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Court of Appeals
Division II
State of Washington
2/14/2019 4:29 PM

No. 52278-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LLEWELLYN ANDREW ROY,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF APPEAL

The jury was instructed it could consider all of the alternative means of committing the crime of second degree animal cruelty, but the State did not present sufficient evidence to prove each of the alternatives beyond a reasonable doubt. The jury entered a general verdict. Therefore, this Court cannot be certain the jury relied upon an alternative that was supported by sufficient evidence. This violated Llewellyn Roy's constitutional right to due process, requiring reversal of the conviction.

B. ASSIGNMENT OF ERROR

The State did not present sufficient evidence to prove each of the alternative means, in violation of due process.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

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

failing to provide necessary (1) shelter; (2) rest; (3) sanitation; (4) space; or (5) medical attention distinct acts constituting alternative means or are they merely definitional terms?

2. When multiple alternative means are submitted to the jury for consideration, a general verdict satisfies due process only if the State presents sufficient evidence to prove each alternative beyond a reasonable doubt. Here, multiple alternative means of second degree animal cruelty were submitted to the jury but the State did not prove each alternative beyond a reasonable doubt. Does the general verdict violate due process?

D STATEMENT OF THE CASE

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

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

them to mate; sometimes he would put one of them in a kennel in the backyard or in a similar kennel in the laundry room. RP 173.

On the night of July 15, 2017, Roy left the house to get cigarettes. RP 174-77. The police stopped and arrested him for reasons unrelated to this case and took him to jail where he remained for days. RP 174-77. Roy had left his dogs outside; Fausto was in the kennel, and Azura and the bulldog were loose in the backyard. RP 180, 189. That morning Roy had fed and watered all of his animals as usual and did not notice any issues with them. RP 178-79. He had not cleaned the house, the birds' cages or the dog kennel for two weeks and was planning to clean them the next day. RP 187-90. He cannot clean more than once every two weeks due to his medical conditions that make it difficult for him to move about. RP 190-92.

In the afternoon of July 19, Roy's neighbor Lisa Wesen noted Roy's dogs had been barking for hours, day and night, which was unusual. RP 87, 93-94. Before that, she had not been aware of any problem with the dogs. RP 93-94. Wesen knocked on Roy's door but no one answered and Roy's car was gone. RP 87. Wesen walked around to the backyard to check on the dogs and saw they had no food or water. RP 87-89. The bulldog was on the back porch staring at the

door, one of the mastiffs was in a kennel on the porch, and the other mastiff was by the fence barking. RP 88. The dogs “were very skinny” and “didn’t look in good health.” RP 89, 98. The mastiffs’ eyes were “red and goopy” and looked infected. RP 89, 98.

Wesen and her husband filled a bucket with water and got some dog food and gave these to the dogs. RP 90-91. The dogs drank the water eagerly. RP 90. Wesen noticed the kennel was “compacted very high with feces,” causing a strong smell. RP 89. The mastiff inside was forced to stand in the feces. RP 89. Another neighbor shoveled the feces out of the kennel so that the dog could lie down on a clean place. RP 91, 97-98. They put some food and water in the kennel. RP 91.

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

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

Krueger and Stockdale found some dog food in the kitchen and fed the dogs outside. RP 112. They noted the mastiffs were “very skinny” and had sores on their elbows. RP 113-15, 137. Both of the mastiffs had a condition called “cherry eye,” which caused their eyelids to swell. RP 113. The mastiffs seemed slow to move and were timid. RP 114. They appeared to be in pain. RP 114, 138. The bulldog, however, was in much better condition and was friendly. RP 114, 123.

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

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

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

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

The dogs also had cherry eye, which occurs when the dog's tear glands protrude and block the dog's vision. RP 153, 166. The condition is painful and susceptible to infection. RP 154, 166. Mastiffs are predisposed to cherry eye; it is not caused by human acts. RP 164. Treating the cherry eye in these dogs would require surgery and cost hundreds of dollars per dog. RP 165-66. To underscore that testimony, a worker at the animal shelter where the dogs were sheltered testified the dogs had surgery to repair their cherry eye. RP 244. The surgery cost around \$3,000 for the female and \$2,000 for the male. RP 248. The shelter worker also testified the dogs had skin and ear infections when they arrived, which is common for mastiffs. RP 246-47.

The veterinarian and the shelter worker testified about the ideal living conditions for a dog. Dogs should be fed at least once a day and have water available at all times. RP 156, 251. The dog's lair should be free of urine and feces which can cause a dog to develop sores. RP 156.

And dogs need shade when they are out in the hot sun and heat in the winter. RP 250.

2. Jury instructions, closing argument, verdicts.

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

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

(1) That on or about and between July 1, 2017 and July 19, 2017, the defendant knowingly, recklessly, or with criminal negligence *failed to provide an animal with necessary shelter, rest, sanitation, space, or medical attention*;

(2) This failure caused the animal to suffer unnecessary or unjustifiable physical pain; and

(3) That these acts occurred in the State of Washington.

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

On the other hand, if, after weighing the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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

In closing argument the deputy prosecutor told the jury the first degree animal cruelty charge pertained to the dead parrot, and the second degree animal cruelty charge pertained to the two mastiffs. RP 272-75. The State's theory for the second degree animal cruelty charge

was the mastiffs did not have proper shelter, sanitation or medical care. RP 279. Their spines and ribs were visible, they had sores and cherry eye, and they were timid and lethargic and appeared to be in pain. RP 276. The male dog's kennel was covered in feces and urine. RP 276.

The State did not elect which mastiff it was relying upon but the prosecutor said the jury must unanimously agree on one mastiff or the other, or both. RP 275. The jury received a "Petrich"¹ instruction informing them they must unanimously agree on a particular mastiff for the second degree animal cruelty charge. CP 23.

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

E. ARGUMENT

The State did not prove all of the statutory alternative means submitted to the jury, in violation of due process.

The jury was instructed on all five alternative means of committing the crime of second degree animal cruelty. CP 25; RCW 16.52.207(2)(a). But the State did not present sufficient evidence to prove all of the means for both mastiffs beyond a reasonable doubt. The jury entered a general verdict. As a result, this Court cannot be certain

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

the jury unanimously agreed on an alternative means that was supported by sufficient evidence. This violated due process.

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

Whether a statute sets forth alternative means is a question of statutory interpretation. State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014).

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

Whether a statute sets forth alternative means depends on how varied the actions are that could constitute the crime. Owens, 180 Wn.2d at 96-97. Owens held the first degree trafficking in stolen property statute did not set forth alternative means because the prohibited acts are closely related and not distinct. Id. at 99. The statute provides “[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to

others” is guilty of the crime. Id. at 96 (quoting RCW 9A.82.050(1)). These terms are closely related because they overlap; any one act of stealing often involves more than one of these terms. Id. at 99. For example, a person who “organizes” a theft will also “plan” it. Id. A person who “manages” a theft will generally “direct” and/or “supervise” it. “Thus, these terms are merely different ways of committing one act, specifically stealing” and are not alternative means. Id.

By contrast, in State v. Peterson, Division One held the first degree animal cruelty statute sets forth separate, distinct acts and therefore creates alternative means. State v. Peterson, 174 Wn. App. 828, 851-52, 301 P.3d 1060 (2013). A person commits the crime if, with criminal negligence, he or she “starves, dehydrates, or suffocates an animal” and causes substantial unjustifiable pain as a result. RCW 16.52.205(2). Peterson recognized that “starvation, dehydration, and suffocation” are “three distinct ways of committing the crime.” Peterson, 174 Wn. App. at 851-52. The terms do not overlap. For example, a person can “starve” or “dehydrate” an animal without “suffocating” it. The statutory terms “are not merely descriptive or definitional but, rather, separate and essential terms of the offense.” Id.

Similarly, the crime of interfering with domestic violence reporting is an alternative means crime. State v. Nonog, 145 Wn. App. 802, 812-13, 187 P.3d 335 (2008). A person commits the crime by preventing or attempting to prevent the victim or a witness to a domestic violence crime “from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.” RCW 9A.36.150(1). These acts are distinct and do not overlap. A person can prevent someone from “calling a 911 emergency communication system” or “obtaining medical assistance” without also preventing the person from “making a report to any law enforcement official.” The variations in the statute are not merely descriptive or definitional of essential terms, but “are themselves essential terms.” Nonog, 145 Wn. App. at 812-13.

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

- (2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:
 - (a) *Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and*

the animal suffers unnecessary or unjustifiable physical pain as a result of the failure

RCW 16.52.207 (emphasis added).

The statute sets forth separate, distinct acts that vary significantly and do not overlap. A person can fail to provide an animal with necessary “shelter” or “rest” without also failing to provide “sanitation,” “space” or “medical attention.” These statutory terms do not merely define or describe an element of the crime but are themselves essential terms. Second degree animal cruelty is therefore an alternative means crime. Owens, 180 Wn.2d at 96-99; Smith, 159 Wn.2d at 787; Peterson, 174 Wn. App. at 851-52; Nonog, 145 Wn. App. at 812-13.

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

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

In an alternative means case, where multiple alternative means are submitted to the jury for consideration, an expression of jury unanimity as to the means is not required so long as each means is

supported by sufficient evidence. Woodlyn, 188 Wn.2d at 164-65. But if the evidence is *not* sufficient to support one or more of the alternative means, our constitution requires a “particularized expression” of jury unanimity as to the supported means. Id.

The need for a particularized expression of jury unanimity when one or more alternative means are not supported by sufficient evidence is a due process requirement. Id.; U.S. Const. amend. XIV; Const. art. I, § 3. The purpose for the requirement is to ensure that when a jury might base its verdict on more than one alternative, the verdict is adequately supported. Woodlyn, 188 Wn.2d at 164-65. “Adequately supported” means a rational jury could find each alternative means is supported by proof beyond a reasonable doubt. Id. at 164 n.2 (citing State v. Green, 94 Wn.2d 216, 230, 616 P.2d 628 (1980); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

“A reviewing court is compelled to reverse a general verdict unless it can ‘*rule out the possibility* the jury relied on a charge unsupported by sufficient evidence.’” Woodlyn, 188 Wn.2d at 165 (quoting State v. Wright, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)) (emphasis in Wright). Absent a special verdict form, or some kind of colloquy or explicit instruction, this Court cannot assume every

member of the jury relied solely upon an alternative means that is supported by sufficient evidence. Woodlyn, 188 Wn.2d at 166. In that situation, the conviction violates due process. Id.

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

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

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

The evidence showed the dogs were left outside in the backyard for three or four days and, on the afternoon they were found, the sun

was shining and the weather was warm. RP 125. The dogs had no food or water and “were very skinny” and “didn’t look in good health.” RP 87-89, 98. Both of the dogs had sores on their elbows and cherry eye and were later treated for ear and skin infections. RP 113-15, 137, 153, 166, 246-47.

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

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

F. CONCLUSION

The State did not prove all of the alternative means submitted to the jury for consideration. The conviction must be reversed.

Respectfully submitted this 14th day of February, 2019.

/s Maureen M. Cyr
State Bar Number 28724
Washington Appellate Project – 91052
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone: (206) 587-2711
Fax: (206) 587-2710
Email: maureen@washapp.org

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NO. 52278-1-II

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Phone (206) 587-2711
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