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NO. 53813-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARVIN TANKERSLEY,

Appellant.

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

THE HONORABLE RANDALL KROG

BRIEF OF RESPONDENT

ADAM NATHANIEL KICK
Skamania County Prosecuting Attorney

YARDEN F. WEIDENFELD
Chief Appellate Deputy Prosecuting Attorney
Attorney for Respondent

Skamania County Prosecuting Attorney
P.O. Box 790
240 N.W. Vancouver Ave.
Stevenson, Washington 98648

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I. INTRODUCTION

The appellant, Marvin Tankersley (“Tankersley”) argues that his convictions for animal cruelty in the first degree and malicious mischief in the third degree should be reversed and the charges dismissed based upon insufficient evidence. He further argues for reversal of the animal cruelty in the first degree account based upon failure to give a unanimity instruction. Finally, he argues for reversal of both counts based upon an alleged comment on his Constitutional right to remain silent.

Because sufficient evidence was presented to support both convictions, under all charged alternatives for animal cruelty in the first degree, and because the State did not improperly comment on Tankersley’s right to remain silent, both convictions should be upheld.

II. ISSUES PRESENTED

- A. Was the evidence presented at Tankersley’s trial sufficient for the jury to find him guilty of animal cruelty in the first degree beyond a reasonable doubt?
- B. Was the evidence presented at Tankersley’s trial sufficient for the jury to find him guilty of malicious mischief in the third degree beyond a reasonable doubt?

C. Was a jury unanimity instruction required?

D. Did the State's cross examination of Tankersley impermissibly comment on his Constitutional right to silence?

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Tankersley resided with his ex-wife Roberta Tankersley and her friend Faith Johnson, RP 92-93, 113-114, in Skamania County, Washington, RP 138. The household also included a dog named Kova. RP 94, 115, 184. Kova was acquired by Roberta Tankersley and Tankersley, who both "went and got him" from a lady with a six-year-old autistic child who was moving to the south and could not take Kova along because "he had too much fur to live in the south." RP 94, 115-116, 133. However, Kova "got along really great" with the child and with other dogs in a dog class. RP 187.

While Tankersley initially "purchased Kova," RP 125, both Roberta Tankersley and Tankersley came to the veterinarian's office "together as a couple and they wanted their accounts and both pets [i.e., Kova and a cat] put under the same account with both of their names on it" because both animals "were going to become both of theirs together." RP 181. Thus, Cynthia Gonser, who worked at the veterinary clinic, "started a new file for them

together, they both filled out a client information sheet, both of their names are on it and there are two signatures on that sheet of paper.” RP 180-181. The veterinary records therefore show both Kova and the cat having both Tankersley’s and Roberta Tankersley’s names. RP 181. Both Tankersley and Roberta Tankersley jointly paid the veterinarian bill for Kova’s shots. RP 125-126. It was Gonser’s understanding that both of them “owned Kova.” RP 184.

Both Roberta Tankersley and Tankersley took care of Kova, RP 126, who was considered “a family dog,” RP 134, belonging to “[t]he house[hold],” RP 94, the other members of which all spent time with Kova, RP 134.

After obtaining the dog, Tankersley, Roberta Tankersley, and Johnson did not have any problems with him, RP 95, and neither did their neighbor Kevin Lueders, RP 150, nor his two cats and ten chickens, even though they “go outside . . . [a]ll the time,” RP 156. Johnson’s 8-year-old autistic grandson would play with Kova, who never hurt the child. RP 95. Kova was “[g]entle” with “everyone at the home,” got along with the other animals (another dog, a puppy, and a cat, RP 107, 111), and was “[j]ust fine” with children. RP 116. There was “no mean bone in that dog’s body,

never,” RP 95, and there were no “issues between Kova and anybody.” RP 116. “[E]verybody got along with him and he was a happy dog,” RP 117, “a really friendly dog,” RP 150. He did not even act out at the veterinarian’s office. RP 182-183.

On the evening of July 16, 2019, Johnson was away at a friend’s house in the Dalles. RP 96. Meanwhile, Roberta Tankersley went to bed at around 7:00 or 8:00 PM. RP 117. Afterwards, Tankersley “walked in the house and he said he was gonna kill the dog and walked back out.” RP 119. During the evening, Roberta Tankersley heard “yelps, from the dog,” of a sort that she had never heard before. RP 118.

Starting at 2:41 AM on July 17, 2019, Tankersley sent Johnson several text messages. RP 97-99. The next text messages (after the one at 2:41 AM) were sent at 3:46 AM and stated “I killed Kova, Kova is dead” and “I will kill.” RP 98-99, 214. Upon waking up at around 7:00 or 8:00 AM and seeing the text messages, Johnson first called Roberta Tankersley and afterwards called law enforcement, all while returning home, RP 100-102, 109-110.

At home, Johnson “looked everywhere” for Kova but could not find him. RP 102. However, she found “a pile of blood under the porch” that had not been there when she left the previous day. RP

106. That was where Kova typically slept. RP 95, 116-117, 163-164. Johnson also found a knife “sittin on the counter” with “fur on it.” RP 106, 110-111. That knife had not been on the counter and had not had fur on it before Johnson had left home the previous day. *Id.*

Skamania County Sheriff Deputy Russ Hastings responded to the home, where he spoke with Johnson and Roberta Tankersley. RP 162. He also looked “underneath the front porch” because he “was informed that that’s where Kova had been killed.” RP 162. Like Johnson, he also saw “a fair amount of blood” there. RP 162-164. Deputy Hastings then checked outside of “the property and the wooded area behind the property,” RP 164, but was unable to find the dog, RP 165.

Tankersley’s four-wheel-drive truck was “[p]arked by the woods,” which was atypical according to Johnson. RP 103. This is in the “backyard area of the property.” RP 166.

While Tankersley typically slept in the house on a living room sofa, the previous evening he had slept in a camper that belonged to Tankersley and Roberta Tankersley (or Tankersley’s daughter). RP 102-103, 129, 189-190, 209. After Deputy Hastings located the defendant sleeping in the camper, which was parked “in the front . .

. of the property,” RP 167, Tankersley said, “When this is over with and you don’t find an animal, then I’m gonna walk,” RP 168, 208, 212. Deputy Hastings also retrieved the knife that was identified as having been involved by Johnson from “inside the residence.” RP 169-170.

About “a week later,” Kova’s remains were found “up by the power lines. . . on a forest road” by the neighbor Kevin Lueders and Jonathan Hays. RP 103-104, 121-122, 137, 151. The forest road is “more than bumpy,” RP 104, but drivable by a truck with four-wheel drive such as the one driven by Tankersley, RP 122, 153-154.

Lueders and Hays directed Skamania County Sheriff Deputies Christian Lyle and Brandon Van Pelt to the site on July 27, 2019. RP 104-106, 137, 143, 154. The road being “too rough” for Deputy Van Pelt’s Crown Victoria, Lueders took the deputies there with his Toyota Tundra. RP 137-138, 154. The site was “about five to seven miles up” in “a pretty remote area” with “a lot of brush on both sides [of the road]” and “two parallel lines of depressed brush and disturbed earth. RP 138-139, 155. “It looked like tire marks going about twenty feet off into the brush, where the carcass sight was and the carcass sight was about 15 feet in diameter of just gray and white fur, with the carcass in the middle.”

RP 139. As their car “couldn’t even get up there without destroying it,” the deputies “had to walk back, down where the brush was depressed to get to it [i.e., the carcass].” *Id.* So it was “a pretty good place to conceal something.” *Id.* At that time of year, there were few people in that area. RP 155. It would “have been difficult to see those remains” for someone “driving normally down that forest road.” *Id.*

Having taken photographs of the dog’s carcass, the deputies returned to the home. RP 142-146. They showed the photographs to Roberta Tankersley and Johnson, who both identified the carcass as that of Kova, Roberta saying “that’s my dog” upon being shown one of the photographs. RP 146-147.

At trial, Tankersley admitted that he had intentionally killed Kova by stabbing the dog twice but claimed that he did so out of “mercy” in that he had just stabbed the dog once before by “accident.” RP 199-200, 202. He claimed that he had slept that night in the camper with a knife because there had been “a prowler there that night,” and he wanted to “watch the property, see if the prowler came back around.” RP 190.

Tankersley elaborated that upon returning home from Portland on the evening of July 16, 2019, he “noticed the cans that

were missing on the back porch . . . about 2 to \$300.00 worth of cans.” RP 191. He suspected a prowler “[b]ecause the back door was open where the cans were on the back rail and normally that door is shut, it’s never open.” RP 192.

When he “heard Kova barking,” Tankersley continued, “it woke me up.” RP 196. He “grabbed the knife,” thinking “maybe Kova was barking at the prowler, maybe the prowler was back.” *Id.*

Tankersley continued:

I left out of the camper . . . and I seen Kova on the side the camper, underneath the pole light . . . and it looked like . . . a silhouette of a person at first, in the blackberries, standing there. I had my knife. . . . I went running down there. When I . . . got closer, I didn’t see the silhouette . . . but . . . Kova . . . was . . . trying to bat the cat off the telephone pole So, I’m yelling at Kova I had a knife in this hand, cuz I grabbed it when I left and I grabbed him by the collar and I pulled him back and I took him to the deck and I hooked him up to the cable. After I hooked him up to the cable, I went to get Tigger [i.e., the cat] off the telephone pole. Kova shot out, it’s a 10 foot red cable It caught him with his chain . . . and he stopped and . . . I yelled at him, then I went around the corner to get Tigger. Tigger had come down the pole and . . . I figured Tigger would get in through the front door, cuz the front door was open. So . . . I unhooked Kova from the cable. I said, now leave Tigger alone and I . . . started walking back up to the camper. . . . I get to the camper and here goes Kova barking again and I’m like; ah, no, he’s after the cat. So, I . . . start ‘comin back down and then I noticed Roberta’s ‘walkin across the deck with Tigger in her arms, yelling at Kova So, I was running down off the

hill, hit the bird bath, . . . flipped over it and went down the embankment . . . and Kova's up here on his hind legs . . . and Roberta is standing . . . with a cat, here in her arms. . . . Kova is jumping up this way, onto the deck. I had forgotten about the knife in this hand . . . and I grabbed him by the collar . . . and I went to pull him back and when I did . . . [h]e lunged forward, knocked me into the railing, I went down this way, the knife was in this hand, I had him with the left, I went to grab around him, he went to bark at the cat and Kova and when he did, he caught my arm here, my arm went like this and I went down underneath and I stabbed him on this side of his body.

RP 196-199.

Upon realizing that he had stabbed Kova, Tankersley testified that he “dropped down” and “pulled the knife out.” RP 200. Kova “was not wheezing from his lungs, there was no blood coming out of his mouth,” and Tankersley “couldn’t let him suffer and just heard like, mercy, a voice inside of [him] saying mercy, so [he] went twice with the knife, in almost the same exact place, so [he] could end him without suffering” RP 202. Kova then lay “under the deck . . . for a couple seconds,” then came back out and lay in front of Tankersley, where he died. RP 202-203.

Tankersley further testified that he texted Johnson that he had killed Kova so that she would not find out upon coming home in the morning, after which he loaded Kova into his truck, and “took him up to the power lines and . . . dropped him off.” RP 204. He

testified that he did not leave Kova on the property so that the other three dogs would not have to see Kova decompose. *Id.* He further testified, “I was gonna bury him and I thought, no, because naturally they break down themselves and it feeds other people and I was hurt and he’s big and I can’t even lift him by myself, so I slid him off of the truck.” *Id.*

Afterwards, he went back to sleep in the camper. RP 205. “[T]he knife was left in the kitchen.” RP 211. Although he heard Johnson at about 10:00 AM “walking back and forth on the deck, with her hands in the air ‘goin, oh, my Kova, oh, my Kova, as loud as she could,” he said to himself, “drama, I can’t take it, I’m ‘goin back to sleep.” RP 205. He never spoke to her. RP 216. He was next awoken by law enforcement. RP 206-207.

Tankersley testified that he “didn’t think [he] did anything wrong,” that he “laid the knife down on the counter,” that to him, “it was an accident and a mercy thing,” and that he “had no idea somebody would think that [he] broke the law of something.” RP 207.

B. PROCEDURAL FACTS

On July 18, 2019, Tankersley was charged by information with one count of Animal Cruelty in the First Degree. CP 1-2. On

August 29, 2019, the State moved to amend the information. CP 9-10, RP 28. The motion was granted. CP 11, RP 29-30. The amended information adds a second count of malicious mischief in the third degree. CP 12-13, RP 28-30. On September 9, 2019, the information was amended a second time with a slight change made to the date(s) upon which the two crimes were alleged to have been committed. CP 39-41, RP 56-58, 91.

On August 29, 2019, the Court also heard the State's motion under CrR 3.5. RP 6-26. The State called as a witness Skamania County Deputy Sheriff Russ Hastings, who testified that on July 17, 2019, he arrested Tankersley based upon Roberta Tankersley's having told him (Deputy Hastings) that Tankersley had stabbed Roberta's dog. RP 7, 11. Tankersley was read his *Miranda* rights, after which he indicated that he did not want to speak with Deputy Hastings and wanted to talk to his attorney. RP 11-12. Afterwards, not prompted by any questioning by law enforcement, Tankersley spontaneously made two statements, one to the effect that "if the wolf killed the cat, that's probably why," and the other to the effect that if law enforcement "didn't find the animal that he would walk." RP 13-15. Tankersley made no other statements. RP 15. The Court

ruled the two statements admissible in the State's case-in-chief. RP 23-26.

A jury trial was held on September 9-10, 2019. RP 32-282. Faith Johnson, Roberta Tankersley, Skamania County Sheriff Deputy Brandon Van Pelt, Kevin James Lueders, and Skamania County Sheriff Deputy Russ Hastings testified for the State. RP 91-173. Cynthia Gonser and Tankersley testified for the defense. RP 179-221. The jury came back with a guilty verdict on both counts. CP 62-63, RP 282-288.

Sentencing was held on September 12, 2019. RP 290-309. The Court initially imposed a sentence of 12 months jail on count one (within the standard range for an unranked felony) and to 364 days suspended on the condition of no law violations on count two (a gross misdemeanor). RP 298. However, with a stipulation between the parties, the Court amended its sentence to an exceptional sentence of 12 months plus one day in prison on count one. CP 66-80, RP 301-302, 304-305. Enforcement of the prison sentence was ordered stayed upon posting of a \$25,000 appeal bond. CP 83, RP 308-309. This appeal follows. CP 84-92.

IV. ARGUMENT

A. The evidence presented at Tankersley's trial, when properly viewed in the light most favorable to the state, was sufficient for the jury to find him guilty of animal cruelty in the first degree beyond a reasonable doubt.

Tankersley argues that the State failed "to provide sufficient evidence that he intentionally inflicted substantial pain on, or caused [physical] injury [to] or killed Kova by means causing undue suffering, or while manifesting extreme indifference to life." Brief of Appellant at Page 13.

However, Tankersley fails to meet his heavy burden to establish that the evidence was insufficient to support a conviction:

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [citation omitted] "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." [citation omitted]

State v. Washington, 135 Wn. App. 42, 48-49, 143 P.3d 606, 609 (2006), *Petition for Review denied*, 160 Wn.2d 1017, 161 P.3d 1028 (2007) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

1. The defendant's own admissions were sufficient for the jury to find him guilty by means of causing physical injury and by means of inflicting substantial pain.

"[T]he term 'undue suffering' does not modify the terms 'substantial pain' or 'physical injury.'" *State v. Andree*, 90 Wn. App. 917, 920, 954 P.2d 346, 348 (1998). Thus, like in *Andree*, Tankersley's "own admissions . . . were sufficient to support a conviction based on causing physical injury," *Id.* at 922, 954 P.2d at 349, as Tankersley even admitted to doing so intentionally at trial. See RP 202 ("I went in twice with the knife, in almost the same exact place, so I could end him without suffering, okay.")

The same holds true with respect to the prong regarding infliction of substantial pain. While Tankersley claimed that his goal was to "end him [Kova] without suffering," he admitted to having intentionally stabbed Kova not once, but twice, and that, afterwards, Kova

got up and it was like he wanted to go back under the deck to his den, over by the side of the trailer. He laid there for a couple of seconds, he got up, started walking back and he had a bad left foot, he tripped on it and he laid down. I couldn't reach him. I can't get under that deck. And, then he gets up and he comes back out this way, outside the deck and he laid down, right in front of me, right on the ground, with his left side on the ground.

RP 202-203. It was only then that Kova was alleged to have “passed on.” RP 203. From these admissions alone, the jury could have properly concluded that substantial pain was inflicted upon Kova. Furthermore, there was the testimony of Roberta Tankersley that during the evening, she had heard “yelps, from the dog,” of a sort that she had never heard before. RP 118.

2. The State did not have a burden to prove that Tankersley intended the result of substantial pain.

In *Andree*, the Court of Appeals cited a holding that “[i]f the definition of a crime includes a particular result as well as an act, the mental element relates to the result as well as to the act....” 90 Wn. App. at 922, 954 P.2d at 349 (quoting *State v. Allen*, 67 Wn. App. 824, 826-827, 840 P.2d 905 (1992), *overruled by State v. Brown*, 140 Wn.2d 456, 467-468, 998 P.2d 321, 326 (2000)). “The *Allen* court reasoned that unless otherwise stated the mens rea element must apply to the result of a crime where the distinction drawn between the severity of crimes depends upon the result of the otherwise illegal act.” *Id.* However, the *Andree* court did “not reach this conclusion,” *Id.*, and in any case, *Allen* was overruled on the point in question in *Brown*, 140 Wn.2d at 467-468, 998 P.2d at 326.

Furthermore, like in *Andree*, “the jury in this case was asked to determine whether the result occurred, and not whether *Andree* intended the result,” and “unchallenged jury instructions become the law of the case.” *Andree*, 90 Wn. App. at 923, 954 P.2d at 349-350. See CP 51 (“A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.”)

Thus, the State had no burden to prove that Tankersley intended the result of substantial pain.

3. Assuming *arguendo* that the State *did* have the burden to prove that Tankersley intended the result of substantial pain, the evidence was still sufficient when properly viewed in the light most favorable to the State.

When properly viewed in the light most favorable to the State, the evidence was sufficient to establish that Tankersley intended the result of substantial pain. “[W]hile specific intent cannot be presumed, a jury may infer . . . inten[t] . . . where . . . ‘conduct plainly indicates the requisite intent as a matter of logical probability.’” *Andree*, 90 Wn. App. at 922-923, 954 P.2d at 349 (quoting *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991)). And contrary to what Tankersley argues, the evidence was *not* “limited to Tankersley explaining that he accidentally stabbed

Kova and then killed her to prevent her from suffering,” Brief of Appellant at Pages 13-14. The evidence also included the following:

- Roberta Tankersley’s testimony that Tankersley “walked in the house and he said he was gonna kill the dog and walked back out.” RP 119.
- Johnson’s (and Tankersley’s) testimony that Tankersley sent her text messages at 3:46 AM stating “I killed Kova, Kova is dead” and “I will kill” without elaboration. RP 98-99, 214-216.
- Tankersley’s statement after having been located by Deputy Hastings’ that “When this is over with and you don’t find an animal, then I’m gonna walk.” RP 168, 208, 212.

Tankersley contradicted only the first of these points. He testified that he assumed Roberta Tankersley had actually seen what he had done “cuz she was looking at me when it happened,” RP 203. He further testified that what he said to Roberta Tankersley was, “Kova’s dead, . . . I had just accidentally killed him, I had to stab him two more times, because I didn’t want him to suffer.” *Id.* However, “[c]redibility determinations are for the trier of fact and are not subject to review,” and the appellate court “must

defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence,” *State v. Paulson*, 131 Wn. App. 579, 586, 128 P.3d 133, 136 (2006).

All three of the above points belie Tankersley’s innocent explanation of the event and his testimony that he “didn’t think [he] did anything wrong,” that to him, “it was an accident and a mercy thing,” and that he “had no idea somebody would think that [he] broke the law of something,” RP 207.

Other factors that would properly lead the jury to discount Tankersley’s innocent explanations include the following:

- His admission that efforts to “rekindle the marriage” with Roberta Tankersley had not gone very well. RP 189.
- His description of the initial allegedly accidental stabbings, RP 196-199, was, in the prosecutor’s words, “confusing” and “doesn’t make any sense.” RP 275-276.
- His description of Kova’s aggressive behavior with the cat, RP 196-198, contradicts Roberta Tankersley’s testimony that Kova got along with the other animals, RP 116, Johnson’s testimony that they did not have any problems with him, RP 95, neighbor Kevin Lueders’ testimony that Kova never did anything to his two cats and ten chickens, even though they

“go outside . . . [a]ll the time,” RP 156, and Gonser’s testimony that Kova did not even act out at the veterinarian’s office, RP 182-183.

- Deputy Van Pelt’s testimony regarding the remoteness of the site where Kova’s carcass was left and his description of it as “a pretty good place to conceal something,” RP 139.
- Lueders’ testimony that at that time of year, there were few people in the area where Kova’s carcass was left, and that it would “have been difficult to see those remains” for someone “driving normally down that forest road.” RP 155.
- Tankersley’s admission that after returning from dropping off Kova’s carcass, he left the knife “in the kitchen,” RP 211 belies his claim that he had slept that night in the camper with a knife because there had been “a prowler there that night,” and he wanted to “watch the property, see if the prowler came back around,” RP 190.
- Tankersley’s admission that, despite having texted Johnson “I killed Kova, Kova is dead” and “I will kill” without elaboration, RP 98-99, 214-216, he just went back to sleep when he heard her at about 10:00 AM “walking back and forth on the deck, with her hands in the air ‘goin, oh, my

Kova, oh, my Kova, as loud as she could,” saying to himself, “drama, I can’t take it, I’m ‘goin back to sleep.” RP 205.

Under the general standard of review for sufficiency of the evidence cited above, there was thus clearly sufficient evidence for the jury to have concluded that Tankersley intended the result of substantial pain.

4. When properly viewed in the light most favorable to the State, the evidence is sufficient to prove that Tankersley intentionally killed an animal by means causing undue suffering.

In *Paulson*, the Court of Appeals held that “RCW 16.52.205(1)(c) requires that the State prove that [defendants] acted intentionally to inflict undue suffering and to kill the dog,” 131 Wn. App. at 586, 128 P.3d at 136.

However, this holding was made after the State had withdrawn a cross-appeal of “the trial court’s ruling requiring the State to prove that [defendants] intended to kill the dog and intended to use means that would cause undue suffering.” *Id.* (footnote 3). Under the reasoning of **Section IV.A.2** above, the State did not have to prove intent to use means that would cause undue suffering.

However, assuming *arguendo* that the State *did* have to prove intent to use means that would cause undue suffering, the evidence was still sufficient. “‘Undue’ means: ‘Excessive or unwarranted.’ [citation omitted] And ‘suffer’ means: ‘To experience or sustain physical or emotional pain, distress, or injury.’” *Id.* (quoting BLACK'S LAW DICTIONARY 1563, 1474 (8th ed. 2004).

Tankersley distinguishes his case from *Paulson*, where “the defendants repeatedly shot arrows at a dog, and repeatedly pulled the arrows out of the still living dog until it finally died.”¹ Brief of Appellant at Page 13. “Here,” Tankersley continues, “unlike in *Paulson*, there was no evidence of any intent to cause undue suffering.” Brief of Appellant at Page 13.

However, Tankersley admitted to having killed Kova by stabbing Kova three times. RP 199-200, 202. That alone is *prima facie* evidence of guilt. See *Paulson*, 131 Wn. App. at 588, 128 P.3d at 137 (“The means show an intent to cause undue suffering because they would not have continued to shoot at it if it had died with the first shot. Furthermore, pulling the arrows out of a living dog to shoot it repeatedly aggravated the suffering.”) For the

¹ However, an eyewitness did testify that “he did not hear the dog bark or whimper, and he saw the dog go limp after the first shot.” *Paulson*, 131 Wn. App. at 583, 128 P.3d at 135.

reasons articulated in **Section IV.A.3** above, the jury was entitled to discount Tankersley's innocent explanations and to conclude that Tankersley both caused undue suffering and did so intentionally. Like in *Paulson*, "[i]nterpreting this evidence in a manner most favorable to the State, the record clearly establishes sufficient evidence of . . . intent to cause undue suffering and . . . guilt under RCW 16.52.205(1)." *Id.*

5. The State had no burden to prove manifestation of extreme indifference to life, but in in any case, when properly viewed in the light most favorable to the State, the evidence is sufficient to prove that Tankersley was guilty under that theory too.

The language in RCW 16.52.205(1) of "manifesting an extreme indifference to life" is new, having been added in 2015. It was thus not part of the statute when either *Andree* or *Paulson* were decided. It is thus not clear whether this constitutes an alternative means of committing the crime of animal cruelty in the first degree.

In general, analysis of whether alternative means are described

focuses on whether each alleged alternative describes "*distinct acts* that amount to the same crime." [citation omitted] The more varied the criminal conduct, the more likely the statute describes

alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various “alternatives” are merely facets of the same criminal conduct.

State v. Sandholm, 184 Wn.2d 726, 734, 364 P.3d 87, 90 (2015)(quoting *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)). Under this standard, it would seem that the State would *not* have a burden to prove “kill[ing] an animal . . . while manifesting an extreme indifference to life” separately from “kill[ing] an animal by a means causing undue suffering,” RCW 16.52.205(1). Either one would suffice for prong (1)(c).

However, assuming *arguendo* that “manifesting an extreme indifference to life” does constitute an alternative means, the evidence, when properly viewed in the light most favorable to the State, is sufficient to prove that Tankersley was guilty under that theory too for the reasons articulated in **Section IV.A.3** above.

B. The evidence presented at Tankersley’s trial, when properly viewed in the light most favorable to the state, was sufficient for the jury to find him guilty of malicious mischief in the third degree beyond a reasonable doubt.

Tankersley argues that the evidence of malicious mischief in the third degree “is insufficient to establish the essential element of damage to the property of another.” Brief of Appellant at Page 15.

“Property of another’ means property in which the actor possesses anything less than exclusive ownership.” RCW 9A.48.010(1)(c). “Consequently, a person can be convicted of malicious mischief for damaging any property in which another person has a possessory or proprietary interest. [citations omitted] Whether the defendant or someone other than the intended victim also has an interest in the property makes no difference.” *State v. Newcomb*, 160 Wn. App. 184, 190, 246 P.3d 1286, 1289 (2011).

Here, when viewed in the light most favorable to the State, the evidence is sufficient to establish that a party or parties other than Tankersley had at minimum some possessory or proprietary interest in Kova. Although Tankersley testified that Kova was his dog and that only he communicated with the previous owner, RP 187-188, as noted above, “[c]redibility determinations are for the trier of fact and are not subject to review,” and the appellate court “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence,” *Paulson*, 131 Wn. App. at 586, 128 P.3d at 136.

Roberta Tankersley did testify that Tankersley initially “purchased Kova,” RP 125, but she also testified that she and Tankersley together “went and got him from a gal in Vancouver,”

RP 115, and jointly paid the veterinarian bill for Kova's shots, RP 125-126. She furthermore testified that they both took care of Kova, RP 126, and that he was "a family dog," all of whose members spent time with Kova, RP 134.

Johnson also testified that Kova was acquired by both Tankersley and Roberta Tankersley and that Kova belonged to "[t]he house." RP 94.

Gonser at the Stevenson Veterinary Clinic testified that Roberta Tankersley and Tankersley came to the veterinarian's office "together as a couple and they wanted their accounts and both pets [i.e., Kova and a cat] put under the same account with both of their names on it" because both animals "were going to become both of theirs together." RP 181. Thus, Gonser said, she "started a new file for them together, they both filled out a client information sheet, both of their names are on it and there are two signatures on that sheet of paper." RP 180-181. The veterinary records therefore show both Kova and the cat having both Tankersley's and Roberta Tankersley's names. RP 181. It was Gonser's understanding that both of them "owned Kova." RP 184.

Viewed in the light most favorable to the State, this evidence is sufficient to establish that Roberta Tankersley and possibly

Johnson had at minimum some possessory or proprietary interest in Kova and is thus sufficient to establish the “property of another” element of malicious mischief in the third degree.

C. A jury unanimity instruction was not required because there was substantial evidence supporting each of the alternative means charged.

Tankersley argues that he was denied his right to jury unanimity because “[t]he state did not provide sufficient evidence of each alternative means [charged] and the court did not provide a jury unanimity instruction.” Brief of Appellant at Page 15.

Tankersley does not argue that animal cruelty in the first degree as he was charged “describes more than one crime,” in which case “there must be a unanimous verdict as to each separate crime described,” *State v. Arndt*, 87 Wn. App. 374, 377-378, 553 P.2d 1328, 1330 (1976). And indeed, given the nature of the statute, such an argument would not make sense, given the relevant tests, including “(1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; (4) and whether the acts may inhere in the same transaction.” *Id.* at 379, 553 P.2d at 1331 (quoting *State v. Kosanke*, 23 Wn.2d 211, 213, 160 P.2d 541, 542 (1945)).

Given these tests, animal cruelty in the first degree as charged is clearly an “alternative means” crime, whereby the statute “defines a specific crime . . . and provides different ways in or means by which the crime may be committed, all in one statute.” *Id.* at 377, 553 P.2d at 1330 (quoting *Kosanke*, 23 Wn.2d at 213, 160 P.2d at 542). Furthermore, the Court of Appeals has held that animal cruelty in the first degree under RCW 16.52.205(2) is an alternative means crime. *State v. Peterson*, 174 Wn. App. 828, 849-855, 301 P.3d 1060, 1070-1074 (2013). Finally, while *Andree* was not a case about jury unanimity, the Court of Appeals did seem to accept that animal cruelty in the first degree under RCW 16.52.205(1) is an alternative means crime, 90 Wn. App. at 923, 954 P.2d at 349 (“There was sufficient evidence to support the jury’s verdict beyond a reasonable doubt as to each of the alternative means charged.”)

With respect to an “alternative means” crime, “unanimity is required as to guilt for the single crime charged, but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means,” *State v. Williams*, 136 Wn. App. 486, 497-498, 150 P.3d 111, 117 (2007). As outlined in **Section IV.A.** above, there *was* substantial evidence as to each of

the alternative means.² Therefore, a jury unanimity instruction was not required.

D. The State’s cross-examination of Tankersley did not impermissibly comment on his Constitutional right to silence because his trial testimony contradicted his inculpatory post-arrest, post-*Miranda* statement, so the State was entitled to cross-examine him on the contradiction. Any error was harmless beyond a reasonable doubt.

“[T]he State may not . . . use post-arrest silence following *Miranda* warnings to impeach a defendant's testimony at trial.” *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174, 177 (1988). “However, once a defendant waives the right to remain silent and makes a statement to police, the prosecution may use such a statement to impeach the defendant's inconsistent trial testimony.” *Id.*, 755 P.2d at 178.

In particular, the State may question a defendant's failure to incorporate the events related at trial into the statement given police or it may challenge inconsistent assertions. Such was the situation in *Cosden* where the defendant had not remained silent, but had uttered a denial in one form and on trial asserted a different excuse. This “partial silence” at the time of the initial statement is not insolubly ambiguous, but “strongly suggests a fabricated

² The same standard as for sufficiency of the evidence is used to determine substantial evidence for alternative means. See, e.g., *Peterson*, 174 Wn. App. at 852-853, 301 P.3d at 1072 (“In determining the sufficiency of the evidence for the alternative means of dehydration, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”)

defense and the silence properly impeaches the later defense.” [citation omitted] Such questioning does not violate due process as the defendant has waived the right to remain silent concerning the subject matter of his statement. [citation omitted]

Id. at 511-512, 755 P.2d at 178 (quoting *State v. Cosden*, 18 Wn. App. 213, 221 568 P.2d 802 (1977), *review denied*, 89 Wn.2d 1016, *cert. denied*, 439 U.S. 823, 99 S. Ct. 90, 58 L.Ed.2d 115 (1978)).

Here, during trial, Tankersley presented an elaborate exculpatory story in which he admitted that he had intentionally killed Kova by stabbing the dog twice but only out of “mercy” in that he had just stabbed the dog once before by “accident.” RP 199-200, 202. He claimed that he had slept that night in the camper with a knife because there had been “a prowler there that night,” and he wanted to “watch the property, see if the prowler came back around.” RP 190. During the night, he initially thought he saw “a silhouette of a person at first, in the blackberries, standing there,” after which he saw “Kova . . . trying to bat the cat off the telephone pole,” after which he “was running down off the hill, hit the bird bath, . . . flipped over it and went down the embankment,” leading to the allegedly accidental stabbing of Kova. RP 196-199.

Tankersley further testified that he did not leave Kova's carcass on the property so that the other three dogs would not have to see Kova decompose. RP 204. Tankersley concluded that he "didn't think [he] did anything wrong," that to him, "it was an accident and a mercy thing," and that he "had no idea somebody would think that [he] broke the law of something." RP 207.

Upon being contacted by law enforcement, however, Tankersley made an *inculpatory* statement strongly suggesting guilt and consciousness of guilt that "[w]hen this is over with and you don't find an animal, then I'm gonna walk," RP 168, 208, 212. This statement was made after Tankersley was advised of his *Miranda* rights. RP 11-14. It is entirely at odds with Tankersley's exculpatory trial testimony giving an *innocent* explanation to everything he did and claiming *no* consciousness of guilt.

For these reasons, under *Belgarde*, the State was entitled to "challenge" Tankersley as to the "inconsistent assertions" and to "question" his "failure to incorporate the events related at trial into the statement given police," 110 Wn.2d at 511, 755 P.2d at 178.

Tankersley cites *State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004) as "illustrative of the prejudice that flows from a comment on the right to silence." Brief of Appellant at Page 21.

However, in *Holmes*, the arrestee made a written post-arrest statement that was “consistent with his [exculpatory] trial testimony,” 122 Wn. App. at 441, 93 P.3d at 214 (emphasis added). Nevertheless, the detective testified that upon arrest, the defendant “didn’t appear surprised. When he was advised what the charge was, there wasn’t any kind of denial or something that I would normally expect to see.” *Id.* at 442, 93 P.3d at 214 (quoting Report of Proceeding (May 6, 2002) at 30). The Court of Appeals found that this testimony “was an observation on his failure to proclaim his innocence, and it provided a basis for an inference of guilt.” *Id.* at 444-445, 93 P.3d at 216. Here, however, the prosecutor merely properly impeached *inconsistent* trial testimony.

Assuming *arguendo* that there was error, any error was harmless. Even “constitutional errors . . . may be so insignificant as to be harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182, 1191 (1985), *cert. denied*, *Guloy v. Washington*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed.2d 321 (1986).

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.

Id.

In deciding whether Constitutional error is harmless, the Washington Supreme Court has rejected the "'contribution' test," where "the appellate court looks only at the *tainted* evidence to determine if that evidence could have contributed to the fact finder's determination of guilt" and has instead adopted the "'overwhelming untainted evidence' test", where "the appellate court looks only at the *untainted* evidence to determine if . . . [it] is so overwhelming that it necessarily leads to a finding of guilt," *Id.* at 426, 705 P.2d at 1191 (emphasis added). The latter rule was favored because it

allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.

Id.

It should first be noted that in his closing arguments, the prosecutor barely alluded to the cross examination to which Tankersley objects. RP 245-259, 272-277.

Secondly, as outlined in **Section IV.A.3** above, the evidence apart from the challenged cross examination that was produced at trial overwhelmingly established Tankersley's guilt. And the strongest impeachment of Tankersley's testimony came in the form

of the uncontested *inculpatory* statement that he made upon being contacted by law enforcement, RP 168, 208, 212, and not in any failure to tell his *exculpatory* story at that time.

Thus, even assuming *arguendo* that the contested cross examination was improper, it is clear beyond a reasonable doubt that it was not necessary to the verdict and was thus harmless.

V. CONCLUSION

For the above reasons, this Court should uphold the appellant's convictions on both counts.

DATED this 14th day of July, 2020.

RESPECTFULLY submitted,

ADAM KICK
Skamania County Prosecuting Attorney

By: 
YARDEN F. WEIDENFELD, WSBA 35445
Chief Appellate Deputy Prosecuting
Attorney

CERTIFICATE OF SERVICE

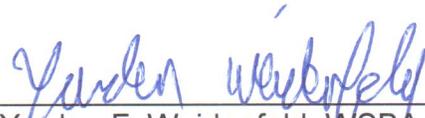
Electronic service of the original brief was effected on July 14, 2020 via the Division II upload portal upon opposing counsel:

liseellnerlaw@comcast.net

Lise Ellner

PO Box 2711

Vashon, WA 98070-2711



Yarden F. Weidenfeld, WSBA # 35445

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