NO. 31078-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLAY HULL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Clay Hull stepped from his car one night because of an emergency need to urinate and was confronted with two barking dogs. One dog jumped on Hull. Hull fired several shots from his gun and one bullet hit one of the dogs. This dog fully recovered. Hull was charged with drive-by shooting and animal cruelty in the first degree.

The trial court ruled that the law of self-defense does not apply when a person uses force to repel an attack by an animal. It refused to instruct the jury on the right to lawfully defend oneself. Barring the jury from considering Hull's right to act in self-defense denied Hull a fair trial.

Additionally, the State did not prove the two alternative means of animal cruelty and the court misapprehended the law when it acknowledged that Hull deserved a sentence below the standard range but believed it lacked authority to give him a mitigated sentence.

B. ASSIGNMENTS OF ERROR.

1. The court denied Hull his right to a fair trial by refusing to instruct the jury on the law of self-defense.

2. Hull was denied his right to a fair trial by unanimous jury when the prosecution presented two alternative means of committing

first degree animal cruelty but one of the alternatives was not supported by substantial evidence.

3. The court misapplied the law when it misunderstood the availability of several mitigating factors that would authorize a sentence below the standard range.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The rights to act in self-defense and to have the jury instructed on the law of self-defense are guaranteed as a matter of due process, by statute, and under the express right to "bear arms in defense of self" under article I, section 24. The court ruled that the right to act in self-defense applies only to threats on a human by a human even though case law demonstrates the right to defend oneself from an animal. Did the court deny Hull his rights to pursue his theory of defense and to act in defense of himself?

2. When the prosecution offers two alternative means by which the jury may convict the accused person, and the court instructs the jury that no unanimous choice of either alternative is required, both alternatives must be supported by substantial evidence. The prosecution argued to the jury that animal cruelty could be based on either substantial pain or physical injury suffered by the dog. When there was

no record evidence of any pain suffered by the dog and no reasonable inference available that the dog felt substantial pain, did the State fail to prove this alternative means of animal cruelty?

3. A court may impose an exceptional sentence below the standard range when significant mitigating factors justify treating the case differently from others in the same class. The court believed it lacked legal authority to impose an exceptional sentence because Hull's case was not identical to the illustrative list of mitigating factors in the statute. Did the court misunderstand its legal authority to give Hull a sentence below the standard range?

D. STATEMENT OF THE CASE.

On December 14, 2010, sometime after 9 p.m., Clay Hull pulled his car over by the side of the road because he needed to urinate. 3RP 505.[1] Hull is an Iraq War army veteran who was injured in an explosion that "blew up" his stomach and left him with significant bladder problems in addition to other effects of combat. 5RP 885. Hull has a concealed weapons permit and was working as a security guard at the Yakima Training Center. 4RP 644-45; 5RP 900.

[1] For purposes of this brief, 3RP refers to 6/25/12; 4RP refers to 6/26/12; 5RP refers to 6/27/12; 6RP refers to 6/28/12, 7/12/12, and 8/17/12.

As Hull unzipped his pants, he heard dogs barking, "saw teeth" and felt a dog's paw pushing aggressively on his arm. 4RP 693; 5RP 906. Hull urinated on his pants. 4RP 693. He pushed the dog back, "hoping it'd just back up" but the dog did not leave. 5RP 906. The dog "came at me again." 5RP 906. Hull pulled out his handgun and fired two or three shots. Id. He fired one or two more as the dog began to leave. Id. He aimed at the ground. 5RP 943.

Hull explained that his military training instilled in him the need to react automatically to a perceived threat. 5RP 906, 919-20. Hull also has post-traumatic stress disorder and brain injury from his Iraq War service, which both impaired his memory and affected his reactions to threatening situations. 4RP 701, 707; 5RP 907.

Minerva Perez lived at a home near this incident. It was "very dark" out. 4RP 774. She heard dogs barking and realized that one of her brother's dogs had been shot, but did not see the shooting. 3RP 485; 4RP 773. Minerva Perez's brother Ulises owned two Dobermans that were kept behind a four foot tall chain link fence. 3RP 478, 493-94. They had not seen their dogs jump over the fence before. 3RP 496-97.

Shawn Moody lived next door to the Perez home and owned a German Shepard who was not kept enclosed. 3RP 417. Moody's

German Shepard was left free to roam. 3RP 424-25. Moody heard his dog barking at a person who was urinating outside. 3RP 417-18. Moody looked out the window and saw this person fire his gun. 3RP 420. Moody ducked, fearing he could be hit. 3RP 420. Moody did not see anything or anyone hit by a bullet but his brother later found a bullet that hit some items sitting outside the house and had perhaps ricocheted off other property. 3RP 464, 468.

Two of Hull's friends were in their own separate cars at the time of the incident. 5RP 826, 864. Steve King and John Munson had separately arranged to meet Hull as Hull was leaving a Carrie Underwood concert and follow him to his house. 5RP 820, 863. King saw a Doberman jump toward Hull's "face area" and Hull shoot in response. 5RP 826-27. Munson also saw a dog come "from out of the shadows and jump" on Hull, Hull pushed it back, and then Hull fired as the dog "was starting to come at him again." 5RP 866.

The Doberman who was shot in the incident made a full recovery. 3RP 484. She was bleeding at the time of the shooting, but was otherwise calm. 3RP 484-85. After medical treatment, the dog was fine. 3RP 484.

Hull was charged with drive-by shooting and first degree animal cruelty while armed with a firearm. CP 6-7. The trial court refused Hull's repeated requests to instruct the jury on the law of self-defense. 3RP 563; 5RP 946, 957. The court insisted that self-defense was only available when the threat involved a human, not an animal. 5PR 957; 6RP 1101. The court provided an instruction on the defense of "necessity," which put the burden of proof on Hull to prove his actions were necessary. CP 82.

Hull was also charged with one count of tampering with a witness, based on statements he allegedly made to his then-girlfriend Laura Peterson who was with him at the time of the incident. CP 6-7. The jury acquitted Hull of this allegation, but convicted him of drive-by shooting and one count of animal cruelty while armed with a firearm. CP 93-95.

At the sentencing hearing, the court explained that "if I could find some way to go below it [the standard range] I would, but I can't by law and I'm bound by my oath." 6RP 1117. The court imposed a sentence at the low end of the standard range. Id.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **The court improperly refused to instruct the jury that Hull could lawfully act in self-defense when defending himself against an attacking animal**

a. The right to act in self-defense is constitutionally guaranteed.

The right to present a defense includes the right to have the jury instructed on the accused person's theory of defense, provided the instruction is supported by the evidence and accurately states the law. U.S. Const. amends. V, VI, XIV; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

> Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.

State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

Additionally, it is constitutionally mandated that, "The right of the individual citizen to bear arms in defense of himself, or the state,

shall not be impaired." Art. I, § 24.[1] This "quite explicit language about the 'right of the individual citizen to bear arms in defense of himself'" set forth in article I, section 24 "means what it says." State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 99 (2010).

The federal constitution likewise guarantees the right to act in self-defense; "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." McDonald v. City of Chicago, Ill., __ U.S. __, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); U.S. Const. amends. II, XIV. The right to bear arms in self-defense is "deeply rooted" and "fundamental" to our concept of liberty. McDonald, 130 S. Ct. at 3036-37; Sieyes, 168 Wn.2d at 292.

b. The right to act in self-defense includes the right to protect oneself from apparently dangerous animals.

As historically recognized, it is "the right of the defendant" to act in defense of himself when he has a good faith belief that he is in apparent danger. State v. Carter, 15 Wash. 121, 123, 45 P. 745 (1896). The right to act in self-defense is viewed from the perspective of the defendant, as the situation appeared to him. Id.

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[1] Article I, section 24 states in full, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to

> The right of self-defense is grounded upon two elements: (1) That the party attacked may use sufficient force to offset the actual danger; [and] (2) that he may use sufficient force to offset the apparent danger.

State v. Churchill, 52 Wash. 210, 214, 100 P. 309 (1909).

When an accused person uses force based on an "arguably reasonable" fear of belligerent dogs, he is entitled to have the jury instructed on the law of self-defense. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). In Werner, the defendant fired his gun when faced with "seven snarling dogs" and the person accompanying the dogs did not comply with the defendant's request to "call off the dogs." Id. at 336. The trial court refused the defendant's proposed self-defense instructions. The Supreme Court reversed Werner's conviction for first degree assault due to the court's failure to provide the requested self-defense instruction premised on fear of an attack by the dogs. Id. at 337.

The Werner Court acknowledged that dogs, or other animals, are considered deadly weapons when used in a deadly manner or perceived to be deadly in their use. Id. (citing State v. Hoeldt, 139 Wn.App. 225, 160 P.3d 55 (2007)); see also State v. Cook, 164 N.C. App. 139, 142, 594 S.E.2d 819, 822, aff'd, 359 N.C. 185, 606 S.E.2d 118 (2004). Just

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organize, maintain or employ an armed body of men."

as dogs can be dangerously employed by a person, they may also be dangerous and threatening to others. See RCW 16.08.020 ("It shall be lawful for any person" who sees a dog "chasing, biting, injuring or killing" any domestic animal "to kill such dog"). Courts have recognized the right to employ self-defense against the attack of a police dog. See, e.g., Henley v. State, 881 N.E.2d 639, 649 (Ind. 2008); People v. Adams, 124 Cal.App. 4th 1486, 1495–96, 21 Cal.Rptr.3d 920 (2004).

Similarly, courts have explicitly recognized that self-defense is not limited to threats from a human. People v. Lee, 131 Cal. App. 4th 1413, 1427, 32 Cal. Rptr. 3d 745, 755 (2005) (collecting cases). "The focus is on the nature of the threat, rather than its source." Id. When the "threat of imminent harm came from a dog and not from a person" it is illogical to prohibit the use of force in self-defense. Id. "In other words, the use of force in self-defense should not be illegitimate because the source of the threat is not a human being." Id.

In Lee, the court was presented with an issue identical to that in the case at bar: whether the jury should be instructed that a person's assault on a dog could be excused under the law of self-defense. After surveying cases nationally, the court concluded, "it appears that courts

have uniformly recognized that a person has a right to use reasonable self-defense when confronted with an aggressive dog." Id. at 1428-29.

Washington has long recognized the right to use force against a threatening animal. State v. Burk, 114 Wn. 370, 374, 195 P. 16, 17 (1921). The Burk Court acknowledged that "unquestionably," a person may use force against an animal "for the protection of his life, or that of some member of his family." Id.

In Burk, an elk threatened the defendant's property and in response, the defendant killed the elk. Id. at 371. Recognizing that using force for the purpose of defending property required "a stronger showing" to justify the use of force than when defending one's own life, the court adopted a necessity defense for cases involving force used against an animal in defense of property. Id. at 374.

The Supreme Court modified this aspect of Burk in State v. Vander Houwen, 163 Wn.2d 25, 28, 35, 177 P.3d 93 (2008), ruling that same law of self-defense applies to a person using force against an animal in defense of property as when a person uses force in defense of himself.

In Vander Houwen, the defendant killed a number of elk who were damaging his orchard. 163 Wn.2d at 31. The Court "reaffirmed"

the holding of Burk that a person "is not guilty of violating the law" if he kills an animal "in defense of himself or his property if such a killing was reasonably necessary for such purpose." Id. at 28. In addition, the court ruled that killing an animal "in defense of self or property" triggers the law of self-defense and the burden of proof is placed on the prosecution. Id. at 35.

The trial court in Vander Houwen gave the jury a necessity defense instruction, rather than the requested instruction that killing an elk is not unlawful if "such killing was reasonably necessary" for defense of self or property. Id. at 31. The necessity instruction put the burden on the defendant to prove that his actions were reasonably necessary to defend his property. Id. at 31-32. The Vander Houwen Court held this instruction did not adequately afford the defendant his constitutional right to act in self-defense. Id. at 33. The burden of persuasion should be placed on the prosecution beyond a reasonable doubt when the defense has presented sufficient evidence for a jury instruction on the law of self-defense. Id. at 35.

c. The court impermissibly refused to let the jury consider whether Hull's actions were justified by his use of lawful self-defense.

Similarly to Vander Houwen, the court refused to give Hull his requested self-defense instruction and instead used a necessity defense instruction that placed the burden on Hull to prove by a preponderance of evidence that his actions were reasonably necessary. CP 87 (Instruction 21); see 163 Wn.2d at 31-32. This instruction put the burden on Hull to prove by a preponderance of evidence that: (1) he reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm to be avoided was greater than the harm from the resulting violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed. Id. As Vander Houwen dictates, the necessity instruction is inadequate when an accused person may have acted in lawful self-defense. 163 Wn.2d at 35.

An accused person is "entitled" to an instruction on his theory of the case, including self-defense, "if there is some evidence demonstrating self-defense." Werner, 170 Wn.2d at 336-37. The defendant must produce some evidence that he believed force was necessary and that this belief, objectively viewed, was reasonable. See

State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The test is both objective and subjective, measured by what a reasonable person would do standing in the defendant's shoes and considering all circumstances known to the defendant. Werner, 170 Wn.2d at 337; State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

Hull testified that as he got out of his car to urinate, he heard two dogs barking, felt one dog jump on him, and feared further attack when he fired his gun. 5RP 906. He told the same thing to the police shortly after the incident, and two friends who saw the incident also witnessed a dog jump on and at Hull. 4RP 693-94; 5RP 826-27, 866. It was dark out and the dog came out of the shadows. 5RP 866. Hull "didn't want to hurt the dog," and "just wanted the dog off" him. RP 907, 920. It was a "really fast, quick situation" that lasted less than one minute. 5RP 909. He fired several shots but did not empty his gun. 5RP 909.

Hull's friend Steve King saw a dog jump toward Hull's face before Hull shot at it. 5RP 827. A German Shepard "looked aggressive" and seemed "like it was going to attack him" at the same time that a Doberman jumped at Hull. 5RP 826-28. John Munson similarly described a dog jumping on Hull as Hull was urinating by his car. 5RP

866. It "started to come at him again" when Hull shot several times. 5RP 866. Munson did not see any fence keeping the dog away. 5RP 874-75, 878. Hull was convicted of both drive-by shooting and animal cruelty for these acts. CP 93, 95.

The judge denied Hull his requested self-defense instruction because it believed that the law of self-defense did not apply to a person who feared an attack by an animal. 6RP 1101. The court believed the legislature has defined self-defense as only involving force from a person. Id. This conclusion was erroneous, as demonstrated by Vander Houwen, Werner, and Lee. The court's refusal to given instructions on Hull's theory of the case is reversible error. Werner, 163 Wn.2d at 367.

d. The court's refusal to instruct the jury on the law of self-defense denied Hull a fair trial.

When there is sufficient evidence to warrant instructing the jury on self-defense, the outcome of the trial will turn on whether the State disproved that the defendant reasonably acted in self-defense. Werner, 170 Wn.2d at 337. The failure to give a self-defense instruction, when appropriate, necessarily prejudices the accused and cannot be harmless error. Id.

An error is presumed prejudicial where jury instructions relieve the State of its burden of proof. State v. Eaker, 113 Wn.App. 111, 120, 53 P.3d 37 (2002), rev. denied, 149 Wn.2d 1003 (2003). The State must prove beyond a reasonable doubt that the error did not contribute to the verdict of the jury. Id.

In this case, Hull's theory of defense centered on his fear that he was being attacked by a dog and feared serious injury if he did not use force to stop the attack. The prosecution emphasized that the necessity defense is "on him" to prove, which is a far different burden than would have existed if the jury was properly instructed on the law of self-defense. 6RP 1028. Hull tried to argue that any reasonable person in Hull's position would have similarly acted when charged by a strange dog in the dark, but the burden of proving necessity was far more onerous on Hull than his right to act in lawful self-defense. 6RP 1043, 1044.

Viewing the record in the light most favorable to Hull, he was entitled to have the court instruct the jury on the theory of self-defense. Agers, 128 Wn.2d at 93; State v. Fernandez–Medina, 141 Wn.2d 448, 455–46, 6 P.3d 1150 (2000). The court's failure to instruct the jury that Hull's actions would be lawful if he reasonably believed he was

defending himself, with the burden of proof on the State, denied him his constitutional right to act in self-defense and to receive a fair trial by jury, thus requiring reversal.

2. **There was insufficient evidence of the alternative means required to prove animal cruelty in the first degree**

a. There must be substantial evidence supporting each alternative means of committing a charged offense.

Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. Winship, 397 U.S. at 364; State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 21, 22. In Washington, the state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution," which prohibits the court from imposing punishment based on facts not expressly found by the jury. State v. Williams-Walker, 167 Wn.2d 887, 695-96, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22.

The jury must unanimously find the prosecution proved every necessary element of the crime charged. Williams-Walker, 167 Wn.2d at 698; State v. Smith, 159 Wn.2d 778, 783, 155 P.3d 873 (2007).

When one element may be established by alternative means, the requirement of unanimity is satisfied only if substantial evidence supports each alternative means. Smith, 159 Wn.2d at 783; State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988); State v. Lillard, 122 Wn.App. 422, 434-35, 93 P.3d 969 (2004), rev. denied, 152 Wn.2d 1002 (2005).

If one of the alternative means presented to the jury is not supported by substantial evidence, the verdict must be vacated unless the reviewing court finds that the verdict must have been based on one alternative that was supported by substantial evidence. State v. Rivas, 97 Wn.App. 349, 351-52, 984 P.2d 432 (1999), disapproved on other grounds, Smith, 159 Wn.2d at 787. When there is only a general verdict, the reviewing court presumes the error requires reversal. Id. at 353; see State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994) (in an alternative means case, "if the evidence is *insufficient* . . . as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.").

b. The State did not prove the alternative means of committing first degree animal cruelty listed in the "to convict" instruction.

The to-convict instruction directed the jury to find that Hull was guilty of animal cruelty if it found:

> (1) That on or about December 14, 2010, the defendant:
> (a) intentionally inflicted substantial pain on an animal; or
> (b) intentionally caused physical injury to an animal.

CP 82 (Instruction 16).

The court further instructed,

> the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

Id.

The prosecution did not elect to proceed on a single alternative, but rather argued both alternative means to the jury. 6RP 1025. The jury issued a general verdict. CP 95. Rivas, 97 Wn.App. at 351-52.

Absent a special verdict form, the court presumes the verdict could have rested on any of the alternatives. Rivas, 97 Wn.App. at 351-52. After the trial, the prosecution insisted that substantial evidence supported both alternatives. 6RP 1098. The court agreed that the

evidence was "hotly contested" and could have rested on both alternatives. 6RP 1103.

When reviewing whether substantial evidence supported an alternative means, the court must be "convinced that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." In re Det. of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714, 721 (2006) (quoting Kitchen, 110 Wn.2d at 410-11). In determining the sufficiency of evidence, the existence of a fact may not rest on guess, speculation, or conjecture. State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

There was no evidence presented that established that the dog suffered "substantial pain" as required under RCW 16.52.205(1)(a). The only evidence documenting the dog's condition from the gun wound was that even though the dog was bleeding, the dog was "perfectly calm" and "made full recovery." 3RP 484-85. Her owner thought she seemed "kind of scared" but still calm. 3RP 498.

The prosecution did not offer veterinary testimony about the nature and extent of injury. Cf. State v. Andree, 90 Wn.App. 917, 922, 954 P.2d 346 (1998) (in animal cruelty prosecution where kitten was stabbed nine times, "testimony of the veterinarian was sufficient to

establish that the kitten suffered substantial pain"). No one testified about the degree to which the dog would perceive pain. No one explained whether a dog's perception of pain would be the same as a human's perception of pain.

While jurors are permitted to make reasonable inferences from proven facts, such inferences cannot rest on speculation. "[A] reviewing court should not give credence to evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative." O'Laughlin v. O'Brien, 568 F.3d 287, 301 (1st Cir. 2009) (internal citations omitted).

Without evidence that the dog felt substantial pain, or expert testimony explaining the kind of pain a dog would suffer from these wounds, it is pure speculation for the jury to infer that the dog felt substantial pain. The dog was calm, not barking or upset after receiving the wound. 3RP 484. Reasonable inferences may not be premised on patently equivocal evidence. State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985). The speculation or conjecture required to surmise the dog suffered substantial pain is impermissible. Consequently, the prosecution did not prove this alternative means beyond a reasonable doubt.

The second alternative means presented was "physical injury." CP 82. There was no testimony about the degree or nature of the injury suffered, other than eyewitness testimony that she was bleeding and had been shot. 3RP 384-85. While there was no evidence explaining the extent of the injury, a juror could potentially infer the dog was physically injured based on the loss of blood. However, the prosecution neither expressly elected this alternative nor did the jury's verdict clearly reflect of finding that its verdict was based on this alternative.

c. The remedy for a verdict based on unproven alternative means is reversal.

Double jeopardy bars retrial for allegations that are not adequately proven. Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The prosecution did not present sufficient proof that the dog suffered substantial pain and this allegation may not be prosecuted a second time.

A verdict issued based on more than one alternative means cannot stand when any alternative means is not supported by substantial evidence. State v. Kinchen, 92 Wn.App. 442, 452, 963 P.2d 928 (1998). Hull's conviction for animal cruelty in the first degree was based on two alternative means and one was not supported by sufficient

evidence. The conviction must be reversed and the case remanded for a new trial. Id.

3. The court misapprehended its authority to impose a sentence less than the standard range.

The trial court made plain its desire to impose a lesser sentence on Hull than that which was mandated under the standard range. 6RP 1117. Yet the court believed it lacked authority to impose a sentence below the standard range. The court's misapprehension of its authority constitutes an abuse of discretion meriting a new sentencing hearing.

a. A court's sentencing decision requires reversal when it rests on an incorrect understanding of the law.

A court's refusal to impose an exceptional sentence below the standard range may be reviewed on appeal when the court "relied on an impermissible basis for refusing to impose an exceptional sentence." State v. Khanteechit, 101 Wn.App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585.

A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); see also State v. Tili, 139 Wn.2d 107,

124, 985 P.2d 365 (1999) (court's failure to articulate a viable basis to find the offender's conduct "separate and distinct" is an abuse of discretion).

Under the SRA, failed defenses may constitute mitigating factors that justify a sentence below the standard range. State v. Jeannotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Factors favoring the mitigation of the standard range need be established only by a preponderance of evidence. RCW 9.94A.535(1).

RCW 9.94A.535(1) includes a list of "illustrative," not exclusive, factors that may mitigate in favor of a lesser sentence. The illustrative list contains factors that, had they been established at trial, would have justified or excused the accused person's behavior. The SRA recognizes that even when such defenses do not or would not have prevailed at trial, circumstances may still justify distinguishing the person's behavior from that of others convicted of the offense. Put another way, the SRA allows "variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime." State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993)

(citing with approval, David Boerner, Sentencing in Washington, § 9-23 (1985)).

b. The evidence of Hull's serious cognitive impairments and reasonable belief he was acting in self-defense were viable grounds for an exceptional sentence.

"The 'failed defense' mitigating circumstance for imposing an exceptional sentence include[s] self-defense." Jeannotte, 133 Wn.2d at 851. Likewise, RCW 9.94A.535(1)(e) authorizes an exceptional sentence below the standard range if a preponderance of evidence shows that, "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired" for a reason other than drugs or alcohol. The statute also provides that where "the victim was an initiator, willing participant, aggressor, or provoker of the incident" to a substantial degree, the court may impose an exceptional sentence below the standard range. RCW 9.94A.535(1)(a).

Hull believed he acted in reasonable self-defense. 5RP 906-07, 920. He presented several witnesses corroborating his description of being attacked by two dogs, but the court ruled that as a matter of law, self-defense is not available when force is used against the threat of animal attack. 5RP 826-27, 886; 6RP 1101. This constitutes a "failed"

claim of self-defense and should have been a mitigating circumstance on which the court could impose an exceptional sentence. The court's failure to recognize this available mitigation constitutes an abuse of discretion. See Jeannotte, 133 Wn.2d at 851.

Additionally, Hull presented the court with documentation of the significant impairment he suffered from his injuries in Iraq. CP 130-43. He had brain injury and post-traumatic stress disorder, and both of these led Hull to react in the manner that he did when he perceived an unexpected attack from dogs in the dark. CP 132-33; 5RP 906, 919. He had been trained to respond to threats by affirmative action and that training, coupled with the trauma he suffered from being attacked in Iraq, caused his reaction on the night in question. 4RP 701; 5RP 919-20.

The court acknowledged Hull's traumatic brain injury from his service in Iraq but contended Hull needed to establish he was unable to appreciate the wrongfulness of his acts to qualify for an exceptional sentence. 6RP 1115-16. The court was wrong to require Hull to prove more than a preponderance of evidence showing that the trauma inflicted by his combat wounds significantly impaired his capacity to react other than by force. RCW 9.94A.535(1)(e).

The court recognized that the dogs provoked the attack, and it was not planned, anticipated or provoked by Hull. 6RP 1114. But it believed this mitigating factor could not apply because the dog was not the victim of the drive-by shooting. 6RP 1114. This interpretation of the law was incorrect, as it could have been a basis to give Hull an exceptional sentence for the animal cruelty conviction for which the dog was the victim.

Under these circumstances, the court was authorized to impose a sentence below the standard range. The circumstances of the case are extraordinary, as the court recognized at the sentencing hearing. Hull's unplanned shooting, provoked by the aggressive behavior of a dog and caused by his own traumatic response stemming from his combat experience in the military, sufficiently authorized the court to depart from the standard sentencing range. Remand for a new sentencing hearing is required.

F. CONCLUSION.

For the reasons stated above, Mr. Hull respectfully asks this Court to reverse his convictions and remand the case for further proceedings.

DATED this 28th day of March 2013.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 31078-7-III
v.	)	
	)	
CLAY HULL,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KEVIN EILMES, DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639 E-MAIL: kevin.eilmes@co.yakima.wa.us	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF MARCH, 2013.

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