Supreme Court No. 98512-0
COA No. 52278-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LLEWELLYN ANDREW ROY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Llewellyn Andrew Roy requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Roy, No. 52278-1-II, filed on April 7, 2020. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A statute that sets forth distinct acts constituting the same crime creates alternative means but a statute that merely defines statutory terms does not. The second degree animal cruelty statute provides that an animal owner who knowingly, recklessly, or with criminal negligence fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention, causing the animal to suffer unnecessary or unjustifiable physical pain, is guilty of the crime. Are failing to provide necessary (1) shelter; (2) rest; (3) sanitation; (4) space; or (5) medical attention distinct acts constituting alternative means or are they merely definitional terms?

2. When multiple alternative means are submitted to the jury for consideration, a general verdict satisfies due process only if the State presents sufficient evidence to prove each alternative beyond a reasonable doubt. Here, multiple alternative means of second degree

animal cruelty were submitted to the jury but the State did not prove each alternative beyond a reasonable doubt. Does the general verdict violate due process?

C. STATEMENT OF THE CASE

1. Llewellyn Roy was charged with one count of second degree animal cruelty after leaving his two mastiffs outside in the backyard for a few days with insufficient food and water.

Llewellyn Roy lives in a house in Centralia. RP 170. In July 2017, he lived alone with his four parrots and three dogs—one Old English bulldog and two Neapolitan mastiffs, a male named Fausto and a female named Azura. RP 171. When Roy went to work, he would leave the dogs either in his enclosed backyard or in the house. RP 174, 189. He never left the two mastiffs together because he did not want them to mate; sometimes he would put one of them in a kennel in the backyard or in a similar kennel in the laundry room. RP 173.

On the night of July 15, 2017, Roy left the house to get cigarettes. RP 174-77. The police stopped and arrested him for reasons unrelated to this case and took him to jail where he remained for days. RP 174-77. Roy had left his dogs outside; Fausto was in the kennel, and Azura and the bulldog were loose in the backyard. RP 180, 189. That morning Roy had fed and watered all of his animals as usual and

did not notice any issues with them. RP 178-79. He had not cleaned the house, the birds' cages or the dog kennel for two weeks and was planning to clean them the next day. RP 187-90. He cannot clean more than once every two weeks due to his medical conditions that make it difficult for him to move about. RP 190-92.

In the afternoon of July 19, Roy's neighbor Lisa Wesen noted Roy's dogs had been barking for hours, day and night, which was unusual. RP 87, 93-94. Before that, she had not been aware of any problem with the dogs. RP 93-94. Wesen knocked on Roy's door but no one answered and Roy's car was gone. RP 87. Wesen walked around to the backyard to check on the dogs and saw they had no food or water. RP 87-89. The bulldog was on the back porch staring at the door, one of the mastiffs was in a kennel on the porch, and the other mastiff was by the fence barking. RP 88. The dogs "were very skinny" and "didn't look in good health." RP 89, 98. The mastiffs' eyes were "red and goopy" and looked infected. RP 89, 98.

Wesen and her husband filled a bucket with water and got some dog food and gave these to the dogs. RP 90-91. The dogs drank the water eagerly. RP 90. Wesen noticed the kennel was "compacted very high with feces," causing a strong smell. RP 89. The mastiff inside was

forced to stand in the feces. RP 89. Another neighbor shoveled the feces out of the kennel so that the dog could lie down on a clean place. RP 91, 97-98. They put some food and water in the kennel. RP 91.

Wesen called the police who told her to call animal control. RP 91-94. Community Service Officer Jennifer Krueger received the complaint and contacted Roy in jail. RP 105-06. He asked her to call his mother to see if she would take care of his animals. RP 107. Krueger called Roy's mother but she would not help. RP 107-08. Krueger went back to the jail and spoke to Roy again. RP 108. He gave her a key to the house. RP 108. He said he was out of bird food and gave her his debit card so that she could buy some. RP 108.

Krueger and Community Service Officer Kyle Stockdale went to the house that afternoon. RP 108-09, 133. They looked in the four bird cages by the front window and found that one of the birds was dead. RP 110, 135.

Krueger and Stockdale found some dog food in the kitchen and fed the dogs outside. RP 112. They noted the mastiffs were "very skinny" and had sores on their elbows. RP 113-15, 137. Both of the mastiffs had a condition called "cherry eye," which caused their eyelids to swell. RP 113. The mastiffs seemed slow to move and were timid.

RP 114. They appeared to be in pain. RP 114, 138. The bulldog, however, was in much better condition and was friendly. RP 114, 123.

The temperature in the backyard was "very warm" but "[t]here was a lot of shade." RP 125.

The State charged Roy with one count of first degree animal cruelty, in regard to the dead parrot, and one count of second degree animal cruelty, in regard to the two mastiffs. CP 1-3; RP 272, 275.

Veterinarian Bridget Ferguson performed a necropsy on the dead parrot. RP 144, 147. She testified the bird likely died of starvation and dehydration, but she could not rule out other causes of death such as cancer, infection, heart disease, or old age. RP 148-52, 159-60, 167.

Ferguson did not examine the mastiffs but viewed photographs of them. RP 154-55, 165. She said they were underweight, caused either by lack of food or a medical condition. RP 155. For a dog to get so underweight would probably take weeks or a month, depending on the dog's activity level. RP 155.

The dogs also had cherry eye, which occurs when the dog's tear glands protrude and block the dog's vision. RP 153, 166. The condition is painful and susceptible to infection. RP 154, 166. Mastiffs are predisposed to cherry eye; it is not caused by human acts. RP 164.

Treating the cherry eye in these dogs would require surgery and cost hundreds of dollars per dog. RP 165-66. To underscore that testimony, a worker at the animal shelter where the dogs were sheltered testified the dogs had surgery to repair their cherry eye. RP 244. The surgery cost around $3,000 for the female and $2,000 for the male. RP 248. The shelter worker also testified the dogs had skin and ear infections when they arrived, which is common for mastiffs. RP 246-47.

The veterinarian and the shelter worker testified about the ideal living conditions for a dog. Dogs should be fed at least once a day and have water available at all times. RP 156, 251. The dog's lair should be free of urine and feces which can cause a dog to develop sores. RP 156. And dogs need shade when they are out in the hot sun and heat in the winter. RP 250.

2. Jury instructions, closing argument, verdicts, and Court of Appeals opinion.

The to-convict instruction for the second degree animal cruelty charge stated:

> To convict the defendant of the crime of animal cruelty in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about and between July 1, 2017 and July 19, 2017, the defendant knowingly, recklessly, or with criminal negligence *failed to provide an animal*

> *with necessary shelter, rest, sanitation, space, or medical attention*;
>
> (2) This failure caused the animal to suffer unnecessary or unjustifiable physical pain; and
>
> (3) That these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 25 (emphasis added); RCW 16.52.207(2)(a).

In closing argument the deputy prosecutor told the jury the first degree animal cruelty charge pertained to the dead parrot, and the second degree animal cruelty charge pertained to the two mastiffs. RP 272-75. The State's theory for the second degree animal cruelty charge was the mastiffs did not have proper shelter, sanitation or medical care. RP 279. Their spines and ribs were visible, they had sores and cherry eye, and they were timid and lethargic and appeared to be in pain. RP 276. The male dog's kennel was covered in feces and urine. RP 276.

The State did not elect which mastiff it was relying upon but the prosecutor said the jury must unanimously agree on one mastiff or the

other, or both. RP 275. The jury received a "Petrich"[1] instruction informing them they must unanimously agree on a particular mastiff for the second degree animal cruelty charge. CP 23.

The jury could not reach a verdict on the first degree animal cruelty charge. CP 11. In a general verdict, the jury found Roy guilty of the second degree animal cruelty charge. CP 34.

Roy appealed. He argued second degree animal cruelty is an alternative means crime and the State did not prove all of the alternative means. Because the record contains no particularized expression of jury unanimity on an alternative means that was supported by the evidence, his right to due process was violated. The Court of Appeals agreed the State presented sufficient evidence to prove only that Roy failed to provide necessary medical treatment, causing unnecessary or unjustifiable physical pain to the animals. Slip Op. at 2. But the court concluded no due process violation occurred because second degree animal cruelty is not an alternative means crime. Slip Op. at 1-2.

[1] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Division Two's published opinion holding that second degree animal cruelty is not an alternative means crime conflicts with Division One's opinions in State v. Peterson and State v. Nonog and presents an issue of substantial public interest that should be decided by this Court.

In a published decision, Division Two of the Court of Appeals held that second degree animal cruelty is not an alternative means crime. Slip Op. at 1-2. This conclusion conflicts with Division One's earlier cases in State v. Peterson, 174 Wn. App. 828, 851-52, 301 P.3d 1060 (2013) and State v. Nonog, 145 Wn. App. 802, 812-13, 187 P.3d 335 (2008). Whether or not the second degree animal cruelty statute creates alternative means is also an issue of substantial public importance that should be decided by this Court. Hence, review is warranted. RAP 13.4(b)(2), (4).

1. Second degree animal cruelty is an alternative means crime.

An alternative means crime is one where the legislature has provided that the State may prove the proscribed conduct in a variety of ways. State v. Barboza-Cortes, 194 Wn.2d 639, 643, 451 P.3d 707 (2019). Deciding which statutes create alternative means crimes is left to judicial interpretation. Id. Thus, review is *de novo*. Id.

Generally, an alternative means statute sets forth "distinct acts that amount to the same crime." State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). By contrast, a statute that merely defines or describes an element of the crime does not set out alternative means. State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007). A definitional statute creates "means within a means" and not alternative means. Id.

Whether a statute sets forth alternative means depends on how varied the actions are that could constitute the crime. State v. Owens, 180 Wn.2d 90, 96-97, 323 P.3d 1030 (2014). The more varied the conduct the more likely the statute describes alternative means. Barboza-Cortes, 194 Wn.2d at 644. In Owens, this Court held the first degree trafficking in stolen property statute did not set forth alternative means because the prohibited acts are closely related and not distinct. Id. at 99. The statute provides "[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others" is guilty of the crime. Id. at 96 (quoting RCW 9A.82.050(1)). These terms are closely related because they overlap; any one act of stealing often involves more than one of these terms. Id. at 99. For example, a person who "organizes" a theft will also

"plan" it. Id. A person who "manages" a theft will generally "direct" and/or "supervise" it. "Thus, these terms are merely different ways of committing one act, specifically stealing" and are not alternative means. Id.

By contrast, in State v. Peterson, Division One held the first degree animal cruelty statute sets forth separate, distinct acts and therefore creates alternative means. Peterson, 174 Wn. App. at 851-52. A person commits the crime if, with criminal negligence, he or she "starves, dehydrates, or suffocates an animal" and causes substantial unjustifiable pain as a result. RCW 16.52.205(2). Peterson recognized that "starvation, dehydration, and suffocation" are "three distinct ways of committing the crime." Peterson, 174 Wn. App. at 851-52. The terms do not overlap. For example, a person can "starve" or "dehydrate" an animal without "suffocating" it. The statutory terms "are not merely descriptive or definitional but, rather, separate and essential terms of the offense." Id.

Similarly, the crime of interfering with domestic violence reporting is an alternative means crime. Nonog, 145 Wn. App. a812-13. A person commits the crime by preventing or attempting to prevent the victim or a witness to a domestic violence crime "from calling a 911

emergency communication system, obtaining medical assistance, or making a report to any law enforcement official." RCW 9A.36.150(1). These acts are distinct and do not overlap. A person can prevent someone from "calling a 911 emergency communication system" or "obtaining medical assistance" without also preventing the person from "making a report to any law enforcement official." The variations in the statute are not merely descriptive or definitional of essential terms, but "are themselves essential terms." Nonog, 145 Wn. App. at 812-13.

Like the first degree animal cruelty statute and the interfering with domestic violence statute, the second degree animal cruelty statute sets forth separate, distinct acts that are themselves essential terms. The statute provides:

> (2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner 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 . . . .

RCW 16.52.207 (emphasis added).

The statute sets forth separate, distinct acts that vary significantly and do not overlap. A person can fail to provide an animal with necessary "shelter" or "rest" without also failing to provide

"sanitation," "space" or "medical attention." These statutory terms do not merely define or describe an element of the crime but are themselves essential terms. Therefore, contrary to the Court of Appeals' conclusion, second degree animal cruelty is an alternative means crime. Owens, 180 Wn.2d at 96-99; Smith, 159 Wn.2d at 787; Peterson, 174 Wn. App. at 851-52; Nonog, 145 Wn. App. at 812-13.

2. When multiple alternative means are submitted to the jury for consideration but the evidence is insufficient to support one or more of the means, due process requires a particularized expression of jury unanimity.

In Washington, criminal defendants have a constitutional right to a unanimous jury verdict. Const. art. I, § 21; State v. Woodlyn, 188 Wn.2d 157, 162, 392 P.3d 1062 (2017).

In an alternative means case, where multiple alternative means are submitted to the jury for consideration, an expression of jury unanimity as to the means is not required so long as each means is supported by sufficient evidence. Woodlyn, 188 Wn.2d at 164-65. But if the evidence is *not* sufficient to support one or more of the alternative means, our constitution requires a "particularized expression" of jury unanimity as to the supported means. Id.

The need for a particularized expression of jury unanimity when one or more alternative means are not supported by sufficient evidence

is a due process requirement. Id.; U.S. Const. amend. XIV; Const. art. I, § 3. The purpose for the requirement is to ensure that when a jury might base its verdict on more than one alternative, the verdict is adequately supported. Woodlyn, 188 Wn.2d at 164-65. "Adequately supported" means a rational jury could find each alternative means is supported by proof beyond a reasonable doubt. Id. at 164 n.2 (citing State v. Green, 94 Wn.2d 216, 230, 616 P.2d 628 (1980); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

"A reviewing court is compelled to reverse a general verdict unless it can '*rule out the possibility* the jury relied on a charge unsupported by sufficient evidence.'" Woodlyn, 188 Wn.2d at 165 (quoting State v. Wright, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)) (emphasis in Wright). Absent a special verdict form, or some kind of colloquy or explicit instruction, this Court cannot assume every member of the jury relied solely upon an alternative means that is supported by sufficient evidence. Woodlyn, 188 Wn.2d at 166. In that situation, the conviction violates due process. Id.

3. The State did not prove all of the alternative means submitted to the jury and the record contains no particularized expression of jury unanimity, violating due process.

All of the statutory alternative means of committing the crime of second degree animal cruelty were submitted to the jury for consideration. The to-convict jury instruction stated the jury must find Roy "failed to provide an animal with necessary shelter, rest, sanitation, space, or medical attention." CP 25. The State did not elect which mastiff it was relying upon but told the jury it could rely upon either dog. RP 272-75. As the Court of Appeals recognized, Slip Op. at 2, the State did not present sufficient evidence to prove all of the alternative means for each dog beyond a reasonable doubt.

The question is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each of these alternative means beyond a reasonable doubt. Owens, 180 Wn.2d at 99; Green, 94 Wn.2d at 221; Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The evidence showed the dogs were left outside in the backyard for three or four days and, on the afternoon they were found, the sun was shining and the weather was warm. RP 125. The dogs had no food or water and "were very skinny" and "didn't look in good health." RP

87-89, 98. Both of the dogs had sores on their elbows and cherry eye and were later treated for ear and skin infections. RP 113-15, 137, 153, 166, 246-47.

This evidence was not sufficient to prove Roy failed to provide both of the dogs with necessary shelter, rest, sanitation, space, and medical attention. Only the male mastiff, Fausto, was in a kennel that was "compacted very high with feces," making it impossible for him to lie down in a clean place. RP 89-91, 180, 189. The female mastiff, Azura, was loose in the enclosed backyard. RP 180, 189. Although it was hot outside that afternoon, "[t]here was a lot of shade." RP 125. Therefore, Azura had ample sanitation and space. And the State presented no evidence to show that either dog had insufficient rest.

The jury entered a general verdict and the record contains no particularized expression of jury unanimity as to any alternative means. CP 34. Therefore, this Court cannot rule out the possibility that the jury relied upon an alternative means that was not supported by sufficient evidence. Woodlyn, 188 Wn.2d at 164-65. The conviction violates due process and must be reversed. Id.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 7th day of May, 2020.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. vs. LLEWELLYN ANDREW ROY, Appellant.	No. 52278-1-II PUBLISHED OPINION

MAXA, C.J. – Llewellyn Roy appeals his conviction of second degree animal cruelty. Under RCW 16.52.207(2)(a)[1], a person is guilty of second degree animal cruelty for "fail[ing] to provide the animal with necessary shelter, rest, sanitation, space, or medical attention" and causing unnecessary pain as a result.

Roy argues that RCW 16.52.207(2)(a) provides five alternative means of committing the offense. Because the jury was instructed on all five means and was not instructed that jurors had to be unanimous regarding one of the means, he claims that the State was required to present sufficient evidence to support each means to sustain the conviction.

We hold that RCW 16.52.207(2)(a) provides only a single means of committing the crime of second degree animal cruelty, and the five listed terms are merely different ways of

[1] RCW 16.52.207 was amended in 2019. Because those amendments do not materially affect the language relied on by this court, we cite to the current version of the statute.

committing that single means. And we hold that the State presented sufficient evidence to prove one of the ways, failing to provide necessary medical treatment and thereby causing unnecessary or unjustifiable physical pain to his animals. Accordingly, we affirm Roy's conviction.

FACTS

On the evening of July 15, 2017, Roy was arrested on his way to the store and placed in jail. At the time, he owned two mastiffs named Fausto and Azura, a bulldog named Mike, and four parrots.

On July 19, Roy's neighbor, Lisa Wesen, was concerned because she heard barking day and night and noticed that Roy's car had not been home for several days. After knocking on the front door and finding no one home, she went to the back fence and saw the three dogs in the backyard. Fausto was in a kennel on the back porch that was compacted with feces, and the dog had nowhere to stand or lie down. Mike was on the back porch staring at the door and Azura was by the fence barking. The mastiffs looked skinny, had red and goopy eyes, and did not look healthy. Wesen and her husband brought food and water to the dogs and a neighbor shoveled out the kennel. Wesen contacted Jennifer Krueger, an animal control officer for the City of Centralia.

Krueger went to the jail and spoke with Roy and Roy asked her to contact his mother to take care of the animals. When Roy's mother declined to help, Krueger contacted Roy again and he provided Krueger with a key to his home. Krueger also asked him to release the animals to an animal shelter so they could get regular care.

Krueger went to Roy's home with Kyle Stockdale, another animal control officer. Roy's home was very warm and smelled of urine and feces. The parrots had shredded newspaper that

was strewn about the living room. One of the parrots had died. The cages were filthy and the parrots had no food or water.

They found the dogs in the backyard. Krueger described the mastiffs:

> They were very, very skinny. You could see every knob on their spine. They had big sores on their elbows where they lay down. Their eyes were -- their eyelids were very swollen with a condition called cherry eye. The female couldn't even hardly see out of her eyes, because the top and bottom lids were so swollen it was just a little slit for her to see.

1 Report of Proceedings at 113. She described the mastiffs as being in bad shape and in pain. Stockdale provided similar testimony. Both mastiffs eventually received medical treatment for their cherry eye as well as for ear and skin infections.

The State charged Roy with first degree and second degree animal cruelty. At trial, the State explained that the first degree charge pertained to the deceased parrot and the second degree charge pertained to the mastiffs.

The to-convict instruction for second degree animal cruelty, tracking the language of RCW 16.52.207(2)(a), required the State to prove that Roy "knowingly, recklessly, or with criminal negligence failed to provide an animal with necessary shelter, rest, sanitation, space, or medical attention." Clerk's Papers at 25. The trial court instructed the jury that it had to be unanimous as to one act of second degree animal cruelty. The court did not instruct the jury that it had to be unanimous regarding the particular ways of committing the crime listed in the to-convict instruction.

The jury could not reach a verdict on first degree animal cruelty pertaining to the parrot and found Roy guilty of second degree animal cruelty pertaining to the mastiffs. Roy appeals his conviction.

ANALYSIS

A. SECOND DEGREE ANIMAL CRUELTY AND ALTERNATIVE MEANS

Roy argues that RCW 16.52.207(2)(a) provides five alternative means of committing second degree animal cruelty and that the State did not present sufficient evidence to prove each means. We disagree.

1. Statutory Language

RCW 16.52.207(2)(a) provides:

> An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner 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.

RCW 16.52.207(2)(a). RCW 16.52.207 identifies three other means of committing second degree animal cruelty: knowingly, recklessly, or with criminal negligence inflicting unnecessary suffering or pain on an animal, RCW 16.52.207(1)(a); abandoning an animal, RCW 16.52.207(2)(b); and abandoning an animal when the animal suffers bodily harm or the abandonment creates a risk that the animal will suffer substantial bodily harm, RCW 16.52.207(2)(c).

Roy claims that RCW 16.52.207(2)(a) identifies five alternative means for committing the crime under that subsection: knowingly, recklessly, or with criminal negligence failing to provide (1) shelter, (2) rest, (3) sanitation, (4) space, or (5) medical attention. The State argues that subsection (2)(a) identifies only one means of committing animal cruelty, and that the subsection merely provides five ways of committing that single means.

2. Alternative Means Doctrine

An alternative means crime is one where the applicable statute provides that the proscribed criminal conduct can be proved in multiple ways. *State v. Barboza-Cortes*, 194

Wn.2d 639, 643, 451 P.3d 707 (2019). As a general rule, the statute identifies a single crime and states that the crime can be committed by more than one means. *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Determining whether a statute provides alternative means of committing a crime is a matter of judicial interpretation. *Barboza-Cortes*, 194 Wn.2d at 643.

The alternative means determination relates to jury unanimity required under article I, section 21 of the Washington Constitution. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). For an alternative means crime, a defendant is entitled to a unanimous jury determination as to the particular means by which he or she committed the crime. *Id.* If there is no express statement of jury unanimity, the State must present sufficient evidence to support each of the alternative means. *Id.* But if the statute identifies a single means of committing a crime, unanimity is not required even if there are different ways of establishing that means. *See Barboza-Cortes*, 194 Wn.2d at 643.

The alternative means analysis focuses on whether the statute describes the crime in terms of separate, distinct acts (alternative means) or in terms of closely related acts that are aspects of one type of conduct (not alternative means). *State v. Sandholm*, 184 Wn.2d 726, 734. 364 P.3d 87 (2015).

> The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various "alternatives" are merely facets of the same criminal conduct.

Id.

Two other principles are relevant here. First, the use of a disjunctive "or" in a list of ways of committing the crime does not necessarily mean that those ways are alternative means. *Owens*, 180 Wn.2d at 96. For example, in *Owens* the Supreme Court held that seven terms

stated in the disjunctive, read together, constituted a single means rather than seven alternative means for trafficking in stolen property. *Id.* at 98.

Second, a statute that provides a means within a means does not identify an alternative means crime. *Smith*, 159 Wn.2d at 783. "[W]here a disputed instruction involves alternatives that may be characterized as a 'means within [a] means,' the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply." *Id.*

3. Analysis

In *Barboza-Cortes*, the court addressed RCW 9.41.040(2)(a), which states that a person is guilty of second degree possession of a firearm if the person "owns, has in his or her possession, or has in his or her control any firearm" after having been previously convicted of certain felonies. 194 Wn.2d at 646. The court held that this statute did not establish an alternative means crime. *Id.* The court stated, "While there may be subtle distinctions in aspects of ownership, possession, and control that may be material in other contexts, in the present circumstances that all describe ways of accessing guns." *Id.* Therefore, the terms were merely "nuances inhering in" accessing guns and "facets of the same criminal conduct." *Id.* (quoting *Sandholm*, 184 Wn.2d at 734).

In *Owens*, the court addressed RCW 9A.82.050(1), which prohibits trafficking in stolen property. 180 Wn.2d at 92. The statute provided that a person is guilty of trafficking if he or she " 'knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others.' " *Id.* at 96 (quoting RCW 9A.82.050(1)). The court held that this group of terms *together* identified a single category of criminal conduct – facilitating or participating in the theft of stolen property. *Id.* at 98-99.

Here, shelter, rest, sanitation, space, and medical attention represent different aspects of the basic necessities for an animal's comfortable life. They are not independent, essential elements of the crime. Instead, they are "minor nuances inhering in the same act" and "facets of the same criminal conduct." *Sandholm*, 184 Wn.2d at 734. *Read together*, the listed terms criminalize failing to provide an animal with basic necessities.

We conclude that RCW 16.52.207(2)(a) identifies a single means of committing second degree animal cruelty: failing to provide an animal with the basic necessities of life and thereby causing unnecessary or unjustifiable physical pain. RCW 16.52.207(2)(a) does not describe five alternative means of committing that crime.

B. SUFFICIENCY OF THE EVIDENCE

Roy argues that his due process rights were violated because the State did not present sufficient evidence to prove all of the means listed in RCW 16.52.207(2)(a) beyond a reasonable doubt. But we have held above that RCW 16.52.207(2)(a) provides a single means of committing second degree animal cruelty, not five alternative means. As noted above, if the statute identifies a single means of committing a crime, unanimity is not required even if there are different ways of establishing that means. *See Barboza-Cortes*, 194 Wn.2d at 643. Therefore, the State had to prove only that Roy failed to provide both mastiffs with necessary shelter, rest, sanitation, space, *or* medical attention.

Here, the State presented evidence that Roy failed to provide both mastiffs with medical attention. Both dogs were emaciated, had sores on their elbows, and had cherry eye. Both also exhibited pain when they moved. Both were later treated for the cherry eye as well as ear and skin infections. And there was evidence that the mastiffs suffered unnecessary or unjustifiable physical pain as a result of the failure to provide medical attention.

We hold that the State provided sufficient evidence that Roy's conduct amounted to second degree animal cruelty under RCW 16.52.207(2)(a).

CONCLUSION

We affirm Roy's conviction of second degree animal cruelty.

MAXA, C.J.

We concur:

SUTTON, J.

GLASGOW, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 52278-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 7, 2020
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