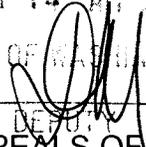


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DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

No. 38669-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN C. JACKSON,

Appellant.

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

The Honorable Anne Hirsch, Judge
Cause No. 08-1-00521-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Jackson established a sufficient probability that juror misconduct occurred such as to require the court to hold an evidentiary hearing.

2. Whether Jackson received ineffective assistance of counsel because his attorney failed to file a timely motion for a new trial and to timely obtain evidence to support the motion.

3. Whether it was error for the court to admit, under ER 404(b), evidence that Animal Services had responded to a complaint in 2007 about the manner in which Jackson kept the dogs.

4. Whether the State presented sufficient evidence to permit a rational trier of fact to find, beyond a reasonable doubt, that Jackson was guilty of two counts of first degree animal cruelty and one count of failure to provide humane care.

B. STATEMENT OF THE CASE.

The State accepts Jackson's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. Jackson presented no credible evidence that juror misconduct occurred, and thus the court was not required to hold an evidentiary hearing.

Following his trial, Jackson moved for an evidentiary hearing, contending that there had been juror misconduct that adversely affected his right to a fair trial. He argues that he

produced sufficient evidence of misconduct that required the court to investigate further. The State disagrees.

A party alleging misconduct on the part of a juror bears the burden of showing that misconduct actually occurred. State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008), citing to State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). “A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank, and free discussion of the evidence by the jury.” State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). “Something more than a possibility of prejudice must be shown to warrant a new trial.” State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968).

It is within the discretion of the trial court to determine whether there has been jury misconduct. State v. Young, 89 Wn.2d 613, 630, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978); State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669 (1997). “On direct appeal, when an unauthorized jury communication is found to have taken place, it is the State’s burden to prove harmlessness beyond a reasonable doubt.” In re Pers. Restraint of Woods, 154 Wn.2d 400, 414, 114 P.3d 607 (2005). If the court finds juror misconduct,

the court abuses its discretion in not granting a new trial only if it is “reasonably doubtful” whether the misconduct affected the verdict. State v. Hall, 40 Wn. App. 162, 168, 697 P.2d 597 (1985).

In this case, Jackson never cleared the first hurdle of establishing that any misconduct occurred. He produced an affidavit from the defendant’s ex-wife who heard from her cousin that the cousin’s friend, a hairdresser, had discussed the case with an unnamed (and presumably unidentified) juror at some unknown time which may or may not have been prior to the verdict. Further, the hairdresser may have said something prejudicial about the defendant because the defendant had at some time dated the hairdresser’s estranged wife. It is hard to think of any more tenuous “information.” [CP 110]

The affidavit also contains several layers of hearsay. Statements by third parties, including trial counsel, alleging jury misconduct are hearsay and incompetent to impeach a jury verdict. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). In Jackman, the trial court had granted a motion for a new trial based in part on juror misconduct. The evidence for the misconduct consisted of affidavits from one juror and the court bailiff which indicated that the jury might have rushed through deliberations

because the jury foreman was due to go on vacation. Id., at 777. The court of appeals reversed, and the Supreme Court affirmed. The Supreme Court found that it was error for the trial court to rely on the bailiff's affidavit because it was inadmissible hearsay. Id.

The Jackman court also found that the juror's affidavit was also inadmissible to prove misconduct because it asserted matters which inhered in the verdict. Id.

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Id., at 778.

Jackman's "information" raised the possibility that the hairdresser had disparaged him to the juror, thus making the juror more likely to think him guilty. He does not allege that the hairdresser provided evidence about the case which the juror then introduced into the jury deliberations. Jury consideration of extrinsic evidence may be grounds for a new trial. Balisok, 123 Wn.2d at 118. The thought processes of the individual jurors as

well as the jury as a whole inhere in the verdict and cannot be used to impeach the verdict. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1998). Any affidavit or declaration that concerns the jurors' mental processes is inadmissible to impeach the verdict. State v. Rooth, 129 Wn. App. 761, 772, 121 P.3d 755 (2005).

Here the court did not abuse its discretion in refusing to hold an investigatory hearing into potential jury misconduct. The information was third level hearsay. Even if there was a conversation between a juror and the hairdresser, Jackson did not establish that it happened during the trial. There is nothing wrong with a juror discussing the case after the verdict is entered. The verdict was entered on September 29, 2008. [CP 86-88] Jackson filed his motion to arrest judgment and for a new trial on October 22, [CP 8992] and by the time the hearing was held on November 18, 2008, he still did not have any more than his ex-wife's affidavit. [11/18/08 RP 11-12] Jackson simply did not meet his burden of proving that misconduct occurred.

2. Jackson did not receive ineffective assistance of counsel. The court considered the motion for a new trial even though it was not timely filed. Further, it is unlikely that the motion would have been granted even if he obtained further information, and thus there was no prejudice.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer

a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance in not objecting to the comparability of his offenses was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Even though Jackson's counsel failed to meet the ten-day deadline for filing a motion for a new trial, CrR 7.5(b), the trial court heard the motion. [11/18/08 RP 17-18] Therefore, he suffered no prejudice from the untimely motion and cannot satisfy the test for ineffective assistance of counsel.

Trial counsel did not, more than seven weeks after the verdict was entered, have any evidentiary support for his allegations of juror misconduct. However, he informed the court that he had been on vacation for a week of that time, [CP 104] and

further that the defendant had no funds to pay an investigator. Counsel did advance the costs of having an investigator speak to the defendant's ex-wife. [CP 105] In any event, Jackson again cannot establish prejudice because even if he had been able to produce the evidence he thinks was there, it would most likely have been inadmissible, as argued above. The outcome of the motion would have been no different.

There was no ineffective assistance of counsel.

3. The court properly admitted evidence that in 2007 Animal Services responded to a complaint about the conditions in which Jackson kept the dogs.

In March of 2007, almost a year before the date of this offense, Jackson's neighbor, Donna Ray, called Animal Services and lodged a complaint that Jackson's dog kennel was covered in feces. At the time there was no concern about the weight of the dogs, but the food and water bowls were empty. [09/23/08 RP 101-02] Kenneth Maynard, an officer with Animal Services, responded to the call. He spoke with Jackson on the phone; Jackson told him his ex-wife was living there, he was moving back that weekend, and he would take care of the problem. [09/23/08 RP 185-86] Believing that the matter was resolved, the officer took no further action and closed the complaint as a "verbal warning." [09/23/08 RP 186]

At the conclusion of a pretrial hearing held on July 7, 2008, the trial court ruled that evidence of the 2007 complaint was admissible under ER 404(b). It found that the evidence was relevant to the issue of notice or knowledge, which is an element of the charged offense, and also relevant to allow the State to present the “whole story, the picture,” because the crime of animal cruelty, as charged in this case, does not occur in one specific instance. [07/08/08 RP 28] The court further found that the potential for prejudice was slight, given that at that time the dogs were not starving. [07/08/08 RP 29]

An appellate court reviews a trial court’s interpretation of an evidentiary rule de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). “Once the rule is correctly interpreted, the trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion.” Id. The trial court begins with the presumption that evidence of other bad acts is inadmissible, and the State bears the burden of establishing that the evidence falls under one of the exceptions to the general prohibition. Id.

Evidence Rule (ER) 401 defines relevant evidence as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence.” ER 403 provides that all relevant evidence is admissible unless it is limited by statutory, constitutional, or other considerations. ER 404(b) prohibits admitting evidence of a person’s character in order to prove that he or she acted in conformity with that character trait. However, ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A trial court has “wide discretion” in balancing the probative and prejudicial values of evidence. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). Unfair prejudice is that which suggests a decision on an improper basis, often, though not necessarily, an emotional one. State v. Rupe, 101 Wn.2d 664, 686, 683 P.2d 571 (1984)

The list contained in ER 404(b) is not exclusive. Washington courts also recognize an exception for “res gestae,” or “same transaction,” where “evidence of other crimes is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Tharp, 27

Wn. App. 198, 204, 616 P.2d 693 (1980) (internal cite omitted).
“Under the res gestae or ‘same transaction’ exception to ER 404(b),
evidence of other crimes or bad acts is admissible to complete the
story of a crime or to provide the immediate context for events
close in both time and place to the charged crime.” State v. Lillard,
122 Wn. App. 422, 432, 93 P.3d 969 (2004).

Contrary to Jackson’s argument, the evidence of the 2007
complaint to Animal Services is relevant to the crime charged. An
animal does not starve overnight; it takes a period of time. A
complaint one year before the current offense is relevant to show
several things, at least one of them having nothing to do with prior
bad acts. First, Jackson told the Animal Services officer that he
wasn’t living there at the time. In 2007, there was no concern about
the dogs’ weight, even though the food and water bowls were
observed to be empty. The kennel was filthy, a condition that
arguably was not Jackson’s fault if he didn’t live there. One year
later, after Jackson moved into the residence and assumed the
care of the animals, they were starved to the point of life-
threatening emaciation. The kennel was again filthy. There was a
build-up of fecal matter, some of which had been there for weeks or
months. [09/23/08 RP 244-45] Second, the 2007 complaint

demonstrates that Jackson had been put on notice that the conditions in which the dogs were kept was unacceptable and he assured the officer he would clean the kennel. Therefore, the fact that the kennel was as bad or worse a year later indicates an indifference to the needs and comfort of the dogs. A person indifferent to the cleanliness of the kennel can be inferred to also be less than conscientious about feeding the dogs regularly and adequately, making it more likely that the starvation occurred from lack of food than from Cushing's Disease or some other problem beyond his control. In other words, it speaks to the absence of mistake or accident.

It is true that the State was required to prove that the dogs were starved and/or dehydrated, [CP 77, 78] not that they lived in deplorable conditions. However, the latter is relevant to show the former. Jackson's defense was that he fed the dogs regularly and adequately, but they, and particularly Ginger, lost weight for reasons unknown to him. [09/25/08 RP 649-50, 658, 665-67] The fact that he let the kennel remain in, or return to, its earlier dreadful condition indicates the criminal negligence that the State was required to prove. It also goes to the length of time the dogs had been underfed. They were apparently of a healthy weight in March

of 2007. In March of 2008 they were morbidly underweight. The State was required to prove that the dogs suffered substantial and unjustifiable physical pain for an extended period of time. The evidence of the 2007 complaint helps to establish a time frame within which that pain would have occurred.

The record indicates that the trial court correctly interpreted ER 404(b) and properly exercised its discretion in applying it. There was no abuse of discretion, and no error.

4. The State presented sufficient evidence to support Jackson's convictions for two counts of first degree animal cruelty and one count of failure to provide humane care.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after

viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, 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).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

a. First degree animal cruelty.

To prove the crime of first degree animal cruelty against the two dogs, Nikki and Ginger, the State had to prove that Jackson acted with criminal negligence, that he starved or dehydrated the dogs, and that the starvation and/or dehydration resulted in substantial and unjustifiable pain that extended for a sufficient period of time to cause considerable suffering or death. [CP 77-78] The evidence was that the two dogs were emaciated and skeletal, with no fat and little muscle. [09/24/08 RP 438, 458-460] Nikki was suffering from gastric dilatation and volvulus, an extremely painful and life-threatening condition requiring surgery, that may be caused by a meal ingested by an animal not used to eating. [09/24/08 RP 440-41]

Jackson argues that the State did not prove starvation because he had dog food in his home and receipts for the purchase of the food, and that he fed them once a day. The State never claimed that he did not feed them. It did claim, and prove, that he fed them far less food than they required to maintain a healthy body. An officer from Animal Services, using Jackson's receipts for the dog food, calculated that he fed the two dogs together between one and a half to two cups of food a day. They should have been

fed seven to ten cups a day. [09/25/08 RP 830] It is common sense that an animal fed only 20 per cent or so of the food it needs is eventually going to starve to death.

There was conflicting testimony about whether Nikki had Cushing's disease. The veterinarian who performed the necropsy did not believe she had the disease. [09/24/08 RP 455, 499] Jackson's expert witness believed she did. The jury makes credibility determinations and decides which evidence to believe. Conflicting evidence is not the same thing as insufficient evidence.

Nikki actually died by being euthanized. Because the volvulus required surgery which the dog could not have survived, the decision was made to put her down. Jackson blames her pain and death on the person who gave Nikki her last meal, which most likely caused the stomach to twist, causing her extreme pain. This overlooks the obvious fact that if he had been feeding her adequately in the first place, the small amount of food she ate [09/24/08 RP 443] would not have caused the volvulus, or that if she were not weak and emaciated she would have had a chance of surviving the surgery. The jury could reasonably have concluded that by putting her in a condition where a small meal caused fatal consequences, he was cruel to an animal. The intense pain that

she suffered in her last hours would not have occurred had he not starved her until she was nothing but a skeleton.

Jackson cites to the testimony of his expert witness as evidence that the State did not prove its case. If the jury were required to believe only his witness, that would be true. However, the trier of fact must decide which witnesses to believe, and the State presented ample evidence that the dogs were emaciated and there was no reasonable explanation except that Jackson had not fed them enough.

The State was required to prove that the starvation and dehydration were done with criminal negligence. That term was defined in jury instruction 5:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

[CP 74]

In this case, Jackson provided most of the evidence of negligence himself. He testified that he left home most days between 6:00 and 7:00 a.m. and returned home anywhere from 6:30 to 10:00 p.m. [09/25/08 RP 648] He usually fed the dogs

between 8:00 and 9:00 p.m. [09/25/08 RP 650] He said he fed them about three-quarters of a half-gallon measure, supplemented occasionally with boiled chicken and rice, but didn't know the recommended amount of food for dogs of that size. [09/25/08 RP 705, 710] He did not spend much time with the dogs in the winter, and only petted their heads as they ran by him. He never brushed them or touched their bodies. Sometimes his children would play with them on weekends. [09/25/08 RP 711-12] The animals were seized on March 4, 2008, towards the end of the winter, when it would have been dark in the evenings. When Jackson fed them, he took a flashlight so he could see where he was going. [09/25/08 RP 649]

This evidence would allow a rational jury to find that Jackson paid so little attention to the dogs that he didn't know what their condition was. He didn't know how much he should be feeding them, for months he saw them only in the dark, he spent only a few minutes at a time with them, he never touched them except to pat their heads. He was rarely home. He simply never considered what the dogs needed. In other words, he failed to be aware of a substantial risk that he was starving and dehydrating the dogs, whereas a reasonable person would have made himself aware.

Jackson maintains that there was no evidence that the dogs suffered the “substantial and unjustifiable pain that extended over a period of time to cause considerable suffering” that is an element of the crime. These terms are not defined and it is up to the trier of fact to determine what is substantial and what is a period of time. The intense pain Nikki suffered prior to her euthanasia would have seemed to last an eternity. It certainly was not over instantaneously. It is disingenuous to say that there was no testimony that the dogs suffered pain from hunger over a “period of time.” It is common knowledge that extreme hunger is a painful condition, and that by the time the dogs had reached the stage of emaciation in which they were found, they had to have been extremely hungry for a long time.

b. Failure to provide humane care.

Jackson argues that the State failed to prove that he failed to provide humane care for the gecko because he testified that he researched the proper care of geckos, obtained the proper equipment and food, and did everything necessary to provide humane care. It was the job of the jury to decide whether to believe him. Having food, equipment, and information is not the same thing as feeding it, using it, and applying it to the gecko. The veterinarian

who examined it after it was turned over to Animal Services found it to be extremely thin with a poor (and unusual) color, poor bone density, and an inability to move normally. The veterinarian concluded that the gecko had been severely neglected and lacked basic necessities, including the sunlight it needed to properly absorb calcium. [09/24/08 RP 396-403] When the animal was fed adequate amounts of food and calcium supplements, treated with the correct UVA and UVB light, and provided heat, it began to thrive. [09/24/08 RP 402-405] Because the gecko returned to normal when given adequate care, it follows that it got into its deplorable condition because of the lack of such care. The jury was not required to believe Jackson's testimony that he gave the gecko proper care. It could also consider the unlikely coincidence that three animals in Jackson's care were all emaciated even though he gave them adequate care.

Here again the fact that there was conflicting evidence is not the same thing as insufficient evidence. It is the trier of fact who decides which witnesses to believe and what weight to give the evidence. There was ample evidence from which a reasonable jury could find Jackson guilty of all three charges.

D. CONCLUSION.

There was ample evidence produced at trial from which a rational trier of fact could find that all of the elements of the charges had been proven beyond a reasonable doubt. The evidence of the 2007 complaint to Animal Services was properly admitted. There was no evidence of jury misconduct that required the court to order a hearing. The State respectfully asks this court to affirm all of the convictions.

Respectfully submitted this 11th day of September, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

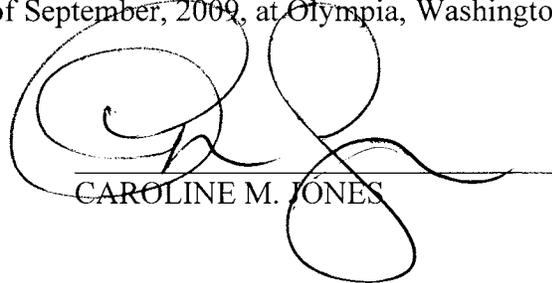
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ATTORNEY AT LAW
PO BOX 7269
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of September, 2009, at Olympia, Washington.



CAROLINE M. JONES