer (1) acted secretly, (2) approached the area in daylight, (3) used the normal and most direct route to the house, and (4) created an artificial vantage point. *Id.* at 27.

Here, the officer's initial vantage point when viewing the dog was a public area open by implied invitation, and her entry into the backyard was not a substantial or unreasonable departure from the area. The path the officer took was a normal one for an ordinary member of the public to see if someone is home. She was not secretive and entered the backyard in daylight. She did not create an artificial vantage point. In sum, the officer was lawfully present at the vantage point and, therefore, did not conduct a "search" within the meaning of the Fourth Amendment. Officer Montano simply observed the dog in plain view from the road, a place she had a right to be. Given these

facts, Ms. Everman-Jones was "'not subject to any reasonable expectation of privacy.'" *Seagull*, 95 Wn.2d at 902 (quoting *Kaaheena*, 59 Haw. at 29). "[W]hat is voluntarily exposed to the general public . . . is not considered part of a person's private affairs." *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994). Accordingly, the trial court properly concluded that this was an open view observation from an area impliedly open to the public.

Ms. Everman-Jones next assigns error to the trial court's conclusion of law 2, which stated: "There was no illegal seizure. Officer Montano properly removed the dog from [the] defendant's home without a warrant under RCW 16.52.085(1). Under the totality of the circumstances the officer believed the animal was in an immediate life-threatening condition." CP at 316. Ms. Everman-Jones contends that the dog was improperly seized under RCW 16.52.085 because the dog was able to get into Officer Montano's van, Dr. Fosberg did not give it emergency treatment, and Dr. Fosberg opined that the dog was not in an immediate life-threatening condition.

RCW 16.52.085(1) permits a law enforcement officer or animal control officer to remove an animal without a warrant "if the animal is in an immediate life-threatening condition." Despite Ms. Everman-Jones's claims, the court's findings of fact support its conclusion that Officer Montano believed the dog was in an immediate life-threatening

condition. To reiterate, the court found that (1) Officer Montano saw a "severely emaciated dog," (2) the dog was suffering from muscle wasting, (3) the dog had no shelter, no food, and was exposed to high summer heat, and (4) Dr. Fosberg opined that the dog was emaciated due to starvation. CP at 314-15. We agree that Officer Montano believed the dog was in an immediate life-threatening condition.

The trial court's findings of fact are substantially supported by the record, and the facts support its denial of the suppression motion.

Motion to Dismiss the Second Count of Animal Cruelty in the First Degree. Ms. Everman-Jones next contends that the trial court erred when it denied her motion to dismiss count II for insufficiency of the evidence. She also contends the evidence was insufficient to support her conviction on the lesser included offense of second degree animal cruelty.

At the outset, we note that Ms. Everman-Jones waived her right to challenge the court's denial of her dismissal motion when she presented her case in chief. "[A] defendant who presents a defense case in chief 'waives' (i.e., may not appeal) the denial of a motion to dismiss made at the end of the State's case in chief." *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). However, Ms. Everman-Jones is more

accurately challenging the sufficiency of the State's evidence, a claim that can be brought at "a late stage of the proceedings." *Id.*

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences therefrom be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, we give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Credibility determinations are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Ms. Everman-Jones argues the evidence is insufficient to support the conviction on the lesser included offense of second degree animal cruelty because the record reflected that she fed her dog twice a day and the dog did not show signs of pain. RCW 16.52.207 provides:

> (2) An owner of an animal is guilty of animal cruelty in the second degree if [he or she] knowingly, recklessly, or with criminal negligence:
> (a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure.

As detailed above, the evidence showed that the dog was severely emaciated and left in the sun without food. Dr. Fosberg testified that the dog, which weighed 67 pounds upon admission at his clinic, should have weighed between 100 and 140 pounds, and was experiencing moderate to severe pain due to starvation. Although Ms. Everman-Jones testified that she fed the dog a high calorie dog food twice a day, the jury was free to reject her version of the events. *Thomas*, 150 Wn.2d at 874. We conclude that sufficient evidence supports the conviction for second degree animal cruelty.

Motion to Arrest Judgment. Finally, Ms. Everman-Jones claims the trial court erred when it denied her motion to arrest judgment at the end of her case. Review of a trial court's decision on a motion to arrest judgment requires this court to engage in the same inquiry as the trial court. *State v. Ngo Tho Huynh*, 107 Wn. App. 68, 76-77, 26 P.3d 290 (2001) (quoting *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000)).

Ms. Everman-Jones contends that the inclusion of the lesser included instruction of second degree animal cruelty, over her objection, effectively resulted in a conviction for an uncharged crime and, therefore, the court should have granted her motion to arrest judgment and dismiss. She argues, "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." Appellant's Br. at 40-41.

Ms. Everman-Jones's argument is not persuasive. On February 2, 2012, without objection, she was arraigned on the amended information, which added the second count of first degree animal cruelty. The State correctly points out that arraignment on the charge of first degree animal cruelty put Ms. Everman-Jones on notice that she could be convicted of any lesser included offense. *State v. Royster*, 43 Wn. App. 613, 620, 719 P.2d 149 (1986). Moreover, RCW 10.61.003 provides that a criminal defendant may also be convicted of a crime that is an inferior degree of the crime charged. *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998). The statute reads:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003.

As discussed above, sufficient evidence supported the conviction for second degree animal cruelty. The trial court did not err when it denied Ms. Everman-Jones's motion to arrest judgment.

We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Brown, J.

Korsmo, C.J.