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COURT OF APPEALS
DIVISION III
SPokane, Washington

301028-III

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DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

SHARON LYNNE PROVOST,

Defendant/Appellant.

APPEAL FROM THE ADAMS COUNTY SUPERIOR COURT

APPELLANT'S BRIEF

Respectfully submitted:



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I. ASSIGNMENTS OF ERROR

1. Whether the court incorrectly took witness testimony at the suppression hearing and then erred in concluding both the initial search of Ms. Provost's property was lawful and that a nexus existed between her home and criminal activity.
2. Whether the trial court erred in allowing testimony at trial from Dr. William Grant about his conversations with Ms. Provost concerning her dogs.
3. Whether the trial court erred in admitting photographs at trial depicting living conditions inside Ms. Provost's home.
4. Whether the trial court erred in allowing testimony at trial from Deputy Verhey regarding a prior complaint made in August of 2007 about the welfare of Ms. Provost's dogs.
5. Whether the State's evidence failed to establish each of the elements of First Degree Animal Cruelty beyond a reasonable doubt.
6. Whether Ms. Provost's trial counsel was ineffective in failing to offer an instruction to the jury on the affirmative defense to the lesser included offense of Second Degree Animal Cruelty.

7. Whether cumulative errors at trial deprived Ms. Provost of her right to a fair trial.
8. Whether the trial court abused its discretion in imposing an exceptional sentence and ordering Ms. Provost to not own, house, harbor or care for domestic animals such as dogs and cats for 20 years.

II. STATEMENT OF THE CASE

The Appellant, Sharon Lynne Provost, was charged by Second Amended Information with four counts of First Degree Animal Cruelty and two counts of Transporting or Confining in an Unsafe Manner. (CP 291-294). The case proceeded to jury trial in June of 2011. Ms. Provost was found guilty by jury of all six counts. (CP 320-323, 328, 329). As a result, the jury did not decide the lesser included offenses of Second Degree Animal Cruelty. (CP 324-327).

Prior to trial, Ms. Provost's trial counsel moved under CrR 3.6 to suppress evidence on the basis of an unlawful search. (CP 33-34); (10/29/2010 RP 27-114). Her trial counsel specifically argued that evidence obtained as a result of an unlawful search was used to obtain a subsequent search warrant for Ms. Provost's properties. (CP 48-55); 10/29/2010 RP 93-98). Her counsel also challenged the scope of the search warrant, arguing there was no nexus between criminal activity and

Ms. Provost's home. (CP 48-55); 10/29/2010 RP 93-98). Over defense objection, the court took witness testimony during the hearing and did not limit its analysis to the four corners of the warrant affidavit. (CP 207-216); (10/29/2010 RP 27-28, 30-31). The court concluded the initial search was lawful under both the Fourth Amendment and the Washington State Constitution and that a nexus existed between criminal activity and Ms. Provost's home. (CP 214-216).

At trial, the State of Washington called five witnesses. Deputy Benjamin Buriak of the Adams County Sheriff's Department testified that he received a call from dispatch that an unidentified woman called in on July 3, 2008, to report an animal welfare concern at Ms. Provost's rural property on Smart Road. (06/21/2011 RP 299-300). The property consisted of 80 acres of pasture land. (06/22/2011 RP 454, 462). Deputy Buriak responded to the property and took several photographs. (06/21/2011 RP 308). Deputy Buriak observed three shed buildings which were surrounded by a fence line and a closed gate leading to the property. (06/21/2011 RP 304, 307). Deputy Buriak counted on the property a total of 25 dogs, four of which were deceased. (06/21/2011 RP 316). The four deceased dogs at the Smart Road property comprised Counts 1 through 4 of the State's Second Amended Information. (CP 291-293). One of the deceased dogs, identified as Dog D, had been chained and appeared to

have hung itself over a wall. (06/21/2011 RP 316-317, 321). It was unclear exactly how the other three dogs, identified as Dogs A-C, died. None of the deceased dogs were ever inspected by a veterinarian to verify the cause of death. (06/21/2011 RP 336).

Deputy Buriak observed a large, 55-gallon, plastic drum filled with water inside the fence line of one of the sheds at the Smart Road property. (06/21/2011 RP 317). There were food dishes and water buckets inside the other sheds. (06/21/2011 RP 318). Some of the food dishes had dog food in them and some of the water buckets had water in them. (06/21/2011 RP 318-319). The food and water dishes appeared dirty. (06/21/2011 RP 318). Deputy Buriak also observed dog fur, garbage, pieces of wood, old feces and old straw inside the sheds on the floors of the kennels. (06/21/2011 RP 319).

Deputy Buriak left the Smart Road property and contacted Ms. Provost at her home on East Third Street. (06/21/2011 RP 320). Ms. Provost said she believed one of the bigger dogs had killed some of the other dogs. (06/21/2011 RP 320, 321). She also believed one of the dogs had died because of the heat. (06/21/2011 RP 321). Ms. Provost told Deputy Buriak she knew about the dog that had hung itself, but that she had not had time to remove it. (06/21/2011 RP 321).

In the days following July 3, 2008, Deputy Buriak prepared an affidavit and obtained a search warrant. (06/21/2011 RP 322). Deputy Buriak, along with other members of law enforcement and Pet Rescue, executed the search warrant on July 12, 2008, at both Ms. Provost's property on Smart Road and her home on East Third Street. (06/21/2011 RP 323, 333). Several dog kennels were discovered that day behind Ms. Provost's residence on East Third Street, along with a total of 93 dogs, all alive. (06/21/2011 RP 325, 331). The kennels were made of wood and had metal roofs covered by tarps. (06/21/2011 RP 325). There was feces and old straw on the ground and floor of the kennels, along with dog food and food and water dishes. (06/21/2011 RP 327). Deputy Buriak also saw water inside the kennels. (06/21/2011 RP 332). Some of the water was dirty, but some of it was not so bad. (06/21/2011 RP 332). Deputy Buriak saw access to water and sprinkler lines next to the kennels. (06/21/2011 RP 337, 339).

Deputy Buriak then proceeded to the Smart Road property after leaving Ms. Provost's home on East Third Street. (06/21/2011 RP 333). The conditions had improved at the Smart Road property from the last time he was there on July 3, 2008. (06/21/2011 RP 333). The four deceased dogs had been removed and there was more straw and things for the dogs. (06/21/2011 RP 333). Some of the garbage had been picked up,

but there was still feces. (06/21/2011 RP 333). There was a little bit of food and water inside the kennels that was accessible to the dogs. (06/21/2011 RP 333; 06/22/2011 RP 371). One of the buckets of water had some dead mice floating in it, which was not uncommon according to Ms. Provost. (06/21/2011 RP 333; 06/22/2011 RP 371, 446-447).

Deputy Daniel Verhey of the Adams County Sheriff's Department assisted Deputy Buriak on July 12, 2008, with the execution of the search warrant at Ms. Provost's home on East Third Street. (06/22/2011 RP 360-361). At the time, Ms. Provost had no living animals inside her home. (06/22/2011 RP 391). Deputy Verhey took several photographs, which were marked and admitted at trial as State's Exhibits 50-82, depicting the interior conditions of Ms. Provost's home. (06/22/2011 RP 361). Ms. Provost's trial counsel made a timely but unsuccessful objection to admission of State's Exhibits 50-82 on the basis of undue prejudice. (06/22/2011 RP 362).

One of the admitted photographs, Exhibit 55, depicted a mummified dog's carcass on the kitchen floor with maggots around the carcass. (06/22/2011 RP 364). Exhibits 58 and 59 depicted a carcass of some form inside an enclosed shower in one of the bathrooms of the home. (06/22/2011 RP 365). Scratch marks were visible on the walls of the shower where the animal had tried to escape. (06/22/2011 RP 370).

Exhibits 61 and 62 depicted a blue child's-type swimming pool sitting on top of a bed in one of the bedrooms. (06/22/2011 RP 365). The swimming pool contained torn up newspaper and fecal matter. (06/22/2011 RP 365). Exhibit 66 depicted a shoe on the ground with what appeared to be a dead mouse inside. (06/22/2011 RP 366). Exhibit 67 depicted a picture of the toilet in one of the bathrooms that was filled with fecal matter. (06/22/2011 RP 366). Exhibits 76 and 77 depicted a litter box with a mummified cat next to it in the basement of the home. (06/22/2011 RP 368). Exhibit 79 depicted a pile of fecal matter on the floor of one of the rooms in the basement. (06/22/2011 RP 368). The fecal matter had built up into a pile as a result of the door to the room being opened. (06/22/2011 RP 368). Exhibit 81 depicted a large cardboard box, approximately four or five feet high, filled with animal fecal matter. (06/22/2011 RP 368).

Deputy Daniel Verhey also testified he previously had contact with Ms. Provost in August of 2007 about a complaint made by Pet Rescue concerning the welfare of Ms. Provost's dogs. (06/22/2011 RP 357-358). At that time, Deputy Verhey saw little, if any, food at the kennels behind Ms. Provost's residence and the water was the same, very little, if any. (06/22/2011 RP 359). According to Deputy Verhey, several of the dogs were sleeping on top of their own fecal matter and there was very little, if

any, fresh straw or bedding inside the kennels. (06/22/2011 RP 359). Ms. Provost's trial counsel had unsuccessfully moved in limine under ER 404(b) to exclude testimony of Deputy Verhey's observations and contact with Ms. Provost in August of 2007. (06/03/2011 RP 23); (CP 241-242). The trial court allowed the testimony, ruling it to be a continuing course of conduct that was relevant and more probative than prejudicial (06/03/2011 RP 23); (CP 280-281).

Dr. William Grant, a forensic psychiatrist at Eastern State Hospital, testified he spoke with Ms. Provost on two occasions about her dogs. (06/21/2011 RP 342-343). Ms. Provost told Dr. Grant that Dogs A-C had died of the heat. (06/21/2011 RP 343). Ms. Provost also told Dr. Grant the dead animal in her shower was a goat, not a dog, which had acquired a severe fungal disease and was being treated. (06/21/2011 RP 344). Ms. Provost told Dr. Grant her animals were very well cared for and were not sick. (06/21/2011 RP 345). Ms. Provost's trial counsel did not ask Dr. Grant any questions on cross examination. (06/21/2011 RP 345).

Nicole Montano of the Spokane County Regional Animal Protection Service, otherwise known as SCRAPS, testified as an expert witness in the field of animal care and safety. (06/22/2011 RP 381). Ms. Montano had previously worked as a veterinary assistant for thirteen years. (06/22/2011 RP 379). In her opinion, the kennel conditions were

poor and inadequate. (06/22/2011 RP 381). There was no testimony by Ms. Montano as to the cause of death to Dogs A-D. (06/22/2011 RP 378-387). Ms. Provost's trial counsel did not ask Ms. Montano any questions on cross examination. (06/22/2011 RP 388).

The final witness at trial for the State was Janet Bowman. (06/22/2011 RP 389). Ms. Bowman testified to being the Treasurer for Adams County Pet Rescue and to assisting the Adams County Sheriff's Office in the execution of the search warrant at Ms. Provost's properties. (06/22/2011 RP 390). According to Ms. Bowman, she did not see any food in any of the kennels, but did see a couple empty bags of dog food. (06/22/2011 RP 395). Ms. Provost's trial counsel did not ask Ms. Bowman any questions on cross examination. (06/22/2011 RP 395).

At the conclusion of the State's case-in-chief, Ms. Provost's counsel moved to dismiss all six counts of the Second Amended Information on the basis of insufficiency of the evidence. (06/22/2011 RP 396-402). The trial court denied the motion to dismiss the four animal cruelty counts, ruling there was "enough circumstantial evidence for a jury to find, for a rational jury to find that the elements of the offenses exist." (06/22/2011 RP 401-402). The trial court also denied the motion to dismiss Counts 5 and 6, ruling the willful element for Transporting or

Confining in an Unsafe Manner is met if the State proves Ms. Provost acted knowingly. (06/22/2011 RP 401-402).

During Ms. Provost's case-in-chief, her trial counsel called three witnesses and Ms. Provost. Ms. Provost testified she was 74 years old. (06/22/2011 RP 403). Ms. Provost started collecting Social Security at the age of 62. (06/22/2011 RP 406). She also received a little bit of retirement from previous employment at WSU, about \$150.00. (06/22/2011 RP 404, 407). She owed \$2,200.00 in taxes in June of 2008. (06/22/2011 RP 437). Ms. Provost started breeding Australian shepherds in 1996. (06/22/2011 RP 407-408). She built kennels behind her residence, with roofs made out of 2x4s and 1x4s and sheet metal and tarps to prevent water leaks. (06/22/2011 RP 408). She began to expand her breeding of the dogs over the years as a supplement to her low income. (06/22/2011 RP 410-411). Some of the dogs had genetic abnormalities and did not appeal to buyers, so Ms. Provost kept them rather than euthanize them. (06/22/2011 RP 413).

Ms. Provost testified she normally got up early in the morning to feed her dogs when the weather was hot. (06/22/2011 RP 416). Ms. Provost fed the dogs varying amounts of food based upon the recommendations on the dog food sacks. (06/22/2011 RP 417). The total amount normally exceeded a 50-pound sack per day for all the dogs.

(06/22/2011 RP 438). Ms. Provost spent thousands of dollars per year on dog food despite her limited income. (06/22/2011 RP 439-440). She would also feed them vegetables and dog bones. (06/22/2011 RP 438). Ms. Provost would check on the dogs after feeding them each day to see if they needed more food. (06/22/2011 RP 417). She woke up at 6:00 a.m. on the day the police came and fed and watered all the dogs behind her home on East Third Street. (06/22/2011 RP 416). She fed and watered all her dogs on a daily basis, but had not yet fed or watered the dogs out at the Smart Road property on the day the police came. (06/22/2011 RP 416, 418, 426). She also gave them regular vaccinations and provided straw for bedding when it was available. (06/22/2011 RP 426-427, 444-445).

Ms. Provost admitted having problems with Dog D getting out of the kennel and killing chickens and chasing sheep. (06/22/2011 RP 419). So she tethered it, which also prevented coyotes from killing it if it escaped the kennels. (06/22/2011 RP 419, 426). Ms. Provost did not hang the dog, it hung itself, and Ms. Provost could not have prevented it unless she was there. (06/22/2011 RP 442). Ms. Provost thought the dog had been hanging over the wall for maybe a couple of days. (06/22/2011 RP 419). She did not immediately remove it because it was hard for her when something died and she had a bad back. (06/22/2011 RP 420). She did speak to a man with a tractor about lifting the dog off the wall.

(06/22/2011 RP 420). She believed Dog B had died by being dragged under a fence during a fight with another dog. (06/22/2011 RP 422, 424). She believed another of the dogs had died from a combination of things, including the excitement and heat and a heart condition. (06/22/2011 RP 425). Ms. Provost felt defeated by her dogs' death and testified it mattered to her. (06/22/2011 RP 423). They were her friends. (06/22/2011 RP 427). After cross-examination concluded, Ms. Provost's trial counsel did not conduct any redirect examination. (06/22/2011 RP 450-452).

Donna Bittick testified she would assist Ms. Provost in picking up dog food. (06/22/2011 RP 454). Ms. Bittick would normally pick up one or two bags a couple times, maybe three, per month. (06/22/2011 RP 454). Ms. Bittick believed Ms. Provost's dogs were always good and healthy because they passed inspection every time she brought them to the petting zoo at the fair. (06/22/2011 RP 455). Ms. Bittick never saw any of Ms. Provost's animals to be malnourished and never saw Ms. Provost mistreat any animals. (06/22/2011 RP 455). She believed Ms. Provost loved her dogs. (06/22/2011 RP 455).

Christopher Olson testified he would assist Ms. Provost by bringing her dog bones and scraps and by picking up dog food. (06/22/2011 RP 459). He would bring her three or four boxes of scraps

per week over the course of three or four months. (06/22/2011 RP 459). Mr. Olson never saw any of Ms. Provost's dogs to be malnourished or in bad health. (06/22/2011 RP 460).

Finally, Richard Donaldson testified he believed Ms. Provost's dogs to be in good health and purchased 50-pound bags of dog food once or twice per week for her to feed to the dogs. (06/22/2011 RP 463). Mr. Donaldson's wife would occasionally assist with feeding the dogs. (06/22/2011 RP 463). Mr. Donaldson never observed any mistreatment and believed Ms. Provost was good with animals. (06/22/2011 RP 464).

On June 23, 2011, the jury found Ms. Provost guilty of all six counts of the Second Amended Information. (CP 320-323, 328, 329) (06/23/2011 RP 515-516). A sentencing hearing was held on July 15, 2011, whereby the trial court entered an original Judgment and Sentence. (CP 347-357). An amended Judgment and Sentence was entered on July 21, 2011, along with a separate misdemeanor Judgment and Sentence on the two counts of Transporting or Confining in an Unsafe Manner. (CP 368-377, 382-385). On the two counts of Transporting or Confining in an Unsafe Manner, Ms. Provost was sentenced to 60 days in jail, consecutive on each count, with all 120 days suspended. (CP 383). On the four counts of First Degree Animal Cruelty, Ms. Provost was sentenced as a first-time offender and received zero days in total confinement with 12 months of

community custody. (CP 349, 370). The court then imposed an exceptional sentence and ordered that Ms. Provost not own, house, harbor or care for domestic animals such as dogs and cats for a period of 20 years. (CP 352, 373). The court requested that the State draft written findings supporting the exceptional sentence, however, the record is unclear as to whether any were submitted. (06/24/2011 RP 566, 576-577).

III. ARGUMENT

A. THE COURT INCORRECTLY TOOK WITNESS TESTIMONY AT THE SUPPRESSION HEARING AND THEN ERRED IN CONCLUDING BOTH THE INITIAL SEARCH OF MS. PROVOST'S PROPERTY WAS LAWFUL AND THAT A NEXUS EXISTED BETWEEN HER HOME AND CRIMINAL ACTIVITY.

Ms. Provost's first assignment of error is that the trial court incorrectly took witness testimony during the suppression hearing. She further argues, in the alternative, that the court erred in concluding the initial search of her property was lawful and that a nexus existed between her home and criminal activity. As a result, Ms. Provost asks this Court to reverse her conviction and remand her case with instructions to either readdress her CrR 3.6 motion or suppress the evidence.

A search warrant affidavit establishes probable cause to search where it sets forth facts which an ordinary, prudent person would conclude a crime has occurred and evidence of that crime would be found at the

place to be searched. *State v. Perez*, 92 Wash.App. 1, 4, 963 P.2d 881 (1998). When deciding the validity of a warrant, the review should be limited to only those facts and circumstances contained within the four corners of the warrant affidavit. *State v. Murray*, 110 Wash.2d 706, 709-10, 757 P.2d 487 (1988); *See also State v. Moore*, 54 Wash.App. 211, 214-15, 773 P.2d 96 (1989).

Ms. Provost first argues the trial court incorrectly took witness testimony during the suppression hearing. Ms. Provost's counsel filed a motion to suppress and memorandum in support challenging the legality of the initial search of her property and arguing evidence obtained from the unlawful search was used to obtain a subsequent search warrant. (CP 48). Her counsel also argued there was no probable cause to search her home and the kennels behind her home. (CP 48). At the suppression hearing, Ms. Provost's counsel made an apparent attempt to amend the motion to address only probable cause for issuance of the warrant and asked the court to consider only the four corners of the affidavit. (10/29/2010 RP 28-30). Over defense objection, the court decided in its discretion to take witness testimony, believing it would be highly unlikely that all facts relevant to the suppression issue would be contained within

the four corners of the affidavit.¹ (CP 207-208); (10/29/2010 RP 27-28, 30-31).

In deciding to take witness testimony, the court abused its discretion. In fact, the court itself acknowledged it would be improper to take additional testimony, yet took it anyway. (10/29/2010 RP 28). Given defense counsel's last-minute decision to proceed only on probable cause, the court should not have taken witness testimony on the issue. Ms. Provost's counsel was then essentially forced to counter near-insurmountable testimony from several prosecution witnesses. As a result, Ms. Provost's due process rights were violated and she asks this Court to remand to the trial court with instructions to readdress her CrR 3.6 motion.

If this Court agrees it was proper for the lower court to take witness testimony, Ms. Provost alternatively argues the lower court erred in concluding the initial search of her property was lawful and that a nexus existed between her home and criminal activity. Evidence of the unlawful search was later used to acquire a search warrant. As a result, Ms. Provost requests this Court reverse her conviction and remand to the trial court with instructions to suppress the evidence.

The Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution guarantee against

¹ The witnesses for the prosecution included Deputy Buriak, Susan Sackman, Jeffery Lane, Deputy Verhey and Heather Fuger. (10/29/2010 RP 35-92).

unreasonable searches and seizures. *State v. Williams*, 102 Wash.2d 733, 736, 689 P.2d 1065 (1984). Article I, Section 7 of the Washington Constitution provides a higher degree of protection than is provided by the federal constitution, by clearly recognizing an individual's right to privacy with no express limitations.² *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984); *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984). As such, a warrantless search or seizure is presumed to be unconstitutional under Article I, Section 7. *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). It is the government's burden to show a warrantless search or seizure is justified. *Williams*, 102 Wash.2d at 736.

An open field on private property may be protected by recognized privacy interests under Article I, Section 7 of the Washington Constitution. *Johnson*, 75 Wash.App. at 707. In *Johnson*, the Court reversed the defendants' convictions and remanded to the trial court with directions to dismiss. *Id.* at 710. There, an anonymous tip was made by a concerned citizen that one of the defendants, Mr. Johnson, was operating a marijuana grow operation on his property. *Id.* at 695. Acting on the tip, three DEA agents went to the property in the middle of the night and

² In the interest of brevity, Ms. Provost requests that this Court engage in a similar analysis under *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986) as Division II of the Washington Court of Appeals did in *State v. Johnson*, 75 Wash.App. 692, 702-03, 879 P.2d 984 (1994) with regard to governmental trespass on private property.

entered an unlocked gate with a “no trespassing” sign. *Id.* at 696. They then traveled down a dirt road that led to a residence. *Id.* The agents observed a barn about 200 yards past the gate and discovered evidence, via thermal imaging, of a possible marijuana grow operation inside the barn. *Id.* at 696-97. The agents used that information to obtain a subsequent search warrant and later in fact discovered a grow operation inside the barn. *Id.* at 697.

In reversing the defendants’ convictions, the *Johnson* Court distinguished *State v. Crandall*, 39 Wash.App. 849, 697 P.2d 250 (1985) and *State v. Hansen*, 42 Wash.App. 755, 714 P.2d 309 (1986), both decided by this Court, and concluded there was substantial evidence, unlike in *Crandall* and *Hansen*, to show the property owners manifested a desire to exclude others from their property. *Johnson*, 75 Wash.App. at 707-08. The *Johnson* Court was careful to point out, however, that the existence of a “no trespassing” sign is not dispositive and is simply one factor to consider. *Id.* at 706; *See also State v. Thorson*, 98 Wn.App. 528, 537-38, 990 P.2d 446 (1999) (absence of clear boundary markers does not change analysis).

Ms. Provost specifically claims Deputy Buriak unlawfully entered her property on Smart Road on July 3, 2008. As in *Johnson*, the reason for law enforcement’s visit to the property was based upon an anonymous

tip. (CP 211; 10/29/2010 RP 36). It was still daylight when Deputy Buriak arrived. (CP 212; 10/29/2010 RP 37). He discovered a gate that was open and saw a primitive access-type road going to the sheds, which were approximately a mile away. (CP 212; 10/29/2010 RP 38, 47). He drove toward the sheds, but was stopped short by an interior fence. (CP 212; 10/29/2010 RP 38). He backed out and saw a different road leading to the sheds, so he took that road and discovered a second open gate. (CP 212; 10/29/2010 RP 38). He did not observe any “no trespassing” signs near the gate, however, there may have been a torn “no trespassing” sign there in 2008, as one had been there some years earlier. (CP 212, 214; 10/29/2010 RP 38, 74, 77-79). The property was surrounded by an old pasture-type fence made of barbed wire and mesh that was common to the area.³ (CP 212; 10/29/2010 RP 73, 77). Once he got to the sheds, Deputy Buriak parked his car, got out and looked inside the sheds. (CP 212; 10/29/2010 RP 40). Deputy Buriak physically entered each of the sheds and later took photographs of his observations. (CP 212; 10/29/2010 RP 41-42, 44).

³ Ms. Provost assigns error to the court’s finding that, “Some of the fence has fallen away,” as that finding is not clearly supported by the record.

The court held Ms. Provost did not have a right to privacy in the metal sheds and the area, given the particular circumstances.⁴ (CP 214). The court cited primarily to the old fence, the open gates and the lack of signs. (CP 214-215). However, as the *Johnson* Court pointed out, the existence of “no trespassing” signs is not dispositive. There was testimony that a “no trespassing” sign, albeit torn, may have been posted on the property. And the property was surrounded by a style of fence that was common to the area and which in fact prevented Deputy Buriak from entering the property on his first attempt. Unlike in *Crandall, supra*, there was no evidence the property was frequented by hunters or other passersby. *Crandall*, 39 Wash.App. at 854. And unlike in *Hansen, supra*, where the officer saw marijuana plants in a garden from a lawful vantage point on a public road, Deputy Buriak had to drive his patrol vehicle onto Ms. Provost’s property, exit his vehicle, and physically enter the sheds in order to obtain a clear look at the dogs and the conditions inside. (10/29/2010 RP 41-42). *See Hansen*, 42 Wash.App. at 757.

⁴ Alternatively, the court justified the search under the community caretaking exception to the warrant requirement. (CP 215). The State raised the emergency aid exception to the warrant requirement in its Response to Defendant’s Motion to Suppress. (CP 68-71). However, this argument fails for primarily two reasons. First, the State concedes that no Washington opinion has expressly applied the emergency aid exception to animals. (CP 108). Second, the emergency aid exception, at least in the instant case, was arguably a pretext to perform a search, as Deputy Buriak did not attempt to render aid to any of the animals and waited several days before securing a warrant to seize the animals. (10/29/2010 RP 62, 67-68); *See State v. Schlieker*, 115 Wn.App. 264, 270, 62 P.3d 520 (2003).

Additionally, the reasons underlying Deputy Buriak's visit to the property are questionable. Unlike the officer in *State v. Seagull*, 95 Wash.2d 898, 905, 632 P.2d 44 (1981) and the tax appraiser in *State v. Vonhof*, 51 Wash.App. 33, 39, 751 P.2d 1221 (1988), who each had legitimate, non-search related reasons for going to the respective properties, Deputy Buriak went to Ms. Provost's property to search for evidence of crime. Although his visit did occur during daylight hours, Deputy Buriak did not go there to speak with Ms. Provost, as Ms. Provost did not live there. In light of Article I, Section 7, the ideal course of action would have been for Deputy Buriak to go to Ms. Provost's known residence, speak with her, make his intentions known, and then proceed either with her to the Smart Road property or without her after at least attempting to get consent.

Ms. Provost's final argument pertaining to this assignment of error is that the court erred in concluding a nexus existed between her home and criminal activity. At the time the warrant was issued, there was simply no causal connection or tie between dogs, living or dead, and the interior of Ms. Provost's home. As a result, Ms. Provost requests this Court grant her the requested relief.

A magistrate's decision to issue a warrant is reviewed for abuse of discretion. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). The

magistrate's decision is generally given great deference by the reviewing court. *Id.* The warrant affidavit should be judged in the light of common sense with doubts resolved in favor of the warrant. *Id.* Probable cause for a warrant requires a nexus between criminal activity and the item to be seized and also between the item to be seized and the place to be searched. *State v. Emery*, 161 Wash.App. 172, 203, 253 P.3d 413 (2011).

A nexus simply did not exist between Ms. Provost's home and criminal activity. The initial warrant affidavit states that, in August of 2007, Deputy Verhey went to Ms. Provost's residence and observed 63 dogs on the property, most of them living inside sheds. (CP 37). The affidavit goes on to state that Deputy Buriak, while in the back yard area of Ms. Provost's residence, observed a couple of sheds and could hear numerous dogs barking. (CP 38). Deputy Buriak then testified at the suppression hearing and confirmed he could hear animals or dogs barking *out there* when he was there to see the fence. (10/29/2010 RP 59) (emphasis added). This information clearly fails to establish that dogs were living inside Ms. Provost's home, only behind it in the sheds. At no time did Ms. Provost claim to have animals inside her home. Yet the court decided a nexus existed. By entering Ms. Provost's home, the State was able to obtain several prejudicial photographs that will be later addressed. Despite giving great deference to the issuing magistrate here, there was no

tangible nexus between dogs, alive or dead, and Ms. Provost's home. Based upon the magistrate's abuse of discretion, Ms. Provost requests this Court reverse her conviction and remand her case with instructions to suppress the unlawfully seized evidence.

B. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY AT TRIAL FROM DR. WILLIAM GRANT ABOUT HIS CONVERSATIONS WITH MS. PROVOST CONCERNING HER DOGS.

Ms. Provost's second assignment of error is that the trial court erred in admitting testimony at trial from Dr. William Grant, a forensic psychiatrist, about his conversations with Ms. Provost. Statements made by Ms. Provost to Dr. Grant were protected by privilege and Ms. Provost was prejudiced by admission of his testimony. The court should have excluded Dr. Grant's testimony.

As a general rule, communications made to a doctor or psychologist are confidential. *State v. Cross*, 156 Wash.2d 580, 613, 132 P.3d 80 (2006) (citing RCW 5.60.060; RCW 18.83.110; *State v. Sullivan*, 60 Wash.2d 214, 223, 373 P.2d 474 (1962)). However, the privilege protects only those communications made in confidence. *Cross*, 156 Wash.2d at 613. The presence of third persons will waive the privilege, depending on the reason for their presence. *State v. Anderson*, 44 Wn.App. 644, 650, 723 P.2d 464 (1986). The privilege may also be

waived when insanity is raised as a defense or when defense counsel places his or her client's mental health at issue in trial. *Id.* at 651; *See also Cross*, 156 Wash.2d at 614. The privilege may also be waived when the patient is warned the communications will not remain confidential. *State v. Side*, 105 Wash.App. 787, 792, 21 P.3d 321 (2001).

Dr. William Grant testified at Ms. Provost's trial that he spoke with Ms. Provost on two occasions about the treatment and care of her dogs. (06/21/2011 RP 342-343). The prosecutor sought to introduce and did in fact introduce statements made by Ms. Provost to Dr. Grant at her reevaluation at Eastern State Hospital on August 19, 2010.⁵ (10/29/2010 RP 24-26). These statements included a comment, which was inherently irrelevant, made by Ms. Provost to Dr. Grant that the dead animal in her shower was a goat, not a dog, which had acquired a severe fungal disease and was being treated. (06/21/2011 RP 344). She also told Dr. Grant that Dogs A-C had died of the heat. (06/21/2011 RP 343).

Both Ms. Provost's trial counsel and her Pastor, Steven Gutzman, were present for the reevaluation. (10/29/2010 RP 10). Dr. Grant testified at the CrR 3.5 hearing that Ms. Provost was reexamined on August 19, 2010, for psychological testing and that Ms. Provost had not been involuntarily committed. (10/29/2010 RP 10-11). Dr. Grant had no

⁵ Statements made by Ms. Provost to Dr. Grant at an earlier evaluation were not introduced by the State.

independent recollection of having advised Ms. Provost of her rights. (10/29/2010 RP 10-11). He did testify that he normally advises the subjects of his examinations that a written report of the examination will be forwarded to the judge, to defense counsel and to the prosecutor. (10/29/2010 RP 12-13). However, there was no testimony by Dr. Grant that Ms. Provost was advised her statements could be used against her in a court of law. (10/29/2010 RP 9-15).

The trial court ruled at the CrR 3.5 hearing that Ms. Provost's statements to Dr. Grant would be admissible at trial, as the doctor-patient privilege did not apply. (10/29/2010 RP 26). The court concluded Ms. Provost was not seeing Dr. Grant as a treating physician and she had no expectation of privacy in her statements to Dr. Grant because "[t]here were too many people there." (10/29/2010 RP 26).

Ms. Provost now challenges the trial court's admission of Dr. Grant's testimony at trial and the court's ruling that the doctor-patient privilege did not apply. First, although the presence of third persons may waive the privilege, as in *Anderson, supra*, each person present with Ms. Provost was also protected by a recognized privilege, namely the attorney-client privilege and the clergyman or priest privilege. *See* RCW 5.60.060. Second, it is unclear from Dr. Grant's testimony whether Ms. Provost was in fact advised of her rights, and even if she was, the language of Dr.

Grant's usual warning would have been insufficient to advise Ms. Provost that her statements could be used against her in a court of law, only that a report would be forwarded to the judge, prosecutor and defense attorney. A reasonable expectation, based upon that warning, would be that the information would not be revealed beyond those parties and certainly would not be used to support a criminal conviction. Finally, although defense counsel may have, at one point, contemplated a diminished capacity defense, Ms. Provost's defense at trial was general denial. Her mental health was never raised as an issue at trial. Therefore, it cannot be said that Ms. Provost waived the privilege. The trial court erred in allowing testimony by Dr. Grant at trial.

C. THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS AT TRIAL DEPICTING LIVING CONDITIONS INSIDE MS. PROVOST'S HOME.

Ms. Provost's third assignment of error is that the trial court erred in admitting certain photographs at trial depicting the living conditions inside her home. The trial court abused its discretion in admitting the photographs without weighing the probative value against the danger of undue prejudice. The photographs in fact carried limited probative value, if any, and were highly prejudicial. They were relied upon heavily by the prosecutor during closing argument. Admission of the photographs affected Ms. Provost's right to a fair trial.

In the State of Washington, the admission of photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Lord*, 117 Wash.2d 829, 870, 822 P.2d 177 (1991); *See also State v. Crenshaw*, 98 Wash.2d 789, 806, 659 P.2d 488 (1983). Photographs are not inadmissible as evidence simply because they are gruesome. *State v. Lingo*, 32 Wash.App. 638, 643, 649 P.2d 130 (1982) (citing *State v. Griffith*, 52 Wash.2d 721, 328 P.2d 897 (1958)). The test for admissibility is whether the photographs carry a probative value that outweighs their prejudicial effect. *Crenshaw*, 98 Wash.2d at 806; *See also* ER 403.

In *Crenshaw*, the Washington State Supreme Court found no abuse of discretion where the trial court admitted some autopsy photographs but ruled one in particular, that of a decapitated head, to be inadmissible. *Id.* The *Crenshaw* Court noted the trial judge was obviously aware of his discretionary function when he excluded one of the photographs and admitted others. *Id.* Despite finding no abuse of discretion, the *Crenshaw* Court admonished that:

“[W]e take this opportunity to warn prosecutors that we look unfavorably on the admission of repetitious, inflammatory photographs.

...

Prosecutors are not given a carte blanche to introduce every piece of admissible evidence if the cumulative effect of such evidence is inflammatory and unnecessary. In other words, in such situations where proof of the criminal act may be amply proven through testimony and noninflammatory evidence, we caution prosecutors to use restraint in their reliance on gruesome and repetitive photographs.”

Id. at 807.

In the instant case, numerous photographs were admitted, however, Ms. Provost challenges only the admission of State’s Exhibits 50-82. Her trial counsel made a timely objection to admission of those photographs on the basis of undue prejudice. (06/22/2011 RP 362). The trial court overruled the objection and admitted the photographs, but failed to articulate a basis for overruling the objection and failed to weigh the probative value against the danger of undue prejudice. (06/22/2011 RP 362). The trial court then took scrupulous testimony from Deputy Verhey concerning the photographs. (06/22/2011 RP 362-370). A number of the photographs depicted dead and rotting animal carcasses, piles of excrement, and overall deplorable living conditions. (06/22/2011 RP 364, 365, 368).

All four of the First Degree Animal Cruelty counts of the State’s Second Amended Information involved deceased dogs found on Ms. Provost’s Smart Road property. (CP 292). Counts five and six charged

the crime of Transporting or Confining in an Unsafe Manner. (CP 292, 293). Count five involved dogs located *on Ms. Provost's property* on East Third Street.⁶ (CP 292) (emphasis added). However, no living animals were ever found inside Ms. Provost's residence, just behind it in the kennels. (06/22/2011 RP 391). Therefore, the photographs showing the interior of the home were not dispositive of any fact at issue and had no tendency to prove or disprove any fact relevant to the elements of the charged crimes. For example, the rotting carcass of a dead goat in a shower has absolutely no bearing on whether or not Ms. Provost unlawfully abused her dogs.

Furthermore, State's Exhibits 50-82 were highly prejudicial. The prosecutor relied heavily upon the photographs during closing argument. (06/23/2011 RP 494-509). At one point, the prosecutor remarked, "the pictures really are the beginning and the end of the case." (06/23/2011 RP 495). At another point, the prosecutor made the following comment:

"I think if you look at the pictures and look [at] the excrement that was on the floor, you look at, well, dead animals that were inside the house...there is no doubt that animals at one time or another were in Ms. Provost's house. And I suspect they would have been in there around on or about July 3, 2008 and July 12, 2008 when the officers arrived.

⁶ Ms. Provost's trial counsel filed a Motion and Order for a Bill of Particulars, requesting to make the complaint more definite and certain. (CP 115-119). It is unclear from the record whether that motion was ever addressed by the court.

The conditions, again, just look at the pictures. They are deplorable...[y]ou start to run out of adjectives.”

06/23/2011 RP 496-497). Also telling are comments made by the trial court at sentencing, which tend to show that the trial court believed the photographs to be prejudicial. Those comments are as follows:

“In regard to the condition and the treatment of these dogs, it is absolutely unbelievable that any rational person could hear this testimony, see these photos and not feel sickened by what happened to these animals.

...

The circumstances that were depicted in this case are nothing short of, and, you know, I hesitate to say this, but a horror show. Dead animals in cages, *mummified in a shower*, hanging by their neck in the sun. I have been a judge for 18 years. This was one of the – I have done a number of murder cases. These pictures were disturbing. Any human being would be disturbed by these photos, and it shows a long period of doing, of this kind of behavior.”

06/23/2011 RP 565-566) (emphasis added).

The trial court erred in admitting State’s Exhibits 50-82 and abused its discretion in failing to weigh the probative value of the photographs against the danger of undue prejudice. The court did not even give a basis for overruling defense counsel’s objection. (06/22/2011 RP 362). The photographs in fact carried limited probative value, if any, and were inflammatory and highly prejudicial. The only arguable purpose of these photographs was to paint Ms. Provost as a disgusting human being,

unworthy of the jury's esteem and compassion, which is precisely what the *Crenshaw* Court expressly warned against. As so much emphasis was placed on these disturbing photographs by the prosecutor, it cannot be said that the error was harmless. It was reversible error that affected Ms. Provost's right to a fair trial.

D. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY AT TRIAL FROM DEPUTY VERHEY REGARDING A PRIOR COMPLAINT MADE IN AUGUST OF 2007 ABOUT THE WELFARE OF MS. PROVOST'S DOGS.

Ms. Provost's fourth assignment of error is that the trial court erred in admitting testimony at trial from Deputy Verhey about a prior complaint made by Pet Rescue against Ms. Provost in August of 2007. Testimony about the prior complaint was of limited relevance and was highly prejudicial. It should have been excluded by the trial court.

Evidence of other crimes, wrongs or acts is generally inadmissible to prove character or action in conformity therewith, but may be admitted for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or the absence of mistake or accident. ER 404(b); *State v. Boggs*, 80 Wn.2d 427, 433, 495 P.2d 321 (1972). To be admissible, the evidence must be relevant, must possess a probative value that is not outweighed by the danger of unfair prejudice, and must be coupled with a limiting instruction, if requested. *State v.*

Lough, 125 Wash.2d 847, 859-60, 889 P.2d 487 (1995). Uncharged offenses are admissible only if they possess substantial probative value. *Id.* at 863. Doubts as to admissibility should be resolved in favor of exclusion. *State v. Meyers*, 49 Wn.App. 243, 247, 742 P.2d 180 (1987). If admission of the evidence does not reasonably affect the outcome of the trial, the error is considered non-prejudicial and therefore harmless. *Id.* at 249-250 (to determine probable outcome, focus shifts to the remaining evidence).

Ms. Provost challenges the admissibility of Deputy Verhey's testimony that a complaint was made by Pet Rescue in August of 2007 about Ms. Provost's care of her dogs. Deputy Verhey testified he contacted Ms. Provost about the complaint and saw little, if any, food, water or fresh straw inside the kennels behind her home. (06/22/2011 RP 359). Ms. Provost's trial counsel moved in limine to exclude introduction of that testimony.⁷ (CP 241-242). The prosecutor argued the testimony established a *modus operandi* linking Ms. Provost to the charged crime. (06/03/2011 RP 23). The trial court allowed the testimony, ruling it to be a continuing course of conduct that was relevant and more probative than prejudicial. (06/03/2011 RP 23); (CP 280-281).

⁷ See generally *State v. Thang*, 145 Wn.2d 630, 658, 41 P.3d 1159 (2002) (argument preserved where defense counsel moved in limine to exclude evidence).

Testimony about the prior complaint was not relevant. The prosecutor's argument that the testimony established a modus operandi is not persuasive because the issue of identity was never at issue. *See State v. Coe*, 101 Wash.2d 772, 777, 684 P.2d 668 (1984). It was undisputed that Ms. Provost owned the land and was responsible for her dogs. The trial court's ruling that the testimony established a continuing course of conduct is equally unpersuasive because the State had not alleged criminal activity dating back to 2007. The State's Second Amended Information charged Ms. Provost only with those crimes committed on, about or between July 3, 2008 and July 12, 2008. (CP 292, 293).

Notwithstanding the lack of relevance, any probative value in the testimony was outweighed by the danger of unfair prejudice. Testimony about the prior complaint tended to show that Ms. Provost did nothing by way of remedial measures to correct the problem, even after being warned. It arguably damaged her credibility by painting her as an insensitive character, at least as to her dogs' welfare. On the felony counts, the jury was charged with deciding whether or not Ms. Provost starved, dehydrated or suffocated her dogs on or about July 3, 2008. (CP 292, 293). Testimony about the prior complaint was unfairly prejudicial because it led the jury to incorrectly conclude Ms. Provost had starved and abused her dogs continuously for the preceding 11 months leading up to July of

2008. Had the State intended to elicit that conclusion, it certainly could have charged Ms. Provost with a continuing course of criminal conduct dating back to August of 2007. It did not and, as such, the testimony about the prior complaint should have been excluded.

E. THE STATE'S EVIDENCE FAILED TO ESTABLISH EACH OF THE ELEMENTS OF FIRST DEGREE ANIMAL CRUELTY BEYOND A REASONABLE DOUBT.

Ms. Provost's fifth assignment of error is a challenge to the sufficiency of the evidence. The State's evidence was insufficient to establish beyond a reasonable doubt that Ms. Provost committed First Degree Animal Cruelty. As a result, her conviction must be reversed.

A challenge to the sufficiency of the State's evidence admits the truth of the evidence and all reasonable inferences therefrom. *Side*, 105 Wash.App. at 790. The standard is whether, viewed in a light most favorable to the State, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. *Id.* (citing *State v. Hansen*, 122 Wash.2d 712, 718, 862 P.2d 117 (1993)).

In the State of Washington, the First Degree Animal Cruelty statute provides, in pertinent part, that:

“(2) A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) [s]ubstantial and unjustifiable physical

pain that extends for a period sufficient to cause considerable suffering; or (b) death.”

RCW 16.52.205(2).

Despite other statutory means for commission of the offense, the State proceeded at trial against Ms. Provost solely under RCW 16.52.205(2). (CP 292). The trial court instructed the jury that, to find Ms. Provost guilty of First Degree Animal Cruelty, each of the following elements had to be satisfied beyond a reasonable doubt:

- “1. The defendant acted with criminal negligence;
and
2. The defendant starved, dehydrated or suffocated [dogs A-D]; and
3. The defendant caused the death of [dogs A-D];
and
4. The acts occurred in the State of Washington.”

(CP 304-307).

Ms. Provost now challenges the sufficiency of the State’s evidence only as it relates to the four counts of First Degree Animal Cruelty. Her trial counsel previously moved to dismiss all six counts of the Second Amended Information at the conclusion of the State’s case-in-chief. (06/22/2011 RP 396-402). The trial court denied the motion to dismiss the four animal cruelty counts, ruling there was “enough circumstantial evidence for a jury to find, for a rational jury to find that the elements of the offenses exist.” (06/22/2011 RP 401-402).

The State's evidence at trial was insufficient to establish all the elements of First Degree Animal Cruelty beyond a reasonable doubt. The evidence specifically failed to prove Ms. Provost caused the death of Dogs A-D. The only evidence the dogs were deceased comes from Deputy Buriak's testimony. He called at one of the dogs several times and when it did not move he concluded it was deceased. (06/21/2011 RP 310). No dead dogs were ever seized and, as a result, causes of death were never known. (06/21/2011 RP 336). One of the dogs, identified as Dog D, had been chained and appeared to have hung itself over a partition wall. (06/21/2011 RP 316-317, 321). It is not unlawful or even negligence per se to chain or tether a dog. While a rational jury could conclude Dog D died of suffocation, there was no evidence, direct or circumstantial, to show Ms. Provost caused Dog D to hang itself. As to Dogs A-C, although the cause of death was unknown, there was testimony at trial that it was possibly the result of heat or fights between the dogs. (06/21/2011 RP 320, 321). None of those causes of death are at the hands of Ms. Provost and it was purely speculative, in the absence of qualified medical evidence, to conclude otherwise. As a result, Ms. Provost's convictions on the animal cruelty counts must be reversed.

F. MS. PROVOST’S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OFFER AN INSTRUCTION TO THE JURY ON THE AFFIRMATIVE DEFENSE TO THE LESSER INCLUDED OFFENSE OF SECOND DEGREE ANIMAL CRUELTY.

Ms. Provost’s sixth assignment of error is that her trial counsel was ineffective in failing to offer an instruction to the jury on the affirmative defense to Second Degree Animal Cruelty. There was no tactical advantage in not offering the instruction and the evidence presented at trial as to Ms. Provost’s financial and economic hardship would have supported the instruction. Ms. Provost was prejudiced because the instructions given did not allow one of her theories of the case to be fully addressed.

In the State of Washington, the statute which criminalizes Second Degree Animal Cruelty is bifurcated into two separate means for commission of the offense. RCW 16.52.207. The statute provides, in pertinent part, that:

“(1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

(2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:

(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure; ...”

RCW 16.52.207. The statute goes on to provide an affirmative defense to subsection (1) and (2)(a), which must be established by a preponderance of the evidence, that the defendant’s failure was due to economic distress beyond his or her control. RCW 16.52.207(4).

In the instant case, Ms. Provost’s trial counsel proposed a set of jury instructions which included instructions on the lesser included crime of Second Degree Animal Cruelty. (CP 217-239). However, her trial counsel failed to propose an instruction on the affirmative defense of economic distress, despite filing a notice of intent to use the defense at trial. (CP 240). As a result, Ms. Provost received ineffective assistance of counsel, as the jury was never instructed on the affirmative defense to the lesser crime.

Claims of ineffective assistance of counsel involve mixed questions of law and fact that are reviewed de novo. *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee an accused the right to effective assistance of counsel. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 684-86, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the accused suffers prejudice as a result. *Id.* Prejudice is established when it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different. *Id.*; *See also Lord*, 117 Wn.2d at 883-84. A strong presumption of effective assistance exists, whereby the accused has the burden of showing there was no legitimate tactical reason for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-336, 899 P.2d 1251 (1995). Counsel's performance is reviewed in the context of the entire record below. *Id.* at 335; *Strickland*, 466 U.S. at 695-96.

In *State v. Smith*, 154 Wash.App. 272, 273, 223 P.3d 1262 (2009), the defendant, Thomas Smith, appealed his conviction for First Degree Animal Cruelty following the death of his llama. Mr. Smith claimed ineffective assistance of counsel when his attorney failed to request an instruction on the lesser included offense of Second Degree Animal Cruelty. *Id.* at 277. Division II of the Washington Court of Appeals agreed, finding defense counsel's all or nothing strategy was not a legitimate trial tactic and constituted deficient performance where evidence at trial supported only the lesser crime. *Id.* at 278. Mr. Smith was prejudiced because the jury was forced to either convict of the greater crime or let him go free despite some evidence of culpable behavior. *Id.*

(citing *State v. Pittman*, 134 Wash.App. 376, 387-89, 166 P.3d 720 (2006)).

A number of Washington courts have addressed the issue of whether a failure to request an affirmative defense instruction rises to the level of ineffective assistance.⁸ In *Powell*, a sex case, the Court reasoned the jury had no way of weighing the legal significance of certain evidence absent the affirmative defense instruction. *Powell*, 150 Wash.App. at 156-57. In concluding counsel was ineffective, the Court rejected the State's claim that counsel's failure to offer the instruction was tactical, because the affirmative defense would be relevant only once the State proved the elements of the crime. *Id.* at 158 n. 12. Likewise, the Court in *Hubert*, another sex case, concluded defense counsel's failure to proffer the affirmative defense instruction precluded the jury from evaluating certain evidence. *Hubert*, 138 Wash.App. at 932. In *Michael*, a firearm case, this Court reasoned that defense counsel's failure to propose an instruction on unwitting possession was not ineffective because counsel would have had to concede the element of knowing possession rather than require the State to meet its burden. *Id.* at 527-28.

⁸ *State v. Powell*, 150 Wash.App. 139, 154-58, 206 P.3d 703 (2009) (counsel ineffective); *In re Hubert*, 138 Wash.App. 924, 928-32, 158 P.3d 1282 (2007) (counsel ineffective); *State v. Michael*, 160 Wash.App. 522, 526-28, 247 P.3d 842 (2011) (counsel not ineffective).

Ms. Provost argues her trial counsel was ineffective. As addressed earlier, her counsel correctly proposed instructions on the lesser included offense of Second Degree Animal Cruelty, but failed to request an instruction on the affirmative defense to that crime. The Court in fact instructed the jury on the lesser included offense. (CP 308-309). The effect of instructing on the lesser offense without also instructing on the affirmative defense is analogous to the gifting of an automobile for which no key exists. It is analogous to a DUI trial where Physical Control is a lesser included and defense counsel fails to request a safely off the roadway instruction where the accused was parked in a parking lot. In other words, instructing on the lesser offense was effectively meaningless without also proffering the affirmative defense instruction.

Furthermore, the evidence at trial supported the affirmative defense instruction. Ms. Provost testified she was 74 years of age and began collecting Social Security at the age of 62. (06/22/2011 RP 403, 406). She received a little bit of retirement from WSU, about \$150.00, and began selling dogs as a supplement to her low income. (06/22/2011 RP 404, 407, 410-411). She owed \$2,200.00 in taxes in June of 2008 and spent thousands of dollars per year on dog food. (06/22/2011 RP 437, 439-440). As in *Powell* and *Hubert*, *supra*, Ms. Provost's testimony as to her financial strife means nothing unless the jury is instructed on the

affirmative defense of economic distress. Unlike *Michael*, Ms. Provost's counsel would not have been compelled to concede a crucial element of the crime charged because the affirmative defense applied to a lesser crime. Deciding not to request the instruction posed no tactical advantage. Ms. Provost was prejudiced because the instructions given did not allow one of her theories of the case, financial and economic hardship, to be fully argued.

G. CUMULATIVE ERRORS AT TRIAL DEPRIVED MS. PROVOST OF HER RIGHT TO A FAIR TRIAL.

Ms. Provost's seventh assignment of error is that cumulative errors at trial deprived her of a fair trial. As discussed herein, the trial court erred in admitting several pieces of evidence and testimony which, taken together with her trial counsel's ineffective assistance, prejudiced her at trial. As a result, Ms. Provost requests that she be given a new trial.

The cumulative error doctrine applies where several trial errors, standing alone, are insufficient to justify reversal but when combined, deny the accused of a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To constitute cumulative error, the trial errors must be prejudicial. *State v. Saunders*, 120 Wn.App. 800, 826, 86 P.3d 232 (2004). Accumulated evidentiary errors by the trial court may necessitate a new trial. *Coe*, 101 Wash.2d at 789. A trial court's refusal to allow

certain defense evidence, coupled with other errors at trial, may necessitate a new trial. *State v. Whalon*, 1 Wash.App. 785, 804, 464 P.2d 730 (1970). Inadmissible testimony from several witnesses, coupled with instances of prosecutorial misconduct and insufficient evidence of guilt, may necessitate a new trial. *State v. Alexander*, 64 Wash.App. 147, 158, 822 P.2d 1250 (1992).

Cumulative errors deprived Ms. Provost of a fair trial. As discussed herein, the trial court allowed inadmissible testimony from Dr. Grant about dead goats in a shower and from Deputy Verhey about prior complaints by Pet Rescue. The trial court admitted certain photographs which had no relevance and portrayed Ms. Provost as a disgusting human being living in absolute filth. Ms. Provost's trial counsel was ineffective in failing to proffer certain jury instructions and in failing to cross examine three of the State's five witnesses.⁹ And the State's remaining evidence was insufficient to support a finding of guilt on four of the six counts. Setting aside the merits of each individual claim, the accumulation of these errors necessitates a reversal of the conviction and a remand for a new trial.

⁹ Ms. Provost does not raise an individual assignment of error for ineffective assistance due to her trial counsel's failure to cross-examine State's witnesses, but does raise it for cumulative error purposes only.

H. THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE AND ORDERING MS. PROVOST TO NOT OWN, HOUSE, HARBOR OR CARE FOR DOMESTIC ANIMALS SUCH AS DOGS AND CATS FOR 20 YEARS.

Ms. Provost's eighth and final assignment of error is that the trial court abused its discretion in imposing an exceptional sentence and ordering her to not own, house, harbor or care for domestic animals for 20 years. There was no legal basis for the court to impose an exceptional sentence based upon the aggravators relied on by the court. As a result, Ms. Provost requests a remand for resentencing.

The trial court's imposition of an exceptional sentence is reviewed for an abuse of discretion. *See generally State v. Bedker*, 74 Wash.App. 87, 101, 871 P.2d 673 (1994); *See also State v. Grayson*, 154 Wash.2d 333, 341-42, 111 P.3d 1183 (2005). RCW 16.52.205(5)(a) allows the trial court to prohibit persons convicted of First Degree Animal Cruelty from harboring or owning animals or from residing in any household where animals are present. *See also* RCW 9.94A.505(8) (court may impose and enforce crime-related prohibitions). However, that authority is not absolute and, in the event of an exceptional sentence, is limited by the Sentencing Reform Act. RCW 9.94A.

All sentences shall be presumed concurrent while consecutive sentences may be imposed only under the exceptional sentence provisions

of RCW 9.94A.535. RCW 9.94A.589(1)(a). Under RCW 9.94A.535(2), the court may impose an aggravated exceptional sentence without a finding of fact by a jury under certain enumerated circumstances. Those circumstances include when a presumptive sentence would be clearly too lenient or when an offender's high offender score results in some offenses going unpunished. RCW 9.94A.535(2). However, the court may not base an exceptional sentence on factors personal in nature to a particular defendant. *State v. Law*, 154 Wash.2d 85, 97, 110 P.3d 717 (2005). Nor may the court impose a sentence of confinement plus community custody which exceeds the statutory maximum for the offense. RCW 9.94A.505(5); *See also In re Brooks*, 166 Wash.2d 664, 668, 211 P.3d 1023 (2009).

Ms. Provost now challenges the trial court's exceptional sentence. The trial court ordered that Ms. Provost not own, house, harbor or care for domestic animals such as dogs and cats for a period of 20 years. (CP 352, 373). The court arrived at a 20-year prohibition by stacking five years for each of the four counts of First Degree Animal Cruelty.¹⁰ (06/24/2011 RP 567). However, the court expressed its concerns on the record pertaining to its ability to stack the prohibition beyond the statutory maximum of five years. (06/24/2011 RP 534, 535). In fact, the court admitted it was unable

¹⁰ As First Degree Animal Cruelty is a Class C felony, it carries a statutory maximum sentence of 5 years. RCW 16.52.205(4); RCW 9A.20.020(1)(c).

to locate any statutory authority for stacking the prohibition. (06/24/2011 RP 534). The State agreed, but maintained it could not locate any authority to the contrary either. (06/24/2011 RP 534). The court then decided to impose an exceptional sentence and based its decision on extreme neglect, the sheer volume of victimized dogs, Ms. Provost's belief that she took good care of her dogs, her belief that she was the victim, and her desire to have dogs again in the future. (06/24/2011 RP 566-569). The court requested that the State draft written findings supporting the exceptional sentence, however, the record is unclear as to whether any were ever submitted. (06/24/2011 RP 566, 576-577).

Despite the record being devoid of written findings, none of the reasons articulated by the court on the record at sentencing may support the imposition of an exceptional sentence under RCW 9.94A.535(2). The majority of the court's reasons are based upon factors personal in nature to Ms. Provost. Ms. Provost's beliefs and desires are irrelevant under a strict reading of the statute. The level of cruelty or neglect and the number of victims may only support an exceptional sentence when those aggravators are proved to a jury beyond a reasonable doubt. *See* RCW 9.94A.535(3) and RCW 9.94A.537. As such, the court incorrectly considered those factors and invaded the province of the jury.

Furthermore, the court's 20-year prohibition carries arguably the same effect as if the court had imposed 20 years of community custody. It is a condition of the sentence that simply cannot survive beyond the statutory maximum of five years. Despite multiple offenses, Ms. Provost enjoys the presumption of a concurrent sentence which may only be overcome by the presence of those aggravators enumerated under RCW 9.94A.535(2). Absent a jury finding, there was no legal basis to prohibit Ms. Provost from owning domestic animals beyond the five year maximum. As a result, Ms. Provost respectfully requests this Court remand for resentencing.

IV. CONCLUSION

Ms. Provost respectfully asks that this Court grant her the requested relief.

DATED: February 3, 2012.

Respectfully submitted:

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