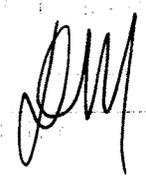


No. 38669-1-II

COURT OF APPEALS, DIVISION II BY 

STATE OF WASHINGTON,

Respondent

vs.

RYAN C. JACKSON,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Anne Hirsch, Judge

Cause No. 08-1-00521-0

PATRICIA A. PETHICK, WSBA NO. 21324
Attorney for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

P.M. 7-6-2009

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT.....	8
(1) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO ORDER AN EVIDENTIARY HEARING BASED ON JURY MISCONDUCT WHERE IT APPEARS THAT A JUROR VIOLATED HER OATH AND DISCUSSED THE CASE WITH A NON-JUROR AND THAT PERSON MAY WELL HAVE HAD A PERSONAL BIAS AGAINST JACKSON SO AS TO PREJUDICE THE JUROR AGAINST JACKSON.....	8
(2) JACKSON WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO PROPERLY SUPPORT THE MOTION FOR A NEW TRIAL BASED ON JUROR MISCONDUCT AND TO DO SO IN A TIMELY MANNER.....	12
(3) THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF A 2007 COMPLAINT TO ANIMAL SERVICES AGAINST JACKSON UNDER THE KNOWLEDGE EXCEPTION TO ER 404(b) WHERE THE EVIDENCE WAS IRRELEVANT TO THE CRIMES CHARGED AND UNFAIRLY PREJUDICIAL	14
(4) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT JACKSON WAS GUILTY OF TWO COUNTS OF ANIMAL CRUELTY IN THE FIRST DEGREE (COUNTS I AND II) AND ONE COUNT OF MISDEMEANOR FAILURE TO PROVIDE HUMANE CARE (COUNT III).....	18
E. CONCLUSION	22

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>State v. Barnes</u> , 85 Wn. App. 638, 932 P.2d 669, <i>review denied</i> , 133 Wn.2d 1021, 948 P.2d 389 (1997).....	9
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997)	17
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	17
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	18
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	18
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994).....	12
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	12
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995)	12
<u>State v. Hawkins</u> , 72 Wn.2d 565, 434 P.2d 584 (1967).....	9, 11
<u>State v. Kelly</u> , 102 Wn.2d 188, 685 P.2d 564 (1984).....	14
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <i>aff'd</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	13
<u>State v. Murphy</u> , 44 Wn. App. 290, 721 P.2d 20 (1986)	9
<u>State v. Oughton</u> , 26 Wn. App. 74, 612 P.2d 812 (1980).....	17
<u>State v. Pogue</u> , 104 Wn. App. 981, 17 P.3d 1272 (2001).....	16
<u>State v. Rose</u> , 43 Wn.2d 553, 262 P.2d 194 (1953).....	9, 11
<u>State v. Saraceno</u> , 23 Wn. App. 473, 596 P.2d 297, <i>review denied</i> , 92 Wn.2d 1030 (1979).....	9

<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	18
<u>State v. Robtoy</u> , 98 Wn.2d 30, 653 P.2d 284 (1982).....	14
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	13
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981)	15
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972)	12
<u>Federal Cases</u>	
<u>Bayamoglu v. Estelle</u> , 806 F.2d 880 (9 th Cir. 1986).....	8
<u>Duncan v. Louisiana</u> , 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).....	8
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979).....	18
<u>Remmer v. United States</u> , 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954).....	
<u>Turner v. Louisiana</u> , 379 U.S. 466, 13 L. Ed. 2d 424, 85 S. Ct. 546 (1965).....	8
<u>Constitution</u>	
Art. 1, sec. 22 (amend. 10) of the Washington Constitution.....	8
U.S. Const. Amend. 6	8
<u>Court Rules</u>	
CrR 3.5.....	2
CrR 3.6.....	2
ER 401	14

ER 402	14
ER 403	14, 16
ER 404(b).....	2, 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to order an evidentiary hearing where Jackson established the possibility of juror misconduct at the motion for arrest of judgment.
2. The trial court erred in allowing Jackson to be represented by counsel who provided ineffective assistance in failing to properly establish the juror misconduct basis for the motion for new trial and to do so in a timely manner.
3. The trial court erred in admitting testimony regarding a 2007 complaint against Jackson made to animal services under the knowledge exception to ER 404(b) where the evidence was not relevant to the crimes charged and was unfairly prejudicial.
4. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to prove beyond a reasonable doubt that Jackson was guilty of two counts of animal cruelty in the first degree and one count of misdemeanor failure to provide humane care.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to order an evidentiary hearing where Jackson established the possibility of juror misconduct at the motion for arrest of judgment? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Jackson to be represented by counsel who provided ineffective assistance in failing to properly establish the juror misconduct basis for the motion for new trial and to do so in a timely manner? [Assignment of Error No. 2].
3. Whether the trial court erred in admitting testimony regarding a 2007 complaint against Jackson made to animal services under the knowledge exception to ER 404(b) where the evidence was not relevant to the crimes charged and was unfairly prejudicial? [Assignment of Error No. 3].

4. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Jackson was guilty of two counts of animal cruelty in the first degree (Counts I and II) and one count of misdemeanor failure to provide humane care (Count III)? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Ryan C. Jackson (Jackson) was charged by second amended information filed in Thurston County Superior Court with two counts of animal cruelty in the first degree (Count I involving a dog named Nikki and Count II involving a dog named Ginger), and two misdemeanor counts of failure to provide humane care (Count III involving a gecko and Count IV involving a cat). [CP 24-25].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. However prior to trial, the court heard a motion wherein the State sought to admit ER 404(b) evidence of Jackson's contact with animal control officers occurring a year before the current charges arose which resulted only in a verbal warning. [CP 26-33; 7-7-08 RP 4-30]. After hearing the State's argument, and considering Jackson's argument in opposition to the evidence, the court, after balancing the probative value against the prejudice, allowed the evidence to be admitted holding that the evidence was admissible under the ER 404(b) exception of knowledge. [7-7-08 RP 27-30].

Jackson was tried by a jury, the Honorable Anne Hirsch presiding. Jackson had no objections and took no exceptions to the court's instructions. [Vol. VII RP 836-837; Vol. VIII 843-845]. Prior to submitting the case to the jury, Jackson moved and the court granted dismissal of one of the counts of failure to provide humane care (Count IV) involving Jackson's cat. [Vol. IV RP 508-524]. The jury found Jackson guilty of the remaining counts—two counts of animal cruelty in the first degree (Counts I and II) and one count of misdemeanor failure to provide humane care (Count III). [CP 86, 87, 88; 9-29-08 RP 5-8].

Prior to sentencing, Jackson made a motion for a new trial outside the prescribed 10-day time limit for making such motions based on potential juror misconduct including a request for an evidentiary hearing to establish the juror misconduct, which the court denied. [CP 89-92, 93-103, 107-108, 109-110; Supp. CP 124-126; 10-23-08 RP 3-6; 11-18-08 RP 3-20]. The court then sentenced Jackson to standard range sentence of 90-days on Count I, a standard range sentence of 90-days on Count II, and 90-days on Count III (a misdemeanor) all of which running concurrently for a total sentence of 3-months including the fact that this sentence could be served in partial confinement on work release or home monitoring. [CP 111-119; 11-18-08 RP 31-38].

A timely notice of appeal was filed on December 15, 2008. [CP 120]. This appeal follows.

2. Facts

On March 4, 2008, Donna Ray (Ray), Jackson's neighbor was talking to another neighbor while he was putting up a satellite dish when she looked over into Jackson's backyard and saw his two dogs, Nikki a Shepard mix and Ginger a beagle mix, both of whom looked extremely thin. [Vol. II RP 104-105]. Nikki was foaming at the mouth/vomiting and Ginger was having trouble standing. [Vol. II RP 104-105, 113-114]. Ray called animal services and while she waited for animal services to arrive she got her ex-husband, Ray Leimkuehler, and her roommate, Richard Carstairs, to go with her into Jackson's backyard to check on the dogs. [Vol. II RP 105, 114, 157-164, 176-180]. When the three got into the yard it appeared that Ginger had disappeared, but just after animal services arrived Ginger was seen in Jackson's house trying to open a Top Ramen package having got into the house through a cat door. [Vol. II RP 115, 191]. Ray went home and got food water for the two dogs, which Ginger ate but Nikki did not—all Ray could do for Nikki was dampen her mouth. [Vol. II RP 115-116]. The kennel in Jackson's yard was covered in dog feces and the dog bowls were empty of food and water. [Vol. II RP 106, 157, 188-190, 244-245].

Upon arriving, animal services officers assessed the condition of the two dogs both of which were 1 on a scale of 1 through 9 with 5 being optimum, less than five underweight and over five overweight. [Vol. II RP 237-244, 248-249; Vol. IV RP 374]. The dogs were taken to a vet for care. [Vol. II RP 213, 251].

Dr. Karen Hook, a vet, determined that Nikki had a twisted bowel (volvulus) requiring surgery to correct, but given her condition she would not survive surgery so animal services authorized euthanizing Nikki. [Vol. II RP 251-252; Vol. IV RP 435-442]. A necropsy confirmed Nikki's twisted bowel and that she possibly suffered from hyperplastic growth on the adrenal glands (Cushing's disease). [Vol. IV RP 442-457, 486-488]. Ginger was bathed and given food with the result that since animal services took her to the vet to the time of trial Ginger had gained a significant amount of weight. [Vol. II RP 279-285; Vol. III RP 292; Vol. IV RP 458-473]. Animal services officer Erika Quinn-Ellenbecker and Dr. Hook testified that the emaciated condition in which the dogs were found could be caused by a lack of food over a period of time and that the dogs would have been in pain. [Vol. III RP 301-302; Vol. IV RP 456-457].

A year earlier, March 30, 2007, Ray had called animal services to complain that Jackson's dog kennel was covered in dog feces; she noticed

nothing wrong with the two dogs. [Vol. II RP 101-103, 155]. Ray's complaint to animal services resulted in a verbal warning and directions to clean the kennel, which Jackson did. [Vol. II RP 185-187].

On April 1, 2008, animal services took into care from Jackson's home a slightly underweight cat and a more severely underweight gecko. [Vol. III RP 300; Vol. IV RP 374-385-386]. Dr. Noreen Jeremiah, a vet, assessed the condition of the gecko as 1.5 on a scale of 1 through 5 with 5 being optimum. [Vol. IV RP 394-395]. Dr. Jeremiah also noted that the gecko was discolored with a thin tail as well as being severely malnourished all of which were indicators of some health issues. [Vol. IV RP 396-403]. After a couple of months since animal services took the gecko to the vet, the gecko has returned to normal coloring and weight. [Vol. IV RP 405-407].

Jackson testified in his own defense. He explained that he did in fact feed his dogs—once a day at night after he got home from work. [Vol. VI RP 646-650, 654-658]. Receipts demonstrating his regular purchase of dog food and photos of bags of dog food were produced and introduced into evidence. [Vol. VI RP 654-655, 659-664; Vol. VII RP 828-834]. Jackson explained that he cleaned the dogs' kennel once a week after his children's weekend visitation, but admitted that he had not

had the time to do so the weekend before March 4th as his children were with him beyond their usual visitation. [Vol. VI RP 673-674].

Jackson testified that Nikki had always been a thin dog and that he hadn't noticed any drastic change in her. [Vol. VI RP 664]. Jackson also testified that Ginger's weight fluctuated during the year and that she would fatten up over the winter but come spring she would rapidly lose weight. [Vol. VI RP 664-665]. He admitted that he had become concerned by Ginger's weight loss, which he attributed to worms, and had scheduled a vet appointment for her on Friday (the first appointment he could get subsequently canceling it to take advantage of the vet's Saturday drop-in clinic) but animal services took Ginger the Tuesday before the appointment. [Vol. VI RP 666-672; Vol. VII RP 751-753]. He also detailed the care that he took of gecko including researching on the internet about its care, obtaining the necessary cage, humidifier, lighting, and food (crickets—with a special “dust” for extra nutrients). [Vol. VI RP 6617-620, 624-635].

Dr. Gilbert Mabrey, a vet, testified on behalf of Jackson. After reviewing the necropsy report, he concluded that Nikki did in fact have volvulus (twisted bowel) but that painful condition can occur in a very short period of time. [Vol. VII RP 777-786]. He also testified that Nikki suffered from Cushing's disease based on necropsy report finding of

hyperplastic growth on Nikki's adrenal glands, which disease can result in an extremely thin dog. [Vol. VII RP 777-786]. Dr. Mabrey, after reviewing the vet reports on Ginger, noted that Ginger had anemia, but that it didn't immediately correct itself upon being fed by the vet as would be expected if the anemia was caused by Ginger not being fed by Jackson. [Vol. VII RP 786-795].

D. ARGUMENT

- (1) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO ORDER AN EVIDENTIARY HEARING BASED ON JURY MISCONDUCT WHERE IT APPEARS THAT A JUROR VIOLATED HER OATH AND DISCUSSED THE CASE WITH A NON-JUROR AND THAT PERSON MAY WELL HAVE HAD A PERSONAL BIAS AGAINST JACKSON SO AS TO PREJUDICE THE JUROR AGAINST JACKSON.

The United States and Washington Constitutions entitle a criminal defendant the right to a trial by an impartial jury. U.S. Const. Amend. 6; Art. 1, sec. 22 (amend. 10); *See Duncan v. Louisiana*, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). One guarantee of impartiality is that the jury is constrained to determine factual issues only on the basis of evidence produced in open court. *Bayamoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986); *See Turner v. Louisiana*, 379 U.S. 466, 13 L. Ed. 2d 424, 85 S. Ct. 546, 549-550 (1965).

Communications by or with jurors constitutes misconduct. State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 20 (1986). A party who asserts juror misconduct bears the burden of showing it occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967); State v. Barnes, 85 Wn. App. 638, 668, 932 P.2d 669, *review denied*, 133 Wn.2d 1021, 948 P.2d 389 (1997). Once established, it gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954); State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953). However, this presumption is not conclusive and may be overcome if the trial court determines such misconduct was harmless to the defendant. State v. Saraceno, 23 Wn. App. 473, 475, 596 P.2d 297, *review denied*, 92 Wn.2d 1030 (1979). Moreover, given the seriousness of juror misconduct even if the affidavits in support of a motion for a new trial based on juror misconduct are not sufficient, the court retains the power, in its discretion, to order an evidentiary hearing on the matter. *See State v. Hawkins*, 72 Wn.2d at 570.

In the instant case, after the verdict was entered it came to the attention of Jackson's attorney that a juror in Jackson's case had been discussing the case with her male hairdresser. [CP 104-106, 109-110]. According to the information provided, the male hairdresser had reason to

feel a bias against Jackson in that Jackson had had a relationship with the hairdresser's estranged wife with whom the hairdresser had since reconciled. [CP 104-106, 109-110]. Jackson's attorney filed a motion for new trial based on potential juror misconduct along with a request that the court allow for additional time to investigate the matter and/or hold an evidentiary hearing. [CP 89-92, 104-106, 107; Supp. CP 124-126]. The State opposed Jackson's attorney's motion and provided the trial court with an affidavit from the bailiff stating that the bailiff had never seen nor been informed of any juror improperly discussing the case. [CP 93-101, 102-103]. However, given the allegation of potential juror misconduct at the juror's hairdresser, the bailiff would be unaware of the potential juror misconduct alleged.

On November 18, 2008, the matter came before the court for hearing on Jackson's attorney's motion. [11-18-08 RP 3-20]. After hearing argument from Jackson's attorney, which argument included repeated requests for an evidentiary hearing on the potential juror misconduct matter [11-18-08 RP 8, 12, 13, 14], and argument from the State, the trial court, while recognizing the significance of the issue presented "to the integrity of the judicial and the trial system" and "the integrity of the whole process" [11-18-08 RP 18, 19], denied Jackson's motion because the affidavits produced did not speak to specific dates and

contained multiple levels of hearsay and innuendo. [11-18-08 RP 19].

The court ultimately concluded, “I think prejudice would have to be presumed if misconduct was shown, but it wasn’t and it wasn’t anywhere near there. Frankly, it is my feeling that this—all of the issues in this case are going to be addressed by the Court of Appeals, and we need to be finished at the trial level.” [11-18-08 RP 20].

In making this ruling the trial court committed reversible error in that the court failed to recognize (despite Jackson’s attorney’s repeated requests for an evidentiary hearing) that it had the power to order such a hearing to ensure “the integrity of the whole process.” *See State v. Hawkins, supra*. If Jackson’s allegations are true that the juror discussed the case with others prior to the verdict, then prejudice is presumed and the State bears the burden of proving such discussions were harmless. *See State v. Rose, supra*. In addition, if Jackson’s allegations are true that the juror discussed the case with someone who was biased against Jackson who could have influenced the juror, the prejudice to Jackson was compounded and the State would have to bear an even heavier burden to establish that these actions were harmless to Jackson. In any event because it cannot be established on this record, based on the trial court’s refusal to order an evidentiary hearing and the serious nature of an allegation of juror misconduct to “the integrity of the judicial and the trial

system” and Jackson’s constitutional right to a fair trial by an impartial jury, this court should remand for an evidentiary to determine whether juror misconduct in fact took place.

(2) JACKSON WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO PROPERLY SUPPORT THE MOTION FOR A NEW TRIAL BASED ON JUROR MISCONDUCT AND TO DO SO IN A TIMELY MANNER.¹

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both

¹ While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the errors claimed and argued above by failing to properly support the motion for new trial based on potential juror misconduct in a timely manner, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to timely obtain the necessary support for the motion for new trial based on potential juror misconduct though counsel's affidavit does indicate that counsel was unavailable during a portion of the time between verdict and sentencing [Supp. CP 124-126], when this information would have supported the motion for new trial and resulted in the granting of the motion.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that but for counsel's failure to timely obtain support for the motion for new trial based on potential juror misconduct, the trial court

was able to summarily deny the motion without any consideration of the substance of the serious issue raised.

- (3) THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF A 2007 COMPLAINT TO ANIMAL SERVICES AGAINST JACKSON UNDER THE KNOWLEDGE EXCEPTION TO ER 404(b) WHERE THE EVIDENCE WAS IRRELEVANT TO THE CRIMES CHARGED AND UNFAIRLY PREJUDICIAL.

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403.

The admission of other crimes, wrongs or acts is governed by ER 404 (b). Under the rule, “(e)vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401s; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Additionally, evidence admissible under ER 404(b) requires proof by a preponderance of the

evidence of the commission of the alleged wrong or act and the defendant's connection to it. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Here, the State elicited testimony that on March 30, 2007, a complaint against Jackson was made by his neighbor Ray to animal services because his dog kennel was full of dog feces. [Vol. II RP 101-103, 155, 185-187]. The complaint resulted in only a verbal warning with no follow-up. [Vol. II RP 101-103, 155, 185-187]. There was no allegation that the dogs were not being fed, in fact, Ray testified the dogs were looked fine. [Vol. II RP 101-103, 155, 185-187]. The State argued that the admission of this evidence was proper to show Jackson's knowledge as to the current charges of animal cruelty in the first degree (Counts I and II), and the court agreed allowing for the admission of this testimony. [CP 26-33; 7-7-08 RP 4-30].

This rationale is unpersuasive. First, the evidence is not relevant in that Jackson was charged with animal cruelty in the first degree and as charged coupled with the court's instructions on Counts I and II [CP 24-25, 51, 52], in order for Jackson to be found guilty it was necessary that he "starve or dehydrate" the animals not that their kennel was unclean. The evidence, regarding the 2007 complaint, is not relevant to show any element of the crimes for which Jackson was charged—it does not

establish that because Jackson failed to clean the dogs' kennel a year ago that he starved them in 2008. Any claim of relevancy as contrasted to the prejudicial effect fails when considering that this testimony only served to establish in the jury's mind that because Jackson was not caring for his dogs properly in 2007, he must have starved them in 2008. Despite any claim to the contrary, this evidence merely established propensity with any claimed probative value being outweighed by danger of unfair prejudice under ER 403.

If the only logical relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). For example, in Pogue's trial for possession of cocaine, the court allowed the State to elicit Pogue's admission that he had possessed cocaine in the past on the issue of knowledge and to rebut his assertion that the police had planted the drugs. The conviction was reversed. The appellate court held:

The only logical relevance of (Pogue's) prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Pogue, 104 Wn. App. at 985.

Similarly, here, the only logical relevancy of the evidence at issue was through a propensity argument; i.e., since Jackson failed to clean his dogs' kennel a year ago he must have starved the dogs in 2008.

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence the jury would have acquitted Jackson given his testimony regarding the feeding of his dogs, coupled with Dr. Mabrey's testimony regarding the condition of the two elderly dogs, and neighbors who testified to Jackson feeding the dogs and seeing nothing unusual in their condition.

The prejudice resulting from the introduction of this evidence denied Jackson his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980). The evidence materially affected the outcome and the error in admitting this evidence was of major significance and not harmless.

- (4) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT JACKSON WAS GUILTY OF TWO COUNTS OF ANIMAL CRUELTY IN THE FIRST DEGREE (COUNTS I AND II) AND ONE COUNT OF MISDEMEANOR FAILURE TO PROVIDE HUMANE CARE (COUNT III).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Jackson was charged with and convicted in Counts I and II of animal cruelty in the first degree. [CP 24-25, 87, 88]. As instructed by the court in Instructions Nos. 8 (with regard to Nikki) and 9 (with regard

to Ginger), the State bore the burden of proving beyond a reasonable doubt the following:

- 1) That on or about March 4, 2005, the defendant did, with criminal negligence:
 - a.) Starve or dehydrate an animal, and, as a result cause:
 - b.) Substantial and unjustifiable pain that extended for a period of time sufficient to cause considerable suffering, or
 - c.) Death, and
- 2.) The acts occurred in the State of Washington.

[CP 51, 52].

The State has failed to present sufficient evidence to prove beyond a reasonable doubt that Jackson starved either dog or that he caused either dog “substantial and unjustifiable pain extending over a period of time to cause considerable suffering” regarding Counts I and II.

The sum of the evidence to prove that Jackson committed these crimes was the fact that the dogs were emaciated and rated as 1 on a scale of 1 through 9 when Ray called animal services and the dogs were taken into care, and the opinion of the vets who examined the dogs that they were emaciated—Nikki having to be euthanized due to volvulus (a twisted bowel) and Ginger gaining weight after being taken into care.

However, with regard to both dogs, Jackson testified that he did in fact feed them (once a day when he got home from work) as evidenced by the fact that he had dog food for them at his home and receipts showing that he had continuously purchased dog food for them. Jackson did not starve these dogs as required in order for him to be found guilty of animal cruelty in the first degree. In addition, Jackson also testified that Nikki was always thin and that Ginger would gain and lose weight during the year—in fact Jackson had noted Ginger’s apparent drastic weight loss to the point that he had scheduled a vet appointment for her just prior to animal services taking the dogs. None of which was disputed by any evidence presented by the State. These are not the actions of a dog owner who is not feeding his animals or committing animal cruelty in the first degree. Moreover, Dr. Mabrey, who testified on Jackson’s behalf, indicated that Nikki’s volvulus could have occurred suddenly having nothing to do with Jackson’s feeding habits, but more importantly that Nikki was probably suffering from Cushing’s disease which could explain her extreme thinness. With regard to Ginger, Dr. Mabrey noted that she was anemic and that if Jackson had not been feeding her that as soon as she was taken into care her anemia should have corrected itself almost immediately, which it had not according the records he reviewed. More importantly, while there was testimony that Nikki was in pain from her

volvulus (a condition whose onset could be immediate) and that Ginger was probably in pain too given her thinness, there was no testimony that this pain was “substantial and unjustifiable extending over a period of time to cause considerable suffering”—a necessary element of the crimes for which Jackson was charged and convicted particularly given the contradictory evidence that Jackson did in fact care for these two dogs. Given the totality of the record available, it cannot be said that Jackson committed the crimes of animal cruelty in the first degree beyond a reasonable doubt regarding either Nikki (Count I) or Ginger (Count II). This court should reverse and dismiss Jackson’s convictions on Count I and II.

Jackson was also charged and convicted in Count III of failure to provide humane care (a misdemeanor) to a gecko. [CP 24-25]. As instructed by the court in Instruction No. 12, in order to find Jackson guilty of this crime the State needed to prove beyond a reasonable doubt:

- 1.) That on or about April 1, 2008, the defendant:
 - a.) harbored, kept, possessed, maintained or had temporary custody of a pet animal to wit: a GECKO; and
 - b.) failed to provide necessary food, water, shelter, rest, sanitation, ventilation, space and medical attention in a way that the health and safety of the animal was not [sic] imperiled; and

c.) The acts occurred in Thurston County, Washington.
[CP 55].

The sum of the State's evidence to prove this misdemeanor count was the fact that the gecko was taken from Jackson's care and determined by Dr. Jeremiah to be severely malnourished (1.5 on a scale of 1 to 5) as evidenced by its thinness, color, and size of its tail coupled with the fact that after of few months in the care of animal services and the gecko was thriving. However, these facts ignore the care that Jackson had given the gecko including researching on the internet about its care, obtaining the necessary cage, humidifier, lighting, and food (crickets—with a special "dust" for extra nutrients). [Vol. VI RP 6617-620, 624-635]. That the gecko did not thrive in Jackson's care is not a criminal offense—he had done everything necessary to provide humane care. This court should reverse and dismiss Jackson's conviction on this count.

E. CONCLUSION

Based on the above, Jackson respectfully requests this court to reverse and dismiss his convictions and/or remand for an evidentiary hearing regarding potential juror misconduct.

DATED this 6th day of July 2009.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 6th day of July 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Ryan C. Jackson
DOC# 325126
c/o Department of Corrections Probation and Parole
3700 Martin Way, Ste. 104
Olympia, WA 98504

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

Signed at Tacoma, Washington this 6th day of July 2009.

Patricia A. Pethick
Patricia A. Pethick

BY: 
DATE: _____
TITLE: _____