

**FILED**

**JAN 04 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 29532-0-III

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

---

THE STATE OF WASHINGTON

Respondent

v.

PAMELA DESKINS

Appellant

---

BRIEF OF RESPONDENT

---

Tim Rasmussen  
Stevens County Prosecutor

Shadan Kapri  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

Stevens County Prosecutor's Office  
215 S. Oak Street  
Colville, WA  
(509) 684-7500

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I.

ASSIGNMENTS OF ERROR

1. THE LACK OF UNANIMITY INSTRUCTION VIOLATED DESKINS RIGHT TO A UNANIMOUS JURY VERDICT.
2. THE COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING ANIMAL CRUELTY FOR WHICH DESKINS DID NOT RECEIVE ADEQUATE NOTICE.
3. THE SENTENCING ORDER REQUIRING FORFEITURE OF ALL PETS AND LIVESTOCK ALONG WITH ACQUIRING OR LIVING WITH ANIMALS DURING THE PROBATIONARY PERIOD IS OVERBOARD AND VOID DUE TO LACK OF STATUTORY AUTHORITY.
4. THE COURT IMPROPERLY IMPOSED A FINE AND RESTITUTION ON DESKINS.

II.

ISSUES PRESENTED

1. WHETHER THE APPELLANT HAS WAIVED THE ISSUE OF JURY INSTRUCTIONS ON APPEAL AND FAILED TO SHOW MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.
2. WHETHER THE FINE UNDER COUNT 1 IS WAIVED FOR PURPOSES OF APPEAL.
3. WHETHER THE SENTENCING ORDER REQUIRING FORFEITURE OF ALL PETS AND LIVESTOCK AND PROHIBITING OWNING OR LIVING WITH ANIMALS WAS OVERBROAD OR VOID DUE TO LACK OF STATUTORY AUTHORITY.
4. WHETHER THE TRIAL COURT JUDGE HAD THE STATUTORY AUTHORITY TO ORDER RESTITUTION UNDER RCW 9.94A.753(5) AND RCW 16.52.080(3).

### III.

#### STATEMENT OF THE CASE

The State of Washington through the Stevens County Prosecuting Attorney's Office filed criminal charges against Ms. Deskins in District Court originally on September 17, 2008. After a lengthy investigation and three-day trial, the jury found Ms. Deskins unanimously guilty on all four counts: Count 1 - Transporting and Confining Animals in an Unsafe Manner, Count 2 - Animal Cruelty in the Second Degree, Count 3 - Harassment, and Count 4 - Tampering with Physical Evidence. (Report of Proceedings (RP) 960).

The jury's verdict in District Court was appealed to the Stevens County Superior Court, and the Superior Court affirmed the convictions for Count 1 and II. (CP 226-30). The Superior Court also reversed the convictions for Count III and IV. (CP 226-30) This appeal follows the Superior Court's decision dated on October 26, 2010. (CP 226-30)

#### IV.

#### ARGUMENT

#### A. APPELLANT HAS WAIVED THE ISSUE OF JURY INSTRUCTIONS ON APPEAL AND FAILED TO SHOW MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.

Our Washington Supreme Court has **consistently** held that “jury instructions not objected to become the law of the case.” *State v. Hames*, 74 Wash.2d 721, 725, 446 P.2d 344 (1968) (“The foregoing instructions were not excepted to and therefore, became the law of the case.’ ” quoting *State v. Leohner*, 69 Wash.2d 131, 134, 417 P.2d 368 (1966)); *State v. Salas*, 127 Wash.2d 173, 182, 897 P.2d 1246 (1995).

This is a well-established “doctrine with roots reaching back to the earliest dates of statehood.” *State v. Hickman*, 135 Wash.2d 97, 102, 954 P.2d 900 (1998) (quoting *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896) and *Peters v. Union Gap Irr. Dist.*, 98 Wash. 412, 413, 167 P. 1085 (1917)).

It is important to note that no error was assigned to the instructions given to the jury in this case whatsoever during the trial. Defense counsel did not submit any instructions or object to any instructions. (RP 375) “Consequently, the instructions become the law of the case and the appropriateness of those instructions to the circumstances of this case is not at issue” on appeal. *State v. Byrd*, 25

Wash. App. 282, 288, 607P.2d 321 (1980); *State v. Robinson*, 92 Wash.2d 357, 597 P.2d 892 (1979); *State v. Reid*, 74 Wash.2d 250, 444 P.2d 155 (1968); *State v. Queen*, 73 Wash.2d 706, 440 P.2d 461 (1968).

Furthermore, the standard for reversing a conviction based on jury instructions is that an Appellant must demonstrate that a jury instruction was not only erroneous but also that the outcome of the case would have been changed by an alternative instruction requested by the defense. *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991).

The superior court judge in the Decision on Appeal – Reasons explicitly stated that:

The misdemeanor transporting or confining in an unsafe manner, RCW 16.52.080, proscribes transporting or confining animals. The plaintiff charged the defendant "...did willfully confine or cause to be confined..." domestic animals. Second Amended Complaint. The Court's instruction only defined the crime as "willfully confined or cause to be confined" domestic animals. Instruction No. 11. Thus the statute is in the alternative, but the charge and instruction are as to a single element. WPIC 4.20 Note on Use. Further, the defendant did not take exception to Instruction 11 and there is no manifest error affecting a constitutional right. *State v. Salas*, 127 Wn.2d 173, 181-83, 897 P.2d 1246 (1995); *State v. Crane*, 115 Wn.2d 315, 330-31, 804 P.3d 10 (1991). (CP 226-30; Decision on Appeal, Reason A)

The superior court was correct in holding the "statute is in the alternative." (CP 226-27); Decision on Appeal, Reason A) In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the

single crime committed. *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). That is exactly what has occurred in this case as noted by the superior court in its Decision on Appeals Reasons. (CP 226-30) There was jury unanimity as to guilt for the crime charged – transporting or confining animals in an unsafe manner. RCW 16.52.080. The Appellant erroneously argues, for the first time on appeal, that this is really a multiple acts case. This is inaccurate and without merit.

The Appellate Courts adhere to the principle that the “to convict” instructions are valid if they contain all of “the essential elements to the conviction.” *Mills*, 154 Wn.2d at 7-8. In this case, there is no question as a matter of law that Instruction 11 did contain every element of the crime charged. RCW 16.52.207(2).

In order to convict a Defendant of transporting or confining an animal in an unsafe manner, the State must prove that Ms. Deskins confined or caused to be confined “any domestic animal or animals in a manner, posture or confinement that will jeopardize the safety of the animal or the public.” RCW 16.52.080

Instruction 11 explicitly stated:

To convict defendant of the crime of Animal Confined in an Unsafe Manner, each of the following elements must be proved beyond a reasonable doubt: (1) The defendant, on or about May 1, 2008 through September 30, 2008; (2) Willfully confined or caused to be confined, a dog, in a manner, or confinement that jeopardized the safety of the

dog; and (3) That the acts occurred in the State of Washington” (Jury Instruction 11)

As the Superior Court noted “there is no manifest error affecting a constitutional right.” (CP 226-27; Decision on Appeal – Reasons A.)

Furthermore, the fact that defense counsel failed to object to this or any instruction, and failed to provide any alternative instructions during the phase of the trial further supports the Washington Supreme Court’s repeated holding that “jury instructions not objected to become the law of the case.” *State v. Hames*, 74 Wash.2d 721, 725, 446 P.2d 344 (1968); *State v. Leohner*, 69 Wash.2d 131, 134, 417 P.2d 368 (1966); *State v. Salas*, 127 Wash.2d 173, 182, 897 P.2d 1246 (1995).

The Appellant also argues, for the first time on appeal, that the court wrongly instructed the jury on the crime of animal cruelty in the second degree and that Ms. Deskins did not receive adequate notice regarding this offense. This argument is without merit. Ms. Deskins was not tried for an uncharged offense as the Appellant argues. (Appellant’s Brief, p. 21) The offense of animal cruelty in the second-degree was found in the original and amended the charging document. Ms. Deskins was informed of the nature of the charges against her. The Appellant is asking the Court of Appeals to “presume prejudice.” (Appellant’s Brief p. 23) The case that Appellant’s cites to *State v. Williamson*, 84 Wn. App. at 39, 42, 44-45, can be distinguished because

the information, in that case, alleged that the Defendant committed the crime of obstruction of a public service by means of conduct but the trial court convicted on the obstruction by means of speech. *Williamson*, 84 Wn. App. 39. That is not the case here. Ms. Deskins was charged with the crime of animal cruelty in the second degree. She had full knowledge of the nature of the offense against her. Furthermore, this issue was never raised in the District Court or the Superior Court level. This is the first time this issue is being raised on appeal.

The Appellate Courts consider "( 1) whether the necessary facts appear in any form, or by fair construction can be found, in the charging document; and, if so, (2) whether the defendant nonetheless suffered actual prejudice as a result of the ineloquent, vague, or ambiguous charging language." *State v. Laramie*, 141 Wash. App. 332, 338, 169 P.3d 859, (2007).

**Such liberal construction removes any incentive to refrain from challenging an alleged defective information before or during trial, when a successful objection would result in only an amendment to the information.** *Kjorsvik*, 117 Wash.2d at 103, 812 P.2d 86 (quoting 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 19.2, at 442 & n.36 (1984)). Moreover, it reinforces the primary objective of the essential elements rule, which is to provide constitutionally required notice to a Defendant in a criminal case of the crimes charged against

him/her which must be defended in a court of law. *State v. Davis*, 119 Wash.2d 657,661,835 P.2d 103 (1992).

The goal of proper and fair notice is met where construction of the charging document in a common sense approach "would reasonably apprise an accused" of the crime charged." *Kjorsvik*, 117 Wash.2d at 109, 812 P.2d 86.

In this case, the information did give adequate notice that the State was charging Ms. Deskins with the crime of animal cruelty in the second-degree. A common sense approach would render that the accused was reasonably apprised of the crime charged. Furthermore, this issue is waived for purposes of appeal pursuant to RAP 2.5(a). It does not rise to the level of a manifest error affecting a constitutional right. If this was truly an issue, it would have been objected to in District Court or even in Superior Court.

**B. THE FINE UNDER COUNT 1 IS WAIVED FOR PURPOSES OF APPEAL.**

The District Court Judge stated that as "to Count I – sixty days in jail, no portion of which will be suspended, a fine of \$1,000.00, all of which will be suspended." (RP 1007) Ultimately, in the record it reveals that Ms. Deskins was ordered to pay "fines and assessments in an amount of \$1,000" (\$500.00 for Count III and \$500.00 for Count IV – both of these Counts were reversed when the convictions were reversed).

The record shows that the total fines ordered did not include the \$1,000 for Count 1. That was suspended. (RP 1007 – 1008) There was no prejudice because she was not ordered to pay the fine by the court. (RP 1007 – 1008)

Furthermore, the \$1,000.00 fine for Count I was never objected to on the trial court level. Under the Rules of Appellate Procedure, RAP 2.5(a) explicitly states that the “appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.” RAP 2.5(a) This claim does not fall under the narrowly defined exception to RAP 2.5(a).

C. THE SENTENCING ORDER REQUIRING FORFEITURE OF ALL PETS AND LIVESTOCK AND PROHIBITING OWNING OR LIVING WITH ANIMALS WAS NOT OVERBROAD OR VOID DUE TO LACK OF STATUTORY AUTHORITY

The Appellant argues that the trial court did not have the authority to order forfeiture of Ms. Deskins animals and livestock under the language of RCW 16.52.200.

Contrary to Appellant’s argument, RCW 16.52.200(3) clearly and explicitly states that “the court **shall order the forfeiture of all** animals

held by law enforcement or animal care and control authorities under the provisions of this chapter **if any one of the animals involved dies as a result of a violation of this chapter.**” RCW 16.52.200(3).

RCW 16.52.200 (3) also specifically states if forfeiture is ordered, then the person convicted of animal cruelty shall be prohibited *from owning or caring for* any similar animals for a period of two years.

RCW 16.52.200(3) (emphasis added) (The term “similar animals” gave the trial court the authority to prohibit Ms. Deskins from living with or acquiring all pets and livestock. Conclusion of Law 2.8.)

The Appellant argues that since “residing with” was added to the statute in 2011 that implicitly meant that Ms. Deskins could live with animals during the probationary period after being convicted of animal cruelty. This is an absurd argument and would take away from the whole legislative intent in passing this law. The legislature prohibited any person convicted of animal cruelty from owning or caring for similar animals in order to prevent another incident of animal cruelty during the probationary period.. Implicit in “owning or caring” for an animal is that the convicted person could not have any animals during the probational period. To read such a literal interpretation of the statute (as Appellant requests) takes away from the whole legislative intent to prevent people convicted of animal cruelty from re-offending within the probationary period.

In other words, if this Court accepts the Appellant's argument then every person who was convicted of animal cruelty could still own animals as long as the animal was outside their home (and not "residing" with them in the house). This is an absurd argument since the animals Ms. Deskins was convicted of abusing all lived outside the home. (Ms. Deskins 39 dogs lived outside throughout the year.)

Here, the conviction of animal cruelty in the second-degree gave the court the authority to prohibit Ms. Deskins from having any similar animals for a period of two years. RCW 16.52.200(3). It also allowed the forfeiture. This law is not overbroad or void but instead fits within the Legislative purpose to protect animals and prevent animal cruelty by individuals already convicted of the crime within a period allowed by the Legislature.

Furthermore, the Appellant fails to reveal that the dogs that were returned to Ms. Deskin's household by SpokAnimal **were given away by her live-in boyfriend Mike Benson.** (RP 1002) Ms. Deskins own attorney, Mr. Rae, stated on the record:

Thank-you Judge. **We have no objection to the dogs being taken** – and – forfeited if the Court chooses to do so – by Mr. Benson.... We just ask – Your Honor we just ask – that he [Mike Benson] be given thirty days to contact and --- and get rid of all of the dogs through the appropriate rescue groups – that – he finds.

(RP 1002) (emphasis added)

On the record, Mr. Mike Benson voluntarily agreed that “I’ll do it.” (RP 1002) Mr. Benson even stated to the judge that “I would say I would enjoy it. It has to be done.” (RP 1003)

D. THE TRIAL COURT JUDGE HAD THE STATUTORY AUTHORITY TO ORDER RESTITUTION UNDER RCW 9.94A.753(5) AND RCW 16.52.080(3).

In the District Court’s Findings of Fact and Conclusions of Law, the trial judge ordered restitution in the amount of \$1400 to Larry and Cindy Tenant, and restitution to the Stevens County Sheriff’s Department in the amount of \$21,582.21. (District Court, Findings of Fact 1.7; CP 225) The superior court Decisions on Appeal affirmed the restitution for the dog “Winnie.” Specifically, in Decisions on Appeal Part H the court stated “the restitution granted for the dog ‘Winnie’ was lawful, and it is clear from the record the injuries suffered by “Winnie’ were casually related to the animal cruelty crimes the defendant was convicted of. But it is necessary to confirm the legal authority to order restitution as to misdemeanors. This part of the sentence is also remanded for clarification.” (Decisions on Appeal, Part H; CP 226-30)

The decision to impose restitution and the amount are within the trial court's discretion. *State v. Bennett*, 63 Wash. App. 530, 535, 821 P.2d 499 (1991). The Appellate Court will reverse such an order only if it is manifestly unreasonable or the sentencing court exercised its

discretion on untenable grounds or for untenable reasons. *State v. Smith*, 33 Wash. App. 791, 798-99, 658 P.2d 1250, *review denied*, 99 Wash.2d 1013 (1983) (citing *State v. Cunningham*, 96 Wash.2d 31, 34, 633 P.2d 886 (1981)). However, the power to impose restitution derives entirely from the statute. *State v. Davison*, 116 Wash.2d 917, 919, 809 P.2d 1374 (1991); *State v. Hunotte*, 69 Wash. App. 670, 674, 851 P.2d 694 (1993).

Under the statute for transporting or confining animals in an unsafe manner, RCW 16.52.080, the statute explicitly states:

“Any person who willfully transports or confines or causes to be transported or confined any domestic animal or animals in a manner....that will jeopardize the safety of the animals or the public shall be guilty of a misdemeanor...[and] **an officer or person may take charge of the animal or animals, and any necessary expense thereof shall be a lien thereon to be paid before the animal or animals may be recovered, and if the expense is not paid, it may be recovered from the owner of the animal or the person guilty [of such a crime].**”

RCW 16.52.080(3).

Under RCW 9.94A.753(5) restitution “shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” RCW 9.94A.753(5). The amount of restitution must be established by substantial credible evidence. *State v. Kisor*, 68 Wash. App. 610, 620, 844 P.2d 1038 (1993). Damages need not be proven with

specific accuracy for purposes of determining the amount of restitution but need to be easily ascertainable. *State v. Mark*, 36 Wash. App. 428, 434, 675 P.2d 1250 (1984).

Here, Larry Tennant testified that on May 6, 2008 his dog “Winnie” was attacked by Ms. Deskins dogs. (RP 443 – 445) Terry Feiler also testified that he saw the Deskins dogs out in the field attacking Winnie. (RP 480) Mr. Tennant took Winnie to a veterinarian, Dr. Koesel, for treatment caused by the substantial injuries. (RP 445) The veterinarian testified that there were “bite wounds all over the [dog’s] body, neck, both front legs, back legs, and abdomen.” (RP 419)

Dr. Koesel gave Winnie antibiotics, pain medicine, and sutured the lacerations and put drains in them. (RP 421) Photographs of the dog wounds were admitted and shown to the jury. (RP 426-427) The bill from the veterinarian was over \$1400. (RP 445)

Under RCW 9.94A.753(5) the trial judge had the statutory authority to order restitution to the Tennants in the amount of \$1400 for the damage caused to their dog and the subsequent bill resulting from it. RCW 9.94A.753(5).

The trial court's decision to order restitution to the Stevens County Sheriff's Department and the Tennants was based upon tenable grounds and reasons in accordance to statutory authority. RCW 9.94A.753(5); RCW 16.52.080(3); *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

Here, Ms. Deskins was both the owner of the animals in question and the person found guilty of confining animals in an unsafe manner under RCW 16.52.080. Therefore, the statute gave the trial judge the statutory authority to recover the money that was spent when the animals were taken by the Stevens County Sheriff's Department in violation of Chapter 16.52. RCW 16.52.080(3).

The animals were transferred to an animal shelter, Spokanimal, which charged the Sheriff's Department for the care of the large number of dogs. Ms. Deskins was aware and has been aware of this large restitution amount before and during the trial. This case had been pending for over a year and a half before it went to trial. To express that she did not have adequate notice is absurd. The trial judge did not abuse her discretion by statutorily ordering the recovery of this expense back to the Stevens County Sheriff's Department under RCW 16.52.080(3).

In the Sentencing portion of the Report of Proceedings, the Prosecutor provided exact figures with regards to what was owed to SpokAnimal. (RP 1001) Captain George also stated on the record that “[t]here’s a bill that’s still outstanding to Spokanimal for \$5,940.00 Your Honor. And – the costs of the sheriff’s office prior to that for caring for those animals was \$21,582.21.” (RP 1001) The Defense had over a year and a half to prepare for this case and the sentencing provisions. The record reveals that an important part of the reason the Judge wanted to finish the case on that day is because Ms. Deskins had made statements that she was suicidal and the judge feared that if the case was continued and she was allowed to go home Ms. Deskins would conflict “self-damage.” (RP 1018)

As the Judge stated on the record “the defendant made it clear that there were some issues and – some representations regarding harming oneself and I am concerned. As you said, I take mental health issues seriously and I want you to know I take mental health issues seriously and I am not going to release her just to walk out of this courtroom and fact his on her own. I think there’s going to be some time of adjustment and frankly the

immediate custody is, in my mind, a good – choice to prevent any self-damage.” (RP 1017 - 1018)

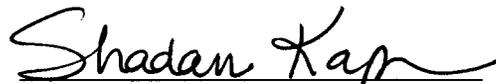
V.

CONCLUSION

Based upon the legal argument above, the State requests that the Court of Appeals affirm the jury verdicts on Count 1 and Count II.

Dated this 12<sup>th</sup> day of January, 2012.

Mr. Timothy Rasmussen  
Stevens County Prosecuting Attorney



Shadan Kapri WSBA # 39962  
Senior Deputy Prosecuting Attorney  
Stevens County  
Attorney for Respondent

**Affidavit of Certification**

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Nielsen, Broman, & Koch, PLLC, Casey Grannis, Eric Nielsen, Attorneys at Law, 1908 E. Madison Street, Seattle, WA 98122 on January 2, 2012.

A handwritten signature in black ink that reads "Shadan Kapri". The signature is fluid and cursive, with a long horizontal line extending to the right from the end of the name.

Shadan Kapri

Senior Deputy Prosecuting Attorney