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NO. 69968-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

Jason Markley,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY, JUDGE

**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

Did the evidence presented support the trial court's finding that Jason Markley did, with criminal negligence, starve Alex, a horse, and cause the animal substantial and unjustifiable pain?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

The appellant, Jason Markley, was charged by information in King County Superior Court, with animal cruelty in the first Degree for his actions between December 25, 2010, and April 8, 2011. CP 1.

A bench trial was held before the Honorable Cheryl Carey in December of 2012. After hearing testimony from witnesses, examining the exhibits presented, and hearing argument from counsel, Judge Carey determined that Markley was guilty as charged. 6RP 80-81. Judge Carey entered written findings of fact and conclusions of law on January 14, 2013. CP 78-81.

**2. SUBSTANTIVE FACTS**

Jason Markley lives with his wife, Cherish Thomas, and their children, in the Auburn area, in King County, Washington. 4RP 97. Around Christmas of 2010, the family decided to purchase a horse. 4RP 101. The couple conducted research regarding different types

of horses before the purchase was made with a primary focus being a horse with a smoother gait, to make it more desirable for riding. 5RP 137, 164. Markley visited two horses, Alex and Hebro, prior to deciding to purchase them. 5RP 154. Alex was an older quarter horse. 4RP 22. Markley and Thomas purchased the horses and moved them to their home in Auburn. 5RP 138. Markley and Thomas hired a Ferrier to trim Alex's hooves. 4RP 25-26The Ferrier described Alex as emaciated in January of 2011. 5RP 157.

Officer Jenee Westberg is an Animal Control Officer with King County, and has worked with that agency for approximately eleven years. 4RP 95-96. Prior to working with animal control, she had personal experience with horses as well, owning them all her life. 4RP 96. On April 8, 2011, Officer Westberg performed a welfare check on Alex at the Markley's property. 4RP 97. A welfare check is in response to a call or complaint made to Animal Control regarding an animal. RP 96. In this case, Officer Westberg had received two calls that indicated concerned citizens wanted Animal Control to go and check on the horse. 4RP 97. Officer Westberg's initial observations of Alex when arriving at the Markley home were that he was clearly thin, with his backbone sticking up, and each initial vertebra identifiable. 4RP 99-100. She also noted that the

skin concaved between each rib, the hip bones were protruding, and she could feel his entire skull as there was no discernible muscle. 4RP 100, 103. Using the Henneke scale, a standard scale graded one through nine used to judge the body condition of a horse, Officer Westberg evaluated Alex's overall condition. 4RP 27. Depending on the type of horse, a good score would be four through six. 4RP 27. Officer Westberg graded Alex as a 1.2. 4RP 106. Based on the condition of Alex, in consultation with the owners, Officer Westberg called a veterinarian, Doctor Heather Stewart, to perform an examination. 4RP 112.

Dr. Stewart graduated with an equine major in Veterinary School at the University of Pennsylvania. 4RP 16. In 2006, Dr. Stewart began a mobile practice, driving around treating horses, dogs, cats and goats. 4RP 17. Dr. Stewart described her initial impressions of Alex as emaciated and graded him as a 1.5 on the Henneke scale. 4RP 20, 28. Dr. Stewart estimated Alex's weight at 750 pounds and stated that the ideal weight for a horse of that size would be between 900 and 1100 pounds. 4RP 29 Markley told Dr. Stewart that the hay they had on site was a local hay, confirmed by Officer Westberg's observations, and that type of sustenance is only good for fat horses that maintain their weight without very

much food at all. 4RP 25, 30. Local hay is not available at the feed store, but Markley made the switch after initially purchasing a higher quality hay from Reber Ranch, which he decided was too expensive. 4RP 107, 108. Other nutritional attempts were minimal, Markley explained to Dr. Stewart. 4RP 108. The only potential treatment method for Alex's condition that was considered was deworming. 4RP 26. Deworming is a routine treatment for horses because with worms in their system from grazing, which makes it difficult to gain weight. 4RP 26. Dr. Stewart recommended a higher quality of hay be purchased for Alex immediately. 4RP 114. Officer Westberg assisted in transporting timothy hay, which Alex ate enthusiastically. 4RP 114. Senior horses, regardless of weight, typically need to have soft food. 5RP 82. Doctor Hannah Mueller testified that local hay is not sufficient for a horse such as Alex because it doesn't have enough calories and senior horses cannot be on a hay only diet. 5RP 86.

Markley contacted Officer Westberg to surrender the horses as he did not believe they could afford what was necessary for Alex. 4RP 117. On the form releasing ownership to King County, the reason indicated was the owner was unable to care properly for the animal. 4RP 119. Officer Aaron Wheatley with Animal Control

helped assist Officer Westberg with transporting Alex and Hebow to Reber Ranch after they were surrendered. 5RP 17.

Officer Wheatley, while with Animal Control for a few years, had significantly less experience with horses than the other witnesses. 5RP 15. Officer Wheatley's first observation of Alex was that his ribs were plainly visible, and he could also see the spine and lack of fat along the neck. 5RP 18.

During his stay at Reber Ranch, Alex's food schedule was monitored by Sergeant Chelsea Eykel with King County Animal Control. 5RP 24. Sgt. Eykel is a shelter sergeant with Animal Control and has worked with them for five years. 5RP 22. Her experience with horses goes back several years, as she has managed boarding and breeding facilities, and rehabilitated older horses. 5RP 22. Sgt. Eykel, although rarely working in the field for these types of investigations, was specifically called in to help with a feeding schedule for Alex, given her prior experience. 5RP 24. Sgt. Eykel also used the Henneke scale to grade Alex and gave him a 1.5. 5RP 31. Sgt. Eykel assisted in feeding Alex three separate times and observed him to be very excited about the new food. 5RP 28-29. Sgt. Eykel described Alex as one of the skinniest horses that she had seen in her experience that was still standing.



5RP 31. One of her duties was to determine whether or not a veterinarian should come out to assess the horse for euthanasia.

5RP 32. The primary factor to be considered in that decision was quality of life for the horse. 5RP 33. That alternative was discarded for the moment based on how Alex was responding to the new food and he was transferred to the care of Dr. Hannah Mueller. 5RP 32.

Dr. Mueller, is a veterinarian specializing in horses and their rehabilitation, who attended Oregon State University. 5RP 62-64.

Dr. Mueller testified that in her expert opinion horses experience pain as they have similar nervous systems to humans, so that a hunger pain to a person would be similar to that felt by a horse.

5RP 66. Horses are in pain when they are emaciated as it typically brings about ulcers as well as achy joints as a result of wasting muscle and muscle loss. 5RP 66-67. Dr. Mueller first had contact with Alex on April 14, 2011. 5RP 69. Dr. Mueller's initial observations were that he was severely emaciated and she graded him a 1 on the Henneke scale. 5RP 70. Alex was in the care of Dr. Mueller for a little less than three months and his recovery was significant. 5RP 83, 98. Given that he was starved prior to arriving at Dr. Mueller's center, the difference displayed after four to six weeks of consistent feeding and care was dramatic and indicated

he was no longer suffering. 5RP 99, 117. No further tests or invasive procedures were necessary; Alex simply got better with good nutrition. 5RP 121. Alex's grading on the Henneke scale improved to a 2.5 after six weeks in Dr. Mueller's care and after less than three months, prior to his transportation to another location, Alex graded at a four or 4.5. 5RP, 78 96. Based on these results, Dr. Mueller concluded that Alex had not been receiving proper nutrition in the months prior to her care and was starved as a result. 5RP 87.

After trial concluded, the court found that initially the horses were fed with hay that had the appropriate nutritional value, but Markley switched to local hay and an older horse cannot survive on this hay alone. 6RP 76. A veterinarian was never called during the time they had the horses, prior to Animal Control being involved, and Alex had been starved. 6RP 77,79. The court found that severe emaciation is conclusive for pain and suffering. 6RP 79. The court found that while Alex may have been thin when purchased, starvation occurred while Alex was in the care and custody of Markley. 6RP 80. Had Alex been fed properly, he would have been in the same condition that he was following three months with Dr. Mueller. 6RP 80.

**C. ARGUMENT**

**THE EVIDENCE IS SUFFICIENT TO SUPPORT MARKLEY'S  
CONVICTION FOR ANIMAL CRUELTY IN THE FIRST DEGREE**

The only issue raised by the respondent on appeal concerns whether or not the respondent acted with criminal negligence in starving his horse, Alex. Despite the respondent's claims, there can be no doubt that systematically choosing poor quality food for his animal resulted in continued and prolonged starvation.

In this case, the respondent made specific choices, based on expense, what to prioritize regarding the horses' care. He chose to shoe Alex so that he could be ridden, but did not have a veterinarian examine the horse. He was aware that the horse was emaciated, he knowingly purchased lower quality food to avoid the expense. Markley's actions did not meet that of a reasonable person in a similar situation and resulted in starvation and substantial pain for Alex. After hearing testimony and argument from the state and defense, the court convicted the respondent of animal cruelty in the first degree, finding that the respondent acted with criminal negligence in the starvation of Alex. This Court should affirm the trial court's findings.

Markley alleges that the trial court erred when it found that the respondent was guilty of the crime of animal cruelty in the first degree because there was insufficient evidence to prove that the respondent starved the horse himself. Rather, he argues, that the horse was previously in that condition and the respondent failed to rehabilitate it. The fact that Alex was emaciated and starved is not disputed, nor is the fact that he suffered substantial pain as a result. The basis for the defense argument is that an individual with little to no knowledge of horses cannot be expected to care for and provide proper nutrition to an older, thin horse.

When a challenge is made regarding sufficiency of the evidence, a conviction will be upheld if the appellate court, viewing the evidence in the light most favorable to the state, is satisfied that there is sufficient evidence to convince a rational trier of fact that the defendant was guilty of the crime charged beyond a reasonable doubt. Using this test, it is not necessary for the State to convince the appellate court that the respondent is guilty beyond a reasonable doubt – just that a rational trier of fact could so find.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

A person is guilty of the crime of animal cruelty in the first degree when “except authorized by law, he, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.” RCW 16.52.205(2). An individual acts with criminal negligence when he “fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). As “starve” is not defined by the statute one must turn to the ordinary dictionary meaning. State v. Edwards, 84 Wn. App. 5, 10, 924 P.2d 397 (1996), review denied, 131 Wn.2d 1016, 936 P.2d 416 (1997). Definitions include “to suffer or die from lack of food”, “to suffer extreme hunger” or “to deprive of nourishment”. Webster’s New Collegiate Dictionary (1973).

In this case, Markley purchased Alex shortly after Christmas in 2010 and had care of him for approximately three months. During that time, Markley failed to provide adequate nutrition for Alex, who was an older horse. The only information regarding the state Alex was in December came from co-defendant Cherish

Thomas. However, regardless of the state Alex was in when Markley assumed ownership, the evidence supported a reasonable inference that the nutrition provided to Alex, local hay, kept him in a near constant state of starvation, to the point where Animal Control considered euthanasia. When he was surrendered to Animal Control, Alex was clearly thin, with his backbone sticking up, each initial vertebra identifiable, his skin concaved between each rib the hip bones were protruding, and his entire skull could be felt through the skin and thick winter coat as there was no muscle to speak of. This condition was the simple result of a lack of appropriate nutrition and was readily identifiable by Animal Control officers, those with and without horse experience, and veterinarians. Alex's health and physical appearance dramatically improved during the three months that he was under the care of Dr. Mueller.

Starvation is an ongoing state that brings about extreme hunger and pain or causes death after a prolonged period of time. The question of criminal negligence is different than intent, as it speaks of not what a person does, but what they fail to do. When an individual takes responsibility for another living thing, providing food and water are basic necessities. However, this does not mean that

any water or any food is sufficient. While Markley is not a veterinarian or an animal care professional, he did take steps to see that his needs and expectations in respect to Alex were met. He researched horses to find the right breed that would be good for his children and he had Alex's shoes replaced so that he could be ridden. Markey's limited attempts made to address Alex's poor nutritional state with beet pulp show that the problem was identified. However, the limited nature of these attempts, discontinued at the first sign of issue with no follow-up, research, or help requested, is further evidence of blatant negligence. Markey purchased Alex after two visits, he brought him home, had him shod, and he made the choice to go to a lower quality feed because of the expense. Even the horse were in a thin state when he was purchased, Markley maintained the starvation that the previous owner potentially set in motion, which makes him no less negligent. 4RP 110. He made a conscious decision to spend his resources elsewhere and not to look into the cause, which was a deviation of the standard of care that a reasonable person in the same situation would exercise.

There is very little case law regarding this issue. The respondent lists no case law that supports his position that those

who have not previously owned horses bear less responsibility for the animals they purchase than those who are familiar with the animals. Rather, broad statements are made that attempt to distinguish starvation from rehabilitation when the simple truth of the matter is that Markley starved and failed to rehabilitate Alex. The trial court reasonably concluded that the actions of Markley were a gross deviation from the standard of care that a reasonable person would exercise in the same situation. The respondent references State v. Zawistowski, as an attempt to infer that a horse must be in good health, prior to the deviation of care, to provide sufficient evidence of starvation. 119 Wn. App. 730, 82 P.3d 698 (2004). This is no way indicated in the statute, and in Zawistowski, is identified merely as further evidence that a crime occurred. The same is true in this case, in a backwards fashion, given that Alex was able to quickly become healthy after the starvation stopped, proving that Markley had failed in his responsibility towards the horse during his time as owner.

Here, there is ample evidence that Alex was starved and suffered considerably as a result. The trial court properly found that the respondent was responsible for starving Alex.




For all the foregoing reasons, the respondent's conviction for animal cruelty in the first degree should be affirmed.

**D. CONCLUSION**

For the reasons set forth above, the State respectfully requests that the Court find that the evidence was sufficient to support the adjudication of guilty of the charge of animal cruelty in the first degree.

DATED this 14<sup>th</sup> day of February, 2014.

RESPECTFULLY submitted,

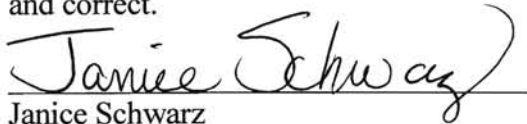
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, attorney for the Appellant, of the Washington Appellate Project, at the following address: 1908 E. Madison St., Seattle, WA 98122 containing a copy of Brief of Respondent to be sent to Court of Appeals, in State v. Jason Markely, Cause No. 69968-7-I, in the Court of Appeals for the State of Washington, Division I.

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



Janice Schwarz  
Done in Kent, Washington

  
Date