FILED
February 6, 2012
Court of Appeals
Division III
State of Washington

COA NO. 29532-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

PAMELA DESKINS,

Appellant.

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

The Honorable Allen C. Nielson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE LACK OF UNANIMITY INSTRUCTION VIOLATED DESKINS'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

The State asserts this is not a multiple acts case. BOR at 4. Under the State's reasoning, any time someone is charged under an alternative means statute there can never be a unanimity violation on a multiple acts theory. The State offers no authority for the proposition. Appellate courts generally do not consider arguments unsupported by legal authority and meaningful analysis. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); Clausing v. State, 90 Wn. App. 863, 877, 955 P.2d 394 (1998).

In multiple acts cases, several acts are alleged and any one of them could constitute the crime charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). That is exactly what happened here. Several acts of unlawful animal confinement were alleged during the charging period and any one of them could constitute the crime charged. CP 19; see Brief of Appellant at 12-14 (citing to record). In a multiple acts case, the right to jury unanimity is violated where, as here, there is no unanimity instruction and no clear election of the act relied upon. Kitchen, 110 Wn.2d at 411; State v.

Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007).

Deskins did not raise the unanimity error below, but "[a]n appellate court will consider error raised for the first time on appeal when the giving *or failure to give* an instruction invades a fundamental constitutional right of the accused, such as the right to a jury trial." State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980) (emphasis added). The constitutional right to a jury trial includes the right to a unanimous verdict. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); U.S. Const. Amend. VI; Wash. Const., art. 1, § 22. The Supreme Court has held instructional errors constituting manifest constitutional error include failing to require a unanimous verdict. State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009) (citing State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974)).

The State nonetheless claims the unanimity error is not one that may be raised for the first time on appeal. BOR at 3. In so doing, the State ignores established law that a unanimity error amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Greathouse, 113 Wn. App. 889, 916, 56 P.3d 569 (2002) (citing State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991)); State v. Furseth, 156 Wn. App. 516, 520 n.3, 233 P.3d 902 (2010); State v. Kiser, 87 Wn.

App. 126, 129, 940 P.2d 308 (1997); State v. Fiallo–Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

The State advances the proposition that instructions not objected to become the law of the case. BOR at 3-4, 6. The proposition is legally irrelevant to the unanimity argument advanced here. Deskins's argument is not premised on the inaccuracy of an instruction that was given. Rather, the argument is premised on an instruction that was not given but should have been. State v. Berg, 147 Wn. App. 923, 930-31, 198 P.3d 529 (2008) (recognizing the distinction), disapproved on other grounds, State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

2. THE COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING ANIMAL CRUELTY FOR WHICH DESKINS DID NOT RECEIVE ADEQUATE NOTICE.

Without citation to authority, the State claims the uncharged alternative means violation cannot be raised for the first time on appeal as a manifest error affecting a constitutional right. BOR at 8. Established law holds otherwise. Deskins had the constitutional right to be informed of the nature of the charges against her. State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The federal and state constitutions demand that a defendant only be tried and convicted on the charge found in the charging document. State v.

Frazier, 76 Wn.2d 373, 376, 456 P.2d 352 (1969). This is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

The State asserts the charging document gave adequate notice of all alternative means of committing the crime but does not even cite to the language in the information to show how this could be. BOR at 6-8. "It is not the function of . . . appellate courts to do counsel's thinking and briefing." Orwick v. City of Seattle, 103 Wn.2d 249, 256, 692 P.2d 793 (1984). Nor is it opposing counsel's function. No response is necessary to the State's bare assertion. Deskins stands by the argument advanced in the opening brief.

3. THE SENTENCING ORDER REQUIRING FORFEITURE OF ALL PETS AND LIVESTOCK IS OVERBROAD AND VOID DUE TO LACK OF STATUTORY AUTHORITY.

The State offers no argument as to how the forfeiture order could lawfully encompass Deskins's livestock and any other animal that was never held by law enforcement. The plain terms of the forfeiture provision apply only to "all animals held by law enforcement or animal care and control authorities under the provisions of this chapter." Former RCW 16.52.200(3) (Laws of 2003, ch. 53 § 113). The State also offers no

argument as to why the dogs returned to Deskins and thus no longer held by authorities are still subject to forfeiture.

The State suggests Deskins waived the legality of the forfeiture order on appeal because defense counsel did not object to the dogs being taken and Michael Benson, who lives on Deskins's property, agreed to remove the dogs. BOR at 11-12.

Established authority demonstrates the State's waiver claim fails. "[A] defendant cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) (although restitution order was based largely on defendant's promise to pay, restitution ordered for uncharged crimes was in excess of trial court's statutory authority and needed to be vacated); see also State v. Wallin, 125 Wn. App. 648, 661-62, 105 P.3d 1037 (rejecting State's argument that defendant invited error when he agreed to previous court order that unlawfully extended community custody after defendant violated terms of release), review denied, 155 Wn.2d 1012, 122 P.3d 186 (2005); State v. Phelps, 113 Wn. App. 347, 354-55, 357, 57 P.3d 624 (2002) (reversing part of sentence extending statute of limitations as void: "Although Phelps agreed to the extension, he cannot grant the court authority to punish him more severely than the sentencing statutes allow.") (citing In re Pers. Restraint of Moore, 116 Wn.2d 30, 38-39, 803 P.2d 300 (1991) ("Since

the sentence to which petitioner agreed and which he received exceeded the authority vested in the trial judge by the Legislature, we cannot allow it to stand.")); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (defendant's request to receive mental health treatment as part of community custody does not give the court authority to impose it), review denied, 163 Wn.2d 1025, 185 P.3d 1194 (2008), overruled on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

4. THE SENTENCING ORDER PROHIBITING OWNING, ACQUIRING OR LIVING WITH PETS AND LIVESTOCK DURING THE PROBATIONARY PERIOD IS OVERBROAD AND VOID DUE TO LACK OF STATUTORY AUTHORITY.

The State claims the prohibition provision under former RCW 16.52.200(3) (Laws of 2003, ch. 53 § 113) must be read to prohibit Deskins from "residing" with similar animals. BOR at 10-11. Ignoring established rules of statutory construction set forth in the opening brief, the State claims it is absurd that Deskins could be allowed to live with similar animals while not being allowed to own or care for them. Id.

The State is wrong. Deskins's property encompasses multiple acres. 1RP 441. Michael Benson lives on the property. 1RP 150, 395. The State describes Benson as Deskins's "live-in boyfriend." BOR at 11. That description is unsupported by the record. The record shows Benson lives on Deskins's multi-acre property in a separate residence. 1RP 150,

395, 422, 441. Benson is quite capable of exclusively owning and caring for animals while Deskins resides on the property.

If the legislature always intended to include a prohibition on residing with animals, there would be no reason why it expressly included that prohibition in a later version of the statute inapplicable to Deskins. RCW 16.52.200(4)(a) (Laws of 2011, ch. 172 § 4, eff. July 22, 2011).

Courts are not free to create public policy under the guise of interpreting a statute. Graham v. Notti, 147 Wn. App. 629, 640, 196 P.3d 1070 (2008), review denied, 166 Wn.2d 1006, 208 P.3d 1124 (2009). When the legislature wants to say something, it says it. State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004). Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). That is what the State is asking the court to do here.

The plain language of former RCW 16.52.200(3), meanwhile, limits prohibition on owning or caring for "similar animals." The trial court's unqualified prohibition order, which is not limited to "similar animals," finds no sanctuary in statutory authority. CP 4. It is too broad. The State does not and cannot explain how any other conclusion is possible.

5. THE COURT IMPROPERLY IMPOSED A FINE AND RESTITUTION.

a. The Court Lacked Statutory Authority To Impose A $1000 Fine Under Count I.

The State does not and cannot dispute that the maximum fine for conviction under RCW 16.52.165 is $150. Instead, the State argues the illegal $1000 fine was not objected to below and therefore cannot be challenged for the first time on appeal. BOR at 9. That claim fails.

"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

Erroneous imposition of monetary obligations without statutory authority falls within this established rule. Moen, 129 Wn.2d at 543-48 (challenge to untimely restitution order may be raised for first time on direct appeal); see also State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000) (challenge to the sentencing court's authority to impose drug fund contribution, which constitutes a legal financial obligation,

reviewable for first time on appeal), review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001).

The justification for this rule is that it tends to bring sentences into conformity and compliance with existing sentencing statutes. State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024, 866 P.2d 39 (1993); Moen, 129 Wn.2d at 545-47. This rule also avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Paine, 69 Wn. App. at 884; Moen, 129 Wn.2d at 545-47.

The State asserts Deskins suffers no prejudice because "she was not ordered to pay the fine by the court." BOR at 9. The assertion is disingenuous. That illegal fine was suspended on the condition that Deskins comply with probation requirements. CP 2. Proceedings are currently pending in the trial court in which the State is seeking to sanction Deskins for failing to comply with probation requirements. This Court is well aware of this fact from previous motions filed at the appellate level. It appears the State is trying to convince this Court to ignore the illegal fine issue and then, on remand, have the trial court impose that fine upon a finding that probation conditions have been violated. Deskins, would, of course, have the right to appeal any such order and she would prevail on appeal because the statute limiting the fine to $150 is crystal clear.

The State concedes the amount of the fine is unlawful. BOR at 8-9; see In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it."). No legitimate purpose is served by not dealing with the issue now. Appellate courts frown upon unnecessary piecemeal ligation. See, e.g., Brown v. General Motors Corp., 67 Wn.2d 278, 282, 407 P.2d 461 (1965); Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977, 986, 478 P.2d 761 (1970). Instead of wasting further judicial resources in the future to correct what is currently an obvious sentencing error, this Court should simply strike the illegal fine from the judgment and sentence.

b. The District Court Lacked Statutory Authority To Impose Restitution For Winnie The Dog.

The State claims RCW 9.94A.753(5) provides the trial court statutory authority to order restitution for the Tennant's dog Winnie. BOR at 13-14. The State fails to address the simple fact that the Sentencing Reform Act, of which RCW 9.94A.753(5) is a part, only applies to felony sentences. State v. Besio, 80 Wn. App. 426, 431, 907 P.2d 1220 (1995). We are dealing with a misdemeanor sentence. RCW 9.94A.753(5) does not apply. The restitution award must be stricken in the absence of statutory authority to impose it.

c. The Court Violated Due Process In Imposing Restitution For Animal Care Costs Without Adequate Notice And Opportunity To Be Heard.

The State claims "Ms. Deskins was aware and has been aware of this large restitution amount before and during the trial." BOR at 15. The State cites to nothing in the record to support that claim. It is not the function of an appellate court "to comb the record with a view toward constructing arguments for counsel." In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Conclusory arguments unsupported by citation to the record and authority do not merit judicial consideration. Cowiche, 118 Wn.2d at 809.

The State contends the record shows an important reason why the judge wanted to hold the sentencing hearing immediately after the jury returned its verdicts was that the trial judge feared Deskins would inflict "self-damage." BOR at 16-17.

The State mischaracterizes the record and the claim is otherwise specious. The judge expressed a desire to incarcerate Deskins immediately due to mental health concerns. 1RP 641. The judge, however, did not seek to justify his refusal to continue the sentencing hearing on that ground. 1RP 641. The State offers no explanation as to why the judge could not have continued the restitution portion of the sentencing hearing to another day to give Deskins an adequate opportunity to contest restitution while going forward with the rest of the sentencing matters and immediate incarceration.

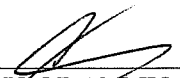
B. CONCLUSION

For the reasons stated above and in the opening brief, Deskins requests that this Court reverse the convictions for counts I and II. In the event this Court declines to do so, the improper orders of forfeiture, probation, fines and restitution should be vacated and the case remanded for resentencing.

DATED this 6th day of February 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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No. 29532-0-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 6th day of February, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Shadan Kapri
Stevens County Prosecuting Attorney
skapri@wapa-sep.wa.gov

Signed in Seattle, Washington this 6th day of February, 2012.

x Patrick Mayovsky

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 29532-0-III
	)	
PAMELA DESKINS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF FEBRUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PAMELA DESKINS
12128 NORTH DIVISION AVENUE #136
SPOKANE, WA 99218

SIGNED IN SEATTLE WASHINGTON, THIS THE 6TH DAY OF FEBRUARY 2012.

x Patrick Mayovsky