No. 31078-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CLAY HULL,

Appellant.

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

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL ASSIGNMENT OF ERROR

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B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

The court impermissibly imposed a firearm enhancement for the unranked offense of animal cruelty in the first degree.

C. ARGUMENT.

1. **The court lacked authority to impose a firearm enhancement for a conviction for the unranked offense of animal cruelty.**

a. *The statute authorizing imposition of a firearm enhancement is inapplicable to unranked felonies.*

A sentence that is not authorized by law is invalid on its face. *In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 176, 196 P.3d 670 (2008). "[S]entences entered in excess of lawful authority are fundamental miscarriages of justice." *In re Personal Restraint of Adolph*, 170 Wn.2d 556, 563, 243 P.3d 540 (2010). "When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

A court exceeds its authority by imposing a sentencing enhancement that is not authorized by statute. *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010); *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

A court's authority to impose a firearm enhancement stems from RCW 9.94A.533(3). *State v. Soto*, _ Wn.App. _, _ P.3d _, 2013 WL 4507928, *4 (Aug. 22, 2013). As this Court explained in *Soto*, the first section of this statute, RCW 9.94A.533(1), limits the application of all provisions of RCW 9.94A.533, including the court's authority to impose firearm enhancements. RCW 9.94A.533(1) provides that the sentencing provisions set forth in this statute apply only to sentences for offenses that received "standard sentence ranges determined by RCW 9.94A.510 and 9.94A.517." *See* RCW 9.94A.533(1)).

An unranked felony is not of offense subject to "standard range sentences determined by RCW 9.94A.510 and 9.94A.517." *Soto*, 2013 WL 4507928 at *2. An unranked offense is one that is not assigned a seriousness level in the sentencing scheme and no standard range term applies. *Id.* RCW 9.94A.533(3) does not authorize firearm sentencing enhancements for the less serious and less common offenses that are not classified under standard range guidelines, and no other sentencing

provision allows firearm enhancements for unranked offenses. *Soto*, 2013 WL 4507928 at *4-5.

b. *Mr. Hull's firearm sentencing enhancement is unauthorized and void.*

Identically to the appellant in *Soto*, Mr. Hull was convicted of first degree animal cruelty and received a firearm enhancement as part of his sentence. *Soto*, 2013 WL 4507928 at *2. Animal cruelty in the first degree as charged is an unranked felony under the Sentencing Reform Act. *Id.*; RCW 16.52.205(1); *see* RCW 9.94A.515 (listing ranked felonies).[1]

In *Soto*, this Court held that the firearm enhancement may not be imposed for a first degree animal cruelty conviction. *Soto*, 2013 WL 4507928 at *5. *Soto* controls here. Like Mr. Soto, the court was not authorized to impose a firearm enhancement to increase Mr. Hull's punishment for first degree animal cruelty. The firearm enhancement "imposed for the animal cruelty conviction was unauthorized and void." *Id.* It must be stricken by this Court.

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[1] As the *Soto* Court noted, a different means of animal cruelty, defined in RCW 16.52.250(3) is a ranked felony, but that means as no application in the case at bar. *See Soto*, 2013 WL 4507928 at *2 n.1.

2. **Mr. Hull was justified in defending himself and the court was required to place the onus on the prosecution to disprove his self-defense.**

The right to defend oneself from perceived threat from an animal, and receive a self-defense instruction that places the burden of proof on the prosecution, was made plain in *State v. Vander Houwen*, 163 Wn.2d 25, 28, 35, 177 P.3d 93 (2008). The *Vander Houwen* Court held 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 prosecution asserts that *Vander Houwen* is distinguishable because it was a "narrow" ruling but omits explaining why. Response Brief at 10-11. *Vander Houwen* involved the use of force against animals to protect property. 163 Wn.2d at 31. While the defense of property has long been recognized as part of the right of self-defense, defending property is not more rigorously protected than defending oneself from a perceived threat. The prosecution presents no logical basis why *Vander Houwen*'s analysis does not control.

The prosecution does not address the constitutional right of "the individual citizen to bear arms in defense of himself," as expressly mandated by article I, section 24. It does not explain why this Court

should treat the pattern jury instruction or statute as the definitive scope of the constitutional right to defend oneself.

The prosecution offers an unreasonable depiction of *People v. Lee*, 131 Cal. App. 4th 1413, 1415, 1427, 32 Cal. Rptr. 3d 745 (2005), a California case that surveyed available case law on whether self-defense applied to a person who used force against a dog that scared her. The prosecution asserts that *Lee* rests on California's pattern jury instruction, which did not seem to specify that the attacker must be a person. Response Brief at 9. *Lee* concluded that the defendant had the right to a jury instruction on the law of self-defense after the court surveyed other cases and other jurisdictions. It concluded that nationally,

> courts have uniformly recognized that a person has a right to use reasonable self-defense when confronted with an aggressive dog. The lack of precedent for the contrary ruling by the trial court here provides further support for the conclusion that it was erroneous.

Lee, 131 Cal. App. 4th at 1429. It based its analysis on the "conceptual" notion of self-defense, predicated on common law, not the constraints imposed by the pattern jury instruction. *Id.* at 1427.

The prosecution's reliance on the pattern jury instructions as defining the scope of the right to act in self-defense is misplaced. The

law is not defined by a pattern instruction. *See State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); *see also State v. Studd,* 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

In sum, the prosecution presents no principled analysis of why the constitutional right to act in self-defense by using force against an animal to defend one's property does not also apply to the right to defend oneself from a perceived threat of force. Mr. Hull was entitled to have the jury instructed that the prosecution must disprove his justification for acting in defense of himself and he is entitled to a new trial.

3. The prosecution did not prove the alternative means of committing animal cruelty in the first degree.

The prosecution agrees it was required to present substantial evidence of both alternative means of committing animal cruelty in the first degree, including proving that Mr. Hull "intentionally inflicted substantial pain on an animal." CP 82.

There was no evidence establishing that the dog suffered "substantial pain" as required under RCW 16.52.205(1)(a). The owners, who would be most familiar with the dog, described the dog as "perfectly calm" and he "made full recovery." 3RP 484-85. The dog

seemed "kind of scared" but still calm. 3RP 498. The prosecution did not offer veterinary testimony about the nature and extent of injury. Since animals are not people, a person's perception of what might cause reasonable pain in oneself cannot necessarily correlate to what constitutes substantial pain in an animal.

In its Response Brief, the prosecution relies solely on the testimony of a police officer, who had never met the dog on any prior occasion and had no medical expertise. Response Brief at 12-13. This officer said that dog was "breathing agonally (phonetic)." 3RP 543. The officer added that what he meant was the dog "was having difficulty breathing, shaking, didn't seem to be able to get a full breath out." 3RP 543. The State asserts that the officer must have meant that the dog's breath was "[p]ertaining to or associated with agony" or "anguished." Response Brief at 13. Yet the State did not introduce this opinion nor have the officer qualified as a witness knowledgeable enough to give an opinion about apparent pain the dog was experiencing. Labored breathing does not demonstrate "substantial pain" being experienced by an animal, particularly where the dog's owners did not notice labored breathing or substantial pain; and the State never offered evidence that the dog was experiencing such pain.

"[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, _ Wn.2d _, _ P.3d _, 2013 WL 3864265, *7 (2013); *see Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Inferences drawn from the evidence should not be the subject of mere surmise or arbitrary assumption. *Id.* (quoting *Bailey v. Alabama,* 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911)). Here, the prosecution did not offer a factual basis for the jury to reasonably conclude that the dog suffered from substantial pain. Because the State failed to prove an alternative means of animal cruelty, a new trial is required without the unproven alternative means. *State v. Kinchen*, 92 Wn.App. 442, 452, 963 P.2d 928 (1998).

4. **The court misunderstood its discretion to impose a sentence below the standard range.**

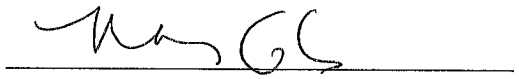
As explained in Appellant's Opening Brief, the trial court made plain its desire to impose a lesser sentence than the standard range, but believed it lacked authority to do so. 6RP 1117. The court's misapprehension of its authority constitutes an abuse of discretion meriting a new sentencing hearing.

E. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hull respectfully requests this Court reverse his convictions and remand his case for further proceedings.

DATED this 24th day of September 2013.

Respectfully submitted,



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I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF AND SUPPLEMENTAL ASSIGNMENT OF ERROR** 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:

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