

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

STATE OF WASHINGTON,
Respondent,

v.

MARVIN TANKERSLEY,
Appellant.

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

The Honorable Patrick M. Robinson (Pro Tem), Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
Attorney for Appellant

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	2
1. Procedural Facts.....	2
Jury Instructions.....	5
2. Substantive Facts.....	5
Comment on Right to Silence.....	10
C. ARGUMENT.....	12
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF INTENT TO CAUSE UNDUE SUFFERING OR EXTREME INDIFFERENCE TO LIFE IN THE CHARGE OF ANIMAL CRUELTY	12
a. Animal Cruelty.....	12
b. Malicious Mischief.....	14
c. Remedy.....	15
2. TANKERSLEY WAS DENIED HIS CONSTITUTIONAL RIGHT TO JURY UNANIMITY	15

TABLE OF CONTENTS

	Page
3. THE PROSECUTOR'S COMMENTS DURING CROSS EXAMINATION CONSTITUTED AN IMPERMISSBLE COMMENT ON TANKERSLEY'S CONSTITUTIONAL RIGHT TO SILENCE	19
D. CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	16
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	22
<i>State v. Clare</i> , 198 Wn. App. 371, 393 P.3d 836 (2017).....	17, 18
<i>State v. Dixon</i> , 150 Wn. App. 46, 207 P.3d 459 (2009).....	19, 20, 21
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	22, 23, 24
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	12
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	17
<i>State v. Gutierrez</i> , 50 Wn. App. 583, 749 P.2d 213 (1988).....	24
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	14, 15
<i>State v. Holmes</i> , 122 Wn. App. 438, 93 P.3d 212 (2004).....	20, 21, 23, 24
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014).....	12
<i>State v. Kintz</i> , 169 Wn.2d 537, 238 P.3d 470 (2010).....	19

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988)	16
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996)	23
<i>State v. MacMaster</i> , 113 Wn.2d 226, 778 P.2d 1037 (1989)	16
<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994)	17
<i>State v. Paulson</i> , 131 Wn. App. 579, 128 P.3d 133 (2006)	13
<i>State v. Peterson</i> , 168 Wn.2d 763, 230 P.3d 588 (2010)	16, 17, 18
<i>State v. Phuong</i> , 174 Wn. App. 494, 299 P.3d 37 (2013)	12
<i>State v. Romero</i> , 113 Wn. App. 779, 54 P.3d 1255 (2002)	20, 22, 23
<i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007)	16
<i>State v. Wanrow</i> , 88 Wn.2d 221, 559 P.2d 548 (1977)	16
<i>State v. Woodlyn</i> , 188 Wn.2d 157, 392 P.3d 1062 (2017)	17
FEDERAL CASES	
<i>Hoffman v. United States</i> , 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951)	22

TABLE OF AUTHORITIES

	Page
FEDERAL CASES, continued	
<i>Jackson v. Virginia</i> , 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	12
<i>Neder v. United States</i> . 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)	16
RULES, STATUTES, AND OTHERS	
BLACK'S LAW DICTIONARY 1563 (8th ed.2004)	13
RAP 2.5	19, 20, 21
RCW 16.52.205	12, 15
RCW 46.61.520	16
RCW 9A.48.090	14
U.S. Const. Amend. V	21
U.S. Const. Amend. XIV	22
Wash. Const. art. I, § 9	22

A. ASSIGNMENTS OF ERROR

1. The court convicted Tankersley of animal cruelty in the first degree despite insufficient evidence for conviction.
2. The court convicted Tankersley of malicious mischief in the third degree despite insufficient evidence for conviction.
3. The prosecutor commented on Tankersley's post-*Miranda* silence, both to impeach and as substantive evidence of guilt, in violation of Tankersley's constitutional rights.

Issues Presented on Appeal

1. Where no medical or direct evidence was presented that the deceased animal experienced undue suffering, was the evidence of animal cruelty insufficient?
2. Where the only account of the circumstances of the animal's death came from appellant, who testified that he injured the animal by accident and then performed a quick mercy killing, was the evidence insufficient to prove either intent to cause undue suffering or extreme indifference to life?

3. Where the testimony was that appellant purchased and owned the animal, was there insufficient evidence to prove that the animal was the property of another for purposes of the malicious mischief charge?

4. Did the prosecutor's cross examination of appellant regarding his post-*Miranda* silence violate Tankersley's constitutional right to silence where it permitted the jury to use Tankersley's choice not to proclaim his innocence as evidence of guilt?

B. STATEMENT OF THE CASE

1. Procedural Facts

Marvin Tankersley was charged with animal cruelty in the first degree--domestic violence and with malicious mischief in the third degree--domestic violence, occurring on July 16th or 17th 2019. The second amended information provided as follows:

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SKAMANIA COUNTY
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SUPERIOR COURT CLERK

**IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAMANIA**

STATE OF WASHINGTON,

Plaintiff,

vs.

MARVIN JOHN TANKERSLEY,
DOB: 5/06/1958
WMA: 5'06" 160 LBS
EYES: HAZ

Defendant.

NO. 19-1-00052-30

SECOND AMENDED INFORMATION

COMES NOW, PATRICK ROBINSON, SPECIAL DEPUTY PROSECUTING ATTORNEY,
in and for Skamania County, State of Washington, in the name and by
the authority of the State of Washington, and by this Amended
Information accuses MARVIN JOHN TANKERSLEY of the crimes of: ANIMAL
CRUELTY IN THE FIRST DEGREE-DOMESTIC VIOLENCE RCW 16.52.205 and
10.99.020; HARASSMENT-THREATS TO KILL and MALICIOUS MISCHIEF IN THE
THIRD DEGREE - DOMESTIC VIOLENCE RCW 9A.48.090 committed as follows,
to-wit:

**Count I:
ANIMAL CRUELTY IN THE FIRST DEGREE-DOMESTIC VIOLENCE
RCW 16.52.205 and RCW 10.99.020**

That he, MARVIN JOHN TANKERSLEY, in the County of Skamania,
State of Washington, on or about or between JULY 16th, 2019 and
JULY 17th, 2019, intentionally and unlawfully inflicted
substantial pain on or caused physical injury to an animal, or

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did kill an animal by a means causing undue suffering or while manifesting an extreme indifference to life; contrary to Revised Code of Washington 16.52.205; **and further the State of Washington does accuse the Defendant, MARVIN JOHN TANKERSLEY, at said time of committing the above crime against an intimate partner as defined in RCW 26.50.010(7), and for purposes of RCW 9a.36.041(4), which is a crime of domestic violence as defined in RCW 10.99.020.**

(Maximum Penalty Five (5) years imprisonment and/or a \$10,000 fine pursuant to RCW 16.52.205(2) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

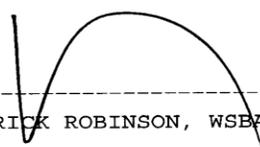
**Count II:
MALICIOUS MISCHIEF IN THE THIRD DEGREE - DOMESTIC VIOLENCE
RCW 9A.48.090(1)(a) and RCW 10.99.020**

That he, MARVIN JOHN TANKERSLEY, in the County of Skamania, State of Washington, on or about or between JULY 16th, 2019 and JULY 17th, 2019, did knowingly and maliciously cause physical damage to the property of another; contrary to Revised Code of Washington 9A.48.090(1)(a); **and further the State of Washington does accuse the Defendant, MARVIN JOHN TANKERSLEY, at said time of committing the above crime against an intimate partner as defined in RCW 26.50.010(7), and for purposes of RCW 9a.36.041(4), which is a crime of domestic violence as defined in RCW 10.99.020.**

(Maximum Penalty- 364 days in jail or \$5,000 fine, or both, pursuant to Revised Code of Washington 9A.48.090(2)(a) and RCW 9A.20.021(2), plus restitution, assessments and court costs.)

DATED at Stevenson, WA this 9th day of ~~AUGUST~~ Sept, 2019.

SKAMANIA COUNTY PROSECUTING ATTORNEY



PATRICK ROBINSON, WSPA# 40028
SPECIAL DEPUTY PROSECUTING ATTORNEY

Jury Instructions

In relevant part, the Court instructed the jury as follows: court's instructions as to the elements of animal cruelty in the first degree were as follows:

1) That on, or about or between, July 16, 2019 and July 17, 2019, the defendant unlawfully and intentionally, A) inflicted substantial pain on an animal, or B) caused physical injury to an animal or, C) killed an animal by means causing undue [sic] suffering or while manifesting an extreme indifference to life.

2) That this act occurred, in the State of Washington.

RP 239-240. The court further instructed the jury that:

To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives 1A, 1B or 1C, has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP 42-61 (JI 6) (Emphasis added).

The jury returned verdicts of guilty on both counts. CP 62-64, 66-80. This timely appeal follows. CP 84.

2. Substantive Facts

Marvin Tankersley accidentally harmed and later killed to end the suffering of his Malamute Husky dog named Zova, that Mr. Tankersley owned and purchased. RP 125-26, 188. The ex-wife,

Roberta Tankersley (hereinafter Roberta¹) took the dog to the veterinarian at times, and her name was on the information documents at the veterinary clinic. RP 202. Initially the veterinary assistant thought the Tankersleys planned to co-own their pets, but Roberta, who only saw Kova once, testified that she knew that before the Tankersleys were a couple, the dog belonged exclusively to Tankersley. RP 181. A week prior to trial, the veterinary assistant knew the dog was exclusively Tankersley's. RP 182, 184.

On July 17th, 2019, Deputy Russ Hastings of the Skamania County Sheriff's Office responded to an animal abuse complaint regarding Zova, who lived with Tankersley, Tankersley's ex-wife Roberta, roommate Faith Johnson, and Tankersley's brother-in-law Aubrey, who is disabled. *Id.* at 114, 128. Along with Kova, there was also a cat named Tigger. Cynthia Gonser, an employee of Stevenson Veterinary Clinic, testified that Roberta and Tankersley came in together and put both of their names on the dog's paperwork. RP 125-26.

Roberta testified for the prosecution. She testified that on the evening of July 16th, she drank "a few beers" and then went to bed

¹ Roberta used to provide distinction from Tankersley, not to be disrespectful.

at around 8:00. RP 117. On cross, she agreed that she “had no idea” how many drinks she consumed. RP 124. Roberta could not remember a trip to Portland and later testified that she did not go to Portland. RP 123. When Roberta drinks she either drinks a small amount or gets too drunk and goes to bed. RP 213-14.

At some point after she went to bed, Tankersley “walked in the house and he said he was gonna kill the dog and walked back out.” RP 119. The night before discovering Kova. Roberta did not think much of the comment and went back to sleep. Id. Roberta did not suggest any reason why Tankersley might kill Kova.

Roberta testified that sometime later that night, she heard Kova yelp in a way she had never heard him yelp before. RP 118. Faith Johnson testified that on the night of July 16th she was staying at a friend’s house in the Dalles drinking, not at Tankersley’s place. RP 96 - 97. Tankersley sent Johnson two texts in the early morning on July 17, 2019, telling her at 3:46 a.m., “I killed Kova, Kova’s dead.” RP 98. Tankersley later sent a text “I will kill”. RP 97-99. Both occurred between 2:41 and 3:46 a.m. Id. Johnson called the police in the morning. RP 100.

When deputy Hastings arrived, he and Johnson

unsuccessfully searched for Kova. RP 102. They found Tankersley sleeping in the cab-over camper, which was not a place he usually slept. Johnson saw blood under the porch and found the knife with fur on it on the counter. RP 106. Johnson and Roberta later identified the dead dog as Kova. RP at 104.

Keven Lueders, a neighbor of Tankersley's knew Kova because Tankersley had brought the dog over and Leuder's three children played with the dog. RP 150. On July 27, 2019, Lueder discovered a dead dog about four miles from his home. RP 153. He did not think much about it until some neighbor children told him that someone killed the dog. RP 139, 154. Leuder believed that someone had backed a vehicle 20 or 30 feet off the road and left the body. RP 155. Lueder called the police and led sheriff's deputy, Van Pelt, to the body. RP 154, 139.

According to Tankersley, when they got back from Portland, the back door of their home was open and several containers with aluminum cans worth-two or three hundred dollars were missing from the back porch. RP 191. Tankersley was concerned there had been an intruder because they had had problems with several different people prowling around the property before, including an

ex-boyfriend of Johnson's. RP 193. Roberta confirmed that Tankersley had been concerned about the theft of some cans that night. RP 119. To keep a lookout, Tankersley decided to sleep in the camper.

During the night Tankersley woke up to Kova barking. He grabbed a knife, went outside, and chased a person he thought he saw about 50 yards downhill from him in some blackberry bushes. Tankersley did not find a person, but he did see Kova, who had treed Tigger the cat on a telephone pole. RP 196. Roberta came outside to retrieve the cat, while Kova continued to lunge for the cat. RP 198. During the chaos, Tankersley, still holding the knife, fell into a birdbath while running towards Kova. RP 198. When he caught Kova, he grabbed Kova's collar and tried to pull him away. Tankersley fell , got up and was again knocked over by Kova. Tankersley grabbed Kova's body with his other hand, having forgotten he was still holding the knife, and stabbed Kova. RP 198-199, 218. After accidentally stabbing Kova, Tankersley began to cry and pray. To end Kova's suffering, he stabbed Kova twice more, ending his life. RP 202.

Tankersley was angry about being burgled and yelled to any

intruders who might be present that he had just killed his dog and that if he saw anyone on the property he would kill them too. RP 203. Tankersley told Roberta that he accidentally stabbed Kova and then killed Kova to end his misery. RP 202-03. Tankersley did not want to leave Kova's body on the property because it would disturb the other animals. RP 204. Faith Johnson's boyfriend Matthew, who had been sleeping in her room, came out of the house, and with Matthew's help Tankersley loaded Kova into his white Dodge truck. RP 204.

Mathew and Tankersley drove up the forest road looking for a hilltop for Kova's resting place, so that he could look out over the valley. RP 205. They did not find one and the truck was low on gas, so in the end Tankersley pulled off the road and pushed Kova out of the truck, not burying the dog but leaving him in the open as if he had died naturally. Id. Tankersley texted Johnson to let her know about the dog's death, so she would not be surprised when she came home. RP 214-215.

Comment on Right to Silence

During cross examination, the prosecutor made the following comments:

BY MR. ROBINSON:

Q It was an accident, so that's why you drove up to the middle of nowhere and left the dog so no one could find it, correct?

A No, sir.

Q It was an accident and you didn't do anything wrong, that's why you told the police about the prowler, correct?

A No, sir.

Q You didn't tell the police about the prowler, did you?

A No, sir.

Q In fact, everything you did when the police showed up was to try to hide your tracks, to try to get away with this, correct?

A No, sir.

RP. 208.

Q And again, you never told the police about the prowler, correct?

A No, sir, I lawyered up, cuz he gave me the Mirada [sic] rights and I said I'd take the lawyer and I quit speaking.

Q But then you said, if you don't find the dog, I'm gonna walk, right?

A Yes.

Q Okay and you never told the police about the silhouette near the blackberries, correct?

A Never did.

Q Never told the police about anything related to Tigger and the telephone pole, correct?

A Correct.

Q Never told them about tripping on the birdbath?

A Nope.

Q Never told them about accidentally stabbing Kova, correct?

A Nope.

RP 212-213.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF INTENT TO CAUSE UNDUE SUFFERING OR EXTREME INDIFFERENCE TO LIFE IN THE CHARGE OF ANIMAL CRUELTY

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime and any sentencing enhancements beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

a. Animal Cruelty

As charged, to convict Tankersley of animal cruelty in the first degree under RCW 16.52.205, the state must prove beyond a reasonable doubt that the defendant (1) intentionally and

unlawfully, (2) inflicted substantial pain on, or (3) caused injury to an animal, or (4) did kill an animal by means causing undue suffering, or (5) while manifesting extreme indifference to life. *Id.* The intent element applies to each alternative means. *State v. Paulson*, 131 Wn. App. 579, 586, 128 P.3d 133 (2006).

Here, Tankersley' s challenges the state's failure to provide sufficient evidence that he intentionally inflicted substantial pain on, or caused injury or killed Kova by means causing undue suffering, or while manifesting extreme indifference to life. In *Paulson*, the defendants repeatedly shot arrows at a dog, and repeatedly pulled the arrows out of the still living dog until it finally died. This Court held the manner of killing provided evidence of intent to cause undue suffering. *Paulson*, 131 Wn. App. at 587-88. This Court in *Paulson* relied on the dictionary definition of "undue" to explain the meaning. "Undue' means: "Excessive or unwarranted." BLACK'S LAW DICTIONARY 1563 (8th ed.2004). And "suffer" means: "To experience or sustain physical or emotional pain, distress, or injury." *Paulson*, 131 Wn. App. at 586 (quoting BLACK'S at 1474).

Here, unlike in *Paulson*, there was no evidence of any intent to cause undue suffering or an extreme indifference to life. Rather,

the evidence was limited to Tankersley explaining that he accidentally stabbed Kova and then killed her to prevent her from suffering. RP 200, 202, 207. This evidence unlike in *Paulson*, does not establish beyond a reasonable doubt that Tankersley killed Kova by means causing undue suffering, or while manifesting extreme indifference to life. Accordingly, the conviction must be reversed for remand with dismissal with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

b. Malicious Mischief

To convict Tankersley of malicious mischief in the third degree under RCW 9A.48.090(1)(a) as charged, the state must prove beyond a reasonable doubt: that Tankersley (1) knowingly and maliciously, (2) caused physical damage to the property of another. *Id.* Here, the evidence of ownership provided that Tankersley paid for the dog and owned the dog solely before he met Roberta. RP 125-26.

After Tankersley met Roberta, the evidence is unclear. Roberta could not remember who paid the vet bills but believed despite not sharing a bank account with Tankersley, she at times, shared the vet bills for Kova but not the cat. RP 125-26. Contrary to

the veterinary assistant's testimony that both Tankersleys owned both pets, Roberta testified that she alone owned the cat. RP 126. The veterinary assistant only saw Kova once and put both Tankersleys' information on Kova's paperwork. RP 181. This information is insufficient to establish the essential element of damage to the property of another. Accordingly, the conviction must be reversed for remand with dismissal with prejudice. *Hickman*, 135 Wn.2d at 103.

c. Remedy

Reversal is required here because the state failed to prove beyond a reasonable doubt each element of the crimes charged. The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge. *Hickman*, 135 Wn.2d at 103.

2. TANKERSLEY WAS DENIED HIS
CONSTITUTIONAL RIGHT TO JURY
UNANIMITY

In this case the state charged Tankersley with all of the alternative means in the animal cruelty in the first degree under RCW 16.52.205. CP 40-41. The state did not provide sufficient evidence of each alternative means and the court did not provide a jury unanimity instruction. CP 42-61.

As a general rule, alternative means crimes are set forth in a statute stating a single offense “under which are set forth more than one means by which the offense may be committed.” *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (quoting *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)). Where a crime may be committed in more than one way, there must be jury unanimity as to guilt for the crime charged. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, reversible error, unless it affirmatively appears that it was harmless. *State v. MacMaster*, 113 Wn.2d 226, 234, 778 P.2d 1037 (1989)² (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). The conviction must be reversed unless the state proves the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 15, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). This means that “[f]rom the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict.”

² Superseded by statute on other grounds in RCW 46.61.520.

Brown, 147 Wn.2d at 344.

“When one alternative means of committing a crime has evidentiary support and another does not, courts may not assume the jury relied unanimously on the supported means.” *State v. Woodlyn*, 188 Wn.2d 157, 162, 392 P.3d 1062 (2017). A complete lack of evidence for one alternative does not render the unanimity error harmless. *Woodlyn*, 188 Wn.2d at 162.

Animal cruelty in the first degree is an alternative means crime that sets out three distinct ways of committing the crime that are essential elements rather than mere definitions of the crime. *Peterson*, 174 Wn. App. at 852. Where a crime may be committed by alternative means and the evidence is not sufficient as to each of those means, a defendant has a right to “jury unanimity on the means by which the defendant is found to have committed the crime.” *State v. Clare*, 198 Wn. App. 371, 379, 393 P.3d 836 (2017) (citing *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (citing *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980))).

In *Peterson* the state charged Peterson with three different ways of committing animal cruelty: starvation, dehydration, and suffocation. Peterson unsuccessfully challenged the sufficiency of

the evidence only as to dehydration means. The court analyzed the evidence in the light most favorable to the state to hold that according to the veterinary witnesses, and the horses behavior, failing to provide the horses with the minimum 6-10 gallons of water needed per day established dehydration. *Peterson*, 174 Wn. App. at 851, 853.

Here, as in *Peterson*, the state charged Tankersley with committing first degree animal cruelty, in 3 different ways: (1) the intentional infliction of substantial pain on, or (2) intentionally causing injury to Kova, or (3) intentionally killing Kova by causing undue suffering, or (4) while manifesting extreme indifference to life.

Unlike in *Peterson* however, the evidence here was limited to an accidental stabbing followed by a mercy killing. RP 125-26. Even viewing the evidence in the light most favorable to the state, the evidence does not establish beyond a reasonable doubt any of the alternative means charged, thus the court was required to provide a unanimity instruction. *Clare*, 198 Wn. App. at 379.

Even for the sake of argument alone, if the state established one of the alternative means beyond a reasonable doubt, “[a]

general verdict of guilty on a single count charging the commission of a crime by alternative means will not be upheld if there is insufficient evidence of one of the alternative means. *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010).

Here, the animal cruelty conviction under count 1 must be reversed because there is insufficient evidence of each alternative means.

3. THE PROSECUTOR'S COMMENTS
DURING CROSS EXAMINATION
CONSTITUTED AN IMPERMISSBLE
COMMENT ON TANKERSLEY'S
CONSTITUTIONAL RIGHT TO
SILENCE

In cross examination the prosecutor repeatedly asked a number of questions challenging Tankersley's right to silence, by hammering the fact that Tankersley did not explain why he did not call the police when he believed there were prowlers on his property, or details of the night Kova was killed. RP 208, 212-13.

Although the defense did not object to these questions at trial, error may be raised for the first time on appeal if it is manifest and affects a constitutional right. RAP 2.5(a). *State v. Dixon*, 150 Wn. App. 46, 57-58, 207 P.3d 459 (2009).

Under RAP 2.5(a)(3). a defendant's failure to object to an

improper remark on his constitutional right to silence does not waive the issue on appeal so long as the remark amounts to a manifest error. RAP 2.5(a)(3). But where the prosecutorial misconduct affects a constitutional right, the two prong test is (1) whether the prosecutor's conduct was improper and (2) whether there is a substantial likelihood that the misconduct affected the verdict. *Dixon*, 150 Wn. App. at 57-58..

Tankersley's meets both prongs of the RAP 2.5 test because "[a] direct comment on silence — such as a Statement that a defendant refused to speak to an officer when contacted — is always a constitutional error." *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004) (citing *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002)). An error is manifest, i.e., prejudicial where there is a substantial likelihood that the statement regarding Tankersley's failure to explain his innocence affected the verdict. *Id.*

In *Dixon*, the conceded that the prosecutor's comment that Dixon should have testified and explained the passenger placed the drugs met the RAP 2.5 test because it shifted the burden of proof by inviting the jury to find guilt based on Dixon's failure to produce

evidence of innocence. The Court held this to be prejudicial, reversible error. *Dixon*, 150 Wn. App. at 59.

Here too, the prosecutor's comments in cross examination mirror those in *Dixon*, suggesting repeatedly that the jury should find guilt based on Tankersley's failure to produce evidence of innocence and based on his silence. Tankersley must and does establish prejudice.

Holmes, is also illustrative of the prejudice that flows from a comment on the right to silence. In *Holmes*, the detective commented that Holmes did not seem surprised by his arrest. The Court held this to be a prejudicial under RAP 2.5 because the comment on Holmes' refusal to speak to an officer when contacted, implied guilt in a case where credibility was an issue and credibility cannot be assessed on appeal, thus the state could not establish the error was not prejudicial. *Holmes*, 122 Wn. App. at 446-47. Thereafter, the Court engaged in the necessary harmless error analysis to determine that the comment was not harmless. *Holmes*, 122 Wn. App. at 447.

The Fifth Amendment to the United States Constitution states, in part, no person "shall ... be compelled in any criminal

case to be a witness against himself.” This provision applies to states through the Fourteenth Amendment. *State v. Burke*, 163 Wn.2d 204, 211, 181 P.3d 1 (2008). The Washington Constitution art. I, § 9 states, “No person shall be compelled in any criminal case to give evidence against himself. We interpret the two provisions equivalently.” *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

The right against self-incrimination is liberally construed. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

In Washington, a defendant's constitutional right to silence applies in both pre- and post-arrest situations. *Easter*, 130 Wn.2d at 236, 243. In the post-arrest context, it is well settled that it is a violation of due process for the state to comment upon or otherwise exploit a defendant's exercise of his right to remain silent. *Romero*, 113 Wn. App. at 779. It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. *Easter*, 130 Wn.2d at 241.

The state may not use a defendant's constitutionally permitted silence as substantive evidence of guilt. *State v.*

Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Thus, “[a] police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions.” *Romero*, 113 Wn. App. at 787 (alteration in original) (quoting *Lewis*, 130 Wn.2d at 705). The state bears the burden of showing a constitutional error was harmless.” *Easter*, 130 Wn.2d at 242.

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Easter*, 130 Wn.2d at 242.

In *Easter*, the court held the prosecutor’s eliciting testimony from the police that Easter did not answer questions and looked away from the police when questioned, constituted prejudicial error because the untainted evidence did not overwhelmingly establish the state’s theory that Easter was driving on the wrong side of the road. *Easter*, 130 Wn.2d at 243.

In *Holmes*, three girls testified consistently and compellingly testimony against Holmes. *Holmes*, 122 Wn. App. at 447. The state’s case was based on a credibility evaluation between Homes

and these girls. *Id.* Despite this powerful evidence, the Court held that it could not determine harmless error beyond a reasonable doubt that the police comment that Holmes did not deny the charges, because “[c]redibility determinations ‘cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable.’” *Holmes*, 122 Wn. App. at 447 (quoting *State v. Gutierrez*, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)).

Here, Tankersley’s version of events was not facially unbelievable, and there was no overwhelming untainted evidence to contradict his testimony. While, not quite a credibility contest, here the prosecutor’s repeatedly and directly hammered Tankersley’s failure to inform the police of his innocence, for the sole purpose of the inviting the jury to infer guilt based on Tankersley’s failure to explain his innocence. Under *Easter*, and *Holmes*, without overwhelming evidence of guilt, the state cannot establish beyond a reasonable doubt that the prosecutor’s cross examination did not affect the verdict. The remedy is to reverse and remand for a new trial. *Easter*, 130 Wn.2d at 243-44; *Holmes*, 122 Wn. App. at 447.

D. CONCLUSION

Tankersley respectfully requests this Court reverse his convictions for insufficient evidence. In the alternative, he requests this Court reverse and remand for a new trial based on the prosecutor's impermissible comment on his right to silence.

DATED this 21st day of January 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Skamania County Prosecutor's Office kick@co.skamania.wa.us and Marvin Tankersley, 55 SW Lovhar, Gresham, OR 97080 a true copy of the document to which this certificate is affixed on January 21, 2020. Service was made by electronically to the prosecutor and Marvin Tankersley by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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