

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

34900-1-II

STATE OF WASHINGTON
RESPONDENT,

VS.

LOWELL W. STAMBAUGH,
APPELLANT.

STATE OF WASHINGTON
DIVISION II
FILED
BY DEPUTY
FEB 21 2007
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SOUTH BEND, WA

APPEAL FROM PACIFIC COUNTY SUPERIOR COURT
HONORABLE MICHAEL J. SULLIVAN, JUDGE

BRIEF OF RESPONDENT

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A.

**STATE'S RESPONSE TO APPELLANT'S
ASSIGNMENTS OF ERROR**

1. Jury instruction nos. 10 and 11,¹ in combination with the entire packet of jury instructions, properly articulated the law with regard to the crime of animal cruelty in the first degree. Mr. Stambaugh incorrectly asserts (1) that his actions did not need to be necessary (2) that he was entitled to rely on facts as they appeared to him and (3) that the reasonableness of his actions must be viewed from his subjective standpoint.

2. Although the State's attorney committed misconduct when he asked Mr. Stambaugh whether other witnesses were lying, this misconduct does not rise to the level of reversible error. Mr. Stambaugh's trial counsel did not make a proper objection. In addition, this misconduct did not create a substantial likelihood that the verdict was affected by this error.

¹ Mr. Stambaugh refers to "Jury instructions 11 and 12." Appellant's Brief at 1. The relevant instructions at issue are in fact jury instruction nos. 10 and 11.

B.

STATEMENT OF THE CASE

In 2005, Mr. Lowell Stambaugh, the defendant, lived in rural Pacific County next to his tenants, the Church family. RP at 138, 142, 163-164, 240 (5/24/06 and 5/25/06). The Churches owned a cat named "Smokey." RP at 139, 163 (5/24/06). The Churches perceived "Smokey" as a very sweet cat. RP at 142, 165 (5/24/06). On the other hand, Mr. Stambaugh assumed that "Smokey" was an aggressive, feral cat. RP at 246-247 (5/25/06). During 2005, Mr. Stambaugh regularly observed "Smokey." Mr. Stambaugh was upset with "Smokey" because this cat would frequently enter Mr. Stambaugh's garage and intimidate Mr. Stambaugh's cats. RP at 241-242 (5/25/06). Mr. Stambaugh believed that "Smokey" was casing Mr. Stambaugh's property and claiming it as territory. RP at 241 (5/25/06).

On October 29, 2005, Mr. Stambaugh intentionally shot "Smokey" with a shotgun. RP at 109, 241 (5/24/06 and 5/25/06). Mr. Stambaugh decided to shoot "Smokey" because he believed that this cat was a threat to his animals.

RP at 269-270 (5/25/06). Mr. Stambaugh asserted that “Smokey” “needed to be gone as in permanently.” RP at 270 (5/25/06). Mr. Stambaugh referred to “Smokey” as “cocky.” RP at 257, 287-288 (5/25/06). Mr. Stambaugh also went out of his way to ensure that a limb on one of his trees would not be damaged in the process of shooting “Smokey.” As Mr. Stambaugh stated, “The cat I wished to be eliminated, not the tree or the limb.” RP at 287-288 (5/25/06). Additionally, Mr. Stambaugh stated, “This is my property. I will shoot whatever I want, wherever I want, whenever I want.” RP at 110 (5/24/06). See also RP at 268 (5/25/06).

Melanie Church found “Smokey” about 30 minutes after he was shot. RP at 152 (5/24/06). “Smokey” suffered traumatic injuries to one of his eyes and one of his ears. Id. He was bleeding out of his mouth. Id. “Smokey” died on the way to the veterinary hospital. Id.

Mr. Stambaugh was charged with one count of animal cruelty in the first degree and malicious mischief in the third degree (less than \$50.00). CP, 1. The jury found Mr.

Stambaugh guilty of animal cruelty in the first degree but acquitted him on the malicious mischief charge. CP, 55, 56.

C.

ARGUMENT

1. THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT WERE PROPER.

Mr. Stambaugh argues that jury instruction nos. 10 and 11 incorrectly state the law with regard to the crime of animal cruelty in the first degree. The State disagrees with Mr. Stambaugh's assertion.

To begin with, although Mr. Stambaugh's trial counsel objected to jury instruction nos. 10 and 11, RP at 320, 322-324 (5/25/06), the record does not indicate the exact language of the jury instructions that the defendant proposed.² Delineating precise instructions appears to be prerequisite for review. Thomas v. French, 99 Wash. 2d 95, 99, 659 P.2d 1097 (1983); State v. Anderson, 41 Wash. App.

² The superior court case file only contains the jury instructions given by the trial court. These instructions are reproduced in Appendix "A".

85, 109, 702 P.2d 481 (1985), rev'd on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987).

Because Mr. Stambaugh arguably did not properly preserve his objections to jury instruction nos. 10 and 11, he may be granted relief only if the issue involves a manifest error affecting a constitutional right. The proper approach for analyzing a constitutional error raised for the first time on appeal is as follows:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Bland, 128 Wash. App. 511, 515-516, 116 P.3d 428 (2005).

For the reasons listed below, the State does not believe that a constitutional issue exists, because the jury instructions which were given by the trial court did not confuse the jury nor misstate the law.

Generally speaking, Mr. Stambaugh seeks to analyze his defense of property claim as though it were a self-defense claim. Mr. Stambaugh begins his appellate argument by referring to RCW 9A.16.020, which pertains to defense of property. Appellant's Brief at 11. This statute, on its face, does not apply to the current case. The first sentence of this statute states: "The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: . . ." [emphasis added]. Since a cat, by definition, is not a person, this statute is not applicable when a person kills a cat belonging to someone else with defense of property as the purported justification. A statute which is plain and unambiguous must be interpreted by looking exclusively to the wording of the statute itself. State v. Cromwell, 157 Wash. 2d 529, 534, 140 P.3d 593 (2006).

Since Mr. Stambaugh directed his actions toward a cat and not a person, RCW 9A.16.020 cannot be used to bolster Mr. Stambaugh's contentions. Even if one accepts that "Smokey" the cat was a trespasser and a threat to injure animals belonging to Mr. Stambaugh, Appellant's Brief at 12, this assertion should not trigger an analysis under RCW 9A.16.020.

Because the WPICs do not contain specific jury instructions for the crime of animal cruelty in the first degree, the trial court properly fashioned its own instructions to address the relevant legal questions. The upshot of Mr. Stambaugh's criticisms of these instructions is that they do not adequately address the "subjective" nature of a defense of property claim. In other words, Mr. Stambaugh argues that what is relevant was his subjective belief about the dangerousness of "Smokey" the cat. Appellant's Brief at 12-16. To support this contention, Mr. Stambaugh cites WPIC 17.04. Appellant's Brief at 12-13. WPIC 17.04 reads as follows:

LAWFUL FORCE - ACTUAL DANGER
NOT NECESSARY

A person is entitled to act on appearances in defending [himself] [herself] [another], if that person believes in good faith and on reasonable grounds that [he] [she] [another] is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

Two observations need to be made. First, WPIC 17.04 pertains to self-defense -- not defense of property. Second, this WPIC is predicated upon a good faith belief that a person is in actual danger of great bodily harm. WPIC 2.04 defines great bodily harm as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." Nothing in the record of proceedings suggests that there were reasonable grounds for Mr. Stambaugh to believe that he was in actual danger of great bodily harm due to the actions of a cat. Thus, Mr. Stambaugh's citation to State v. Mullen, 141 Wash. 104, 250 P.2d 645 (1926) is inapposite.

Similarly, Mr. Stambaugh's reference to State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984), and the battered person syndrome is misplaced. Allery involved self-defense in the context of a homicide; the current case concerns defense of property. While the decision in Allery caused WPIC 16.02 (JUSTIFIABLE HOMICIDE – DEFENSE OF SELF AND OTHERS) and WPIC 17.02 (LAWFUL FORCE – DEFENSE OF SELF AND OTHERS) to be rewritten, both of these WPIC instructions do not pertain to a defense of property argument. Consequently, the holding of Allery should not be automatically extended to a defense of property claim. Cf. State v. Burk, 114 Wash. 370, 195 P. 16 (1921), which involved the killing of protected elk. The Burk court specifically noted that “a stronger showing would have to be made by one undertaking to justify his violation of the law in defense of property than he would be required to make in defense of his life.” Id. at 374.

In short, the reviewing court should look to Burk and its progeny to determine whether the trial court properly instructed the jury with regard to defense of property in an

animal cruelty case. See, e.g., State v. Vander Houwen, 128 Wash. App. 806, 115 P.3d 399 (2005) and State v. Bailey, 77 Wash. App. 732, 893 P.2d 681 (1995). This line of cases acknowledges that the killing of an animal is lawful, if such killing is reasonably necessary to protect one's property. These cases do not require the trier of fact to consider whether the defendant's actions were reasonably necessary from the "subjective" perspective of the defendant. Mr. Stambaugh would like the reviewing court to hold that the law relating to self-defense should apply to an animal cruelty case where defense of property is at issue. The State finds no support in case law for this proposition.

On the other hand, Burk and its progeny allow the trial court the discretion to give jury instructions that provide a legal justification for killing an animal when such act is reasonably necessary to protect one's property. Jury instruction nos. 10 and 11, in combination with the entire packet of instructions, allowed each side to argue its theory of the case. Taken together, these instructions did not mislead the jury nor misstate the law. See State v. Stevens,

158 Wash. 2d 304, 308, 143 P.3d 817 (2006). Therefore, Mr. Stambaugh's arguments concerning jury instruction nos. 10 and 11 should be rejected. ³

2. MR. STAMBAUGH'S CONVICTION SHOULD NOT BE REVERSED BASED ON PROSECUTORIAL MISCONDUCT.

a. Mr. Stambaugh's trial counsel did not properly object when the State's attorney asked the defendant whether previous witnesses were lying.

The State agrees with Mr. Stambaugh's assertion that a litigant should not ask a witness to comment on the veracity of another witness. Appellant's Brief at 16. However, an attorney's improper remarks should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wash. 2d 24, 85-86,

³ As an aside, Mr. Stambaugh argues at 15-16 of Appellant's Brief that jury instruction no. 11 is ambiguous because it "required the jury to determine whether Mr. Stambaugh's actions were 'reasonable and necessary considering all the surrounding circumstances or events'." Id. at 15. Mr. Stambaugh asserts that it is unclear whether the phrase "considering all the surrounding circumstances or events" modifies only the word "necessary" or whether this phrase modifies both the words "reasonable" and "necessary." This argument is without merit. Any sensible construction of this sentence would interpret the phrase in question as modifying both the words "reasonable" and "necessary." If the trial court had wanted this phrase to modify only the word "necessary," a comma would have been placed after the word "reasonable."

882 P.2d 747 (1994). A failure to timely object when an improper comment is made strongly suggests that the conduct complained of did not appear critically prejudicial to the defendant in the context of the trial. State v. Swan, 114 Wash. 2d 613, 661, 790 P.2d 610 (1990).

Where prosecutorial misconduct is claimed, the defense bears the burden of demonstrating the impropriety of the comments made by the State's attorney, as well as the prejudicial effect. State v. Brown, 132 Wash. 2d 529, 561, 940 P.2d 546 (1997). Absent a proper objection, a request for a curative instruction, or a motion for mistrial, the issue of misconduct is waived unless the misconduct was so flagrant or ill-intentioned that the prejudice could not have been cured by an instruction, provided that a constitutional right is not affected. State v. Echevarria, 71 Wash. App. 595, 597, 860 P.2d 420 (1993). If a constitutional right is implicated, the issue of misconduct is waived unless the error constitutes a "manifest error affecting a constitutional right." State v. Klok, 99 Wash. App. 81, 83, 992 P.2d 1039 (2000).

In this instance, the State's attorney asked Mr. Stambaugh if previous witnesses (Melanie and Lori Church) were lying. RP at 291-292 (5/25/06). Mr. Stambaugh's trial counsel made no objection. Subsequently, the State's attorney again asked Mr. Stambaugh if Melanie Church was lying. The Report of Proceedings reads as follows:

Q. (By Mr. Anderson) [State's Attorney]

Your testimony is on the day that you shot Lori and Melanie Church's cat and her son's cat, you testified to something different than Melanie did. You said that she said, you know, "*Why didn't you just shoo it away*", or something to that effect, and you said--

A. Exactly.

Q. -- because, to quote you, "*Because it's ineffectual*", and then you laughed.

A. I -- I made the whole statement as, "*Because it's ineffectual.*"

Q. And then you - -

A. It wasn't a laugh, it was like, incredible statement you made.

Q. Did you laugh at her after you shot her cat that day?

A. No. That wasn't - - it - -

Q. You didn't. So she's lying about that too; is that what you're saying?

A. It's a matter of characterization, yes.

Q. Are you saying she's lying about that now too?

MR. TURNER [Mr. Stambaugh's attorney]:
Objection, argumentative.

MR. ANDERSON: It's a simple question,
Your Honor.

A. Uh, yes.

THE COURT: Excuse me, - -

A. Yes. Yes, I'll say she lied, - -

THE COURT: Excuse me. Excuse - -

A. -- or at least recharacterized what I said

THE COURT: Excuse me. Be - -

A. -- what I - - how I said it.

THE COURT: Mr. Stambaugh, when I
start talking, - -

THE WITNESS: I'm sorry.

THE COURT: - - you stop talking.

THE WITNESS: Okay.

THE COURT: When I start talking, the attorneys stop talking. That's the way it works.

I'm going to overrule the objection. I'm going to allow the answer that Mr. Stambaugh gave.

RP at 293-295 (5/25/06).

Although the quoted passage above shows that Mr. Stambaugh's trial counsel objected to the "liar" question by the prosecuting attorney, the basis of the objection was "argumentative." The proper basis for this objection would have been prosecutorial misconduct. Consequently, because Mr. Stambaugh's trial counsel did not lodge the proper objection, the trial court correctly overruled the objection. In addition, Mr. Stambaugh's trial counsel never requested a curative instruction nor made a motion for a mistrial based on this line of questioning. Hence, the State asserts that the issue of misconduct was waived by Mr. Stambaugh because the misconduct was not "so flagrant and ill-intentioned as to create prejudice incurable by instruction." Klok, 99 Wash. App. at 84. Further, the prosecutor's questions do not

constitute a manifest error affecting a constitutional right.

Id. at 83.

b. The improper questions which were posed to Mr. Stambaugh by the State's attorney do not constitute prejudice.

Even if one assumes that Mr. Stambaugh's trial counsel made a proper objection, Mr. Stambaugh cannot prevail on the issue of misconduct, unless he demonstrates that he was prejudiced by the improper questions asked by the prosecutor. Prejudice is established only when there is a substantial likelihood the instances of misconduct affected the jury's verdict. State v. Pirtle, 127 Wash. 2d 628, 672, 904 P.2d 245 (1995). Mr. Stambaugh asserts that the misconduct was not harmless, i.e., it affected the outcome of the trial. This contention is backed up with little analysis. The first "liar" question, RP at 291-292 (5/25/06), was generic in nature. The second "liar" question, RP at 293-295 (5/25/06), pertained to whether Mr. Stambaugh had laughed. Mr. Stambaugh acknowledges that these questions were of marginal relevance to the outcome of the case. Appellant's Brief at 18-19.

While a jury theoretically could have thought less of Mr. Stambaugh because he disagreed with the testimony of Melanie and Lori Church, it is difficult to infer that there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Mr. Stambaugh provided the jury with a long-winded recitation of what happened in this case. RP at 240-299 (5/25/06). He stated inter alia that he intentionally shot "Smokey" the cat. RP at 241, 257-259 (5/25/06). Mr. Stambaugh also righteously admitted that he was justified in "eliminating" this "cocky" cat. RP at 257, 287-288 (5/25/06).

Given Mr. Stambaugh's admissions, there is overwhelming evidence to support the jury's verdict. Mr. Stambaugh presumes prejudice, but he has not demonstrated a substantial likelihood that the prosecutor's misconduct changed the outcome of the trial. The presumption that the misconduct was not harmless is but a bat of the law, "flitting in the twilight but disappearing in the sunshine of actual facts." Bradley v. S.L. Savidge, Inc., 13 Wash. 2d 28, 38, 123 P.2d 780 (1942).

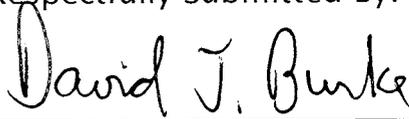
A cursory examination of the actual facts of this case reveals that Mr. Stambaugh did not have a reasonable basis for killing "Smokey" the cat. Mr. Stambaugh could have made greater efforts to talk to the Churches to see if they could help alleviate Mr. Stambaugh's concerns. Instead, it is abundantly clear that Mr. Stambaugh took matters into his own hands and carried out the "final solution," because he perceived "Smokey" the cat as a major irritant. Against this backdrop, the prosecutorial misconduct which occurred was an insignificant piece of the overall mosaic that was presented to the jury. Mr. Stambaugh's argument that he is entitled to a new trial based on prosecutorial misconduct should be rejected.

D.

CONCLUSION

For the reasons listed above, the relief sought by Mr. Stambaugh should be denied. Mr. Stambaugh's conviction for animal cruelty in the first degree should be upheld.

Respectfully Submitted By:

A handwritten signature in cursive script that reads "David J. Burke". The signature is written in black ink and is positioned above a horizontal line.

DAVID J. BURKE - WSBA #16163
PACIFIC COUNTY PROSECUTOR

FILED

2006 MAY 25 PM 3: 29

CLERK OF SUPERIOR COURT
PACIFIC COUNTY, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

[Handwritten signature]

STATE OF WASHINGTON,)
)
) Plaintiff,)
)
) vs.)
)
) **LOWELL W. STAMBAUGH,**)
)
) Defendant.)
 _____)

NO. **05-1-00300-4**

COURT'S INSTRUCTIONS

DATE: 5/25/06

Michael J. Sullivan

JUDGE

HQ

APPENDIX 'A'

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I

have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony of the witnesses. The law is contained in my instructions to you. You must disregard any

remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberation, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To

assure that all parties received a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. This plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, their reasoning together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

A person is guilty of Animal Cruelty in the First Degree when he, except as authorized by law, intentionally causes physical injury to an animal.

INSTRUCTION NO. 7

Physical injury means physical pain or injury, illness, or an impairment of physical condition.

INSTRUCTION NO. 8

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 9

To convict the defendant of the crime of animal cruelty in the first degree, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about October 29, 2005, the defendant intentionally caused physical injury to an animal; and
- (2) That the defendant acted without legal authority; and
- (3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of 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.

INSTRUCTION NO. 10

A person acts with legal authority where there is reasonable and apparent necessity to perform that act.

INSTRUCTION NO. 11

Every person has a natural right to defend and protect his animals from injury or destruction by other animals if such defense is reasonable and necessary considering all the surrounding circumstances or events, both before and during such defense.

INSTRUCTION NO. 12

A person commits the misdemeanor of malicious mischief in the third degree when he knowingly and maliciously causes physical damage to the property of another in an amount not exceeding \$50.00.

INSTRUCTION NO. 13

A cat is property.

INSTRUCTION NO. 14

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 15

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

INSTRUCTION NO. 16

To convict the defendant of the misdemeanor of malicious mischief in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 29, 2005, the defendant caused physical damage to the property of another in an amount not exceeding \$50.00;
- (2) That the defendant acted knowingly and maliciously; and
- (3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of 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.

INSTRUCTION NO. 17

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with you fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 18

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and a reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted into evidence, these instructions, and two verdict forms for recording your verdict.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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

STATE OF WASHINGTON,)
)
 Respondent.)
)
 vs.)
)
 LOWELL W. STAMBAUGH,)
)
 Petitioner.)
 _____)

NO 34900-1-II
AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

VICKI FLEMETIS, being first duly sworn on oath, deposes and
says:

I am the Office Administrator for the Pacific County Prosecutor.

That on FEBRUARY 21, 2007, I mailed two copies of Respondent's
Brief to the Attorney for Petitioner at the following address:

THOMAS E. WEAVER
ATTORNEY AT LAW
P.O. BOX 1056
BREMERTON, WA 98337

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362


VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 21ST day of
FEBRUARY, 2007.


NOTARY PUBLIC in and for the State
Of Washington, residing at Raymond