

FILED

APR 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 301028

STATE OF WASHINGTON,
Respondent,

vs.

SHARON LYNNE PROVOST,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 08-1-00138-5

BRIEF OF RESPONDENT



Kimberly S. Horner, WSBA #42534
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Attorney for Respondent

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court was correct in taking witness testimony during the suppression hearing, concluding that the initial search of Ms. Provost's property was lawful, and concluding that there was a nexus between Ms. Provost's home and criminal activity.
- B. Dr. Grant's testimony was allowable at trial because the physician-patient privilege did not apply.
- C. The photographs depicting the interior of Ms. Provost's home were properly admitted at trial.
- D. Deputy Verhey's testimony regarding the August, 2007 complaint made about the welfare of Ms. Provost's dogs was properly admitted at trial.
- E. Each of the elements of First Degree Animal Cruelty was sufficiently established at trial.
- F. Ms. Provost's trial counsel was not ineffective for failing to offer a jury instruction on the affirmative defense to Second Degree Animal Cruelty.
- G. Ms. Provost was not denied her right to a fair trial through cumulative errors.
- H. This case should be remanded to the trial court for resentencing purposes only.

II. STATEMENT OF THE CASE

On June 23, 2011, Appellant Sharon Provost was convicted by a jury of four counts of First Degree Animal Cruelty and two counts of Transporting or Confining in an Unsafe Manner. (6/23/2011 RP 515; CP 320-323, 328, 329) These counts were charged in the State's Second Amended Information and arose out of Ms. Provost's treatment of her animals in July of 2008. (CP 291-294)

At trial, the State called several witnesses, including Adams County Sheriff's Office employees Benjamin Buriak and Daniel Verhey, Spokane County Regional Animal Protection Service employee Nicole Montano, and Dr. William Grant, a forensic psychiatrist. (6/21/2011 RP 299, 341-342; 6/22/2011 RP 356, 378)

Deputy Buriak testified that on July 3, 2008, he received a call from dispatch regarding the welfare of some animals on a property on Smart Rd., which is in Lind, Adams County. The initial report had come from a woman who had gone out to the property to look at dogs that were for sale, and who then called the sheriff's office to report that there were several dead dogs and large amounts of garbage on the property. Deputy Buriak responded to the scene at approximately seven o'clock that evening, and

observed debris, garbage, and large amounts of feces scattered over the property. He also observed four dead dogs, including one that was hanging by its neck. He further observed 21 live dogs on the property, and noted that there was very little food and only dirty water. (6/21/2011 RP 300-301, 309-314, 316-319)

Deputy Buriak testified that after photographing the conditions at the Smart Rd. property, which belonged to Ms. Provost, he proceeded to Ms. Provost's residential property on 3rd St. in Lind. Ms. Provost spoke with Deputy Buriak at that time and stated that she believed that one of her bigger dogs had killed some of her smaller dogs and that one of her dogs had died from the heat. (6/21/2011 RP 320-321)

Deputy Buriak further testified that he obtained a search warrant for both of Ms. Provost's properties and executed same on July 12, 2008. He testified that Ms. Provost's residential property contained approximately 93 dogs, a large amount of feces, and very little food. He also testified that the Smart Rd. property contained approximately 16 dogs, garbage, feces, and dead mice in a water bucket. (6/21/2011 RP 322-323, 325-333)

After Deputy Buriak, the State next called Dr. Grant, who testified that he met with Ms. Provost in 2009 and again in 2010,

and she told him that three of her dogs had died the day the deputies visited her Smart Rd. property, but that she felt that she took good care of her animals. (6/21/2011 RP 342-345) ¹

The State's next witness was Deputy Verhey, who testified that in August of 2007, he responded to Ms. Provost's residential property regarding an animal welfare complaint. At that time, he observed 63 dogs, very little food and water, inadequate bedding, and a large amount of feces. Deputy Verhey also testified that on July 12, 2008, he participated in the execution of the search warrant. Exhibits 50 through 82 were admitted during Deputy Verhey's testimony, over Ms. Provost's attorney's objection. The photos depicted the inside of Ms. Provost's home, and showed multiple animal carcasses, general filth and clutter, and a large amount of animal fecal matter. (6/22/2011 RP 357-360, 362-369)

The State next called an animal welfare expert, Ms. Montano, who testified that the conditions on Ms. Provost's property in July of 2008 posed severe health and safety risks to animals. (6/22/2011 RP 381-387)

¹ Dr. Grant had previously testified at a CrR 3.5 hearing that the purpose of the evaluations of Ms. Provost was to determine if she was competent to stand trial, and that Ms. Provost's attorney and Ms. Provost's pastor were also present at the 2010 evaluation. (10/29/2010 RP 9-10)

During the State's case-in-chief, Ms. Provost's counsel cross-examined Deputy Buriak and Deputy Verhey, but did not cross-examine Dr. Grant, Ms. Montano, or an additional witness called by the State, Ms. Janet Bowman. (6/21/2011 RP 334-339, 345; 6/22/2011 RP 373-376, 388, 395-396) The jury was instructed as to Transporting or Confining in an Unsafe Manner, First Degree Animal Cruelty, and the lesser included offense of Second Degree Animal Cruelty, but was not instructed on the affirmative defense to Second Degree Animal Cruelty. (6/23/2011 RP 480-486)

Ms. Provost was sentenced on July 15, 2011. At that time, the trial judge ordered that Ms. Provost was not to own, harbor, care for, or live with dogs or cats for twenty years. The judge articulated her reasons for ordering this prohibition for twenty (as opposed to five) years, which included the extreme neglect of the animals, the sheer number of animals involved, Ms. Provost's belief that she took good care of her animals, Ms. Provost's belief that she was the victim, and Ms. Provost's intention of obtaining animals again in the future. (7/15/2011 RP 532, 567-569, 572)

Prior to trial, during a CrR 3.6 hearing, the defense argued: (1) that Deputy Buriak unlawfully entered Ms. Provost's Smart Rd. property on July 3, 2008, and that the warrant which later arose out

of that visit was thus invalid; (2) that there was an insufficient nexus between conditions at the Smart Rd. property and the inside of Ms. Provost's house to support the warrant authorizing the search of the inside of the house; and (3) that live witness testimony should not be allowed during the CrR 3.6 hearing. (10/29/2010 RP 27-28, 93-98) The trial court allowed witness testimony, and Deputy Buriak testified that (1) he had received an animal welfare complaint from a subject who had visited the Smart Rd. property to buy a dog; (2) he responded to the scene at approximately 7:00 p.m., while it was still light out; (3) when he arrived, he observed a poorly maintained fence and a wide open gate; (4) he observed no "Private Property" or "No Trespassing" signs on the property; (5) he observed a number of dogs on the property, including several dead dogs; and (6) he observed poor conditions on the property, including an inadequate supply of food and water, and large amounts of feces and garbage. (10/29/2010 RP 35-43) He also testified that a warrant for the search of Ms. Provost's two properties was executed on July 12, 2008. (10/29/2010 RP 58-59) The trial court ruled that the initial search of the Smart Rd. property was lawful and that a nexus sufficient to support the search warrant

existed between evidence of criminal activity and Ms. Provost's home. (CP 214-216)

III. ARGUMENT

- A. The trial court was correct in taking witness testimony during the suppression hearing, concluding that the initial search of Ms. Provost's property was lawful, and concluding that there was a nexus between Ms. Provost's home and criminal activity.

Ms. Provost argues that the trial court should not have allowed witness testimony at the CrR 3.6 hearing, that it erred in concluding that the initial search of her property was lawful, and that it erred in concluding that there was an adequate basis for a search warrant for her home. The State disagrees with all of these contentions and addresses each, in turn, below.

1. Witness testimony at the CrR 3.6 hearing was both necessary and proper.

Ms. Provost made two arguments in her CrR 3.6 memorandum: (1) that the evidence used to support the search warrant was unlawfully obtained, and (2) even if such evidence was not unlawfully obtained, it did not provide probable cause for a warrant allowing the search of Ms. Provost's home and the kennels behind it. (CP 48) During the CrR 3.6 hearing, Ms. Provost's trial counsel argued that the court should consider only the facts

contained within the four corners of the search warrant affidavit in resolving these issues. (10/29/10 RP 27-28)

It would be appropriate to focus only on the information contained within the four corners of the search warrant affidavit if the inquiry is limited to whether the facts known to the issuing court provided probable cause for a search warrant. See State v. Murray, 110 Wn.2d 706, 709-710, 757 P.2d 487 (1988). However, in this case, the issue extends a step beyond that into whether the information contained in the search affidavit was unlawfully obtained. This issue necessarily requires inquiry into the circumstances under which the information was gathered.

Ms. Provost now argues that her trial counsel tried to limit the scope of the CrR 3.6 hearing only to whether there was probable cause to support the issuance of a search warrant, and that therefore no live witness testimony was needed. However, at the CrR 3.6 hearing, her trial counsel argued that the case officer illegally searched the Smart Road location, and that such search yielded the information that was later used to obtain a search

warrant. (10/29/10 RP 30) In order to resolve this issue, the trial court needed to hear witness testimony.²

2. Deputy Buriak did not unlawfully enter onto the Smart Road property on July 3, 2008, as he did not intrude into Ms. Provost's private affairs.

Ms. Provost relies primarily on State v. Johnson, 75 Wn.App. 692, 879 P.2d 984 (Div. II, 1994), to support her argument that Deputy Buriak unlawfully trespassed on her Smart Road property on July 3, 2008. However, the Johnson case is markedly distinguishable from the case at hand.

In Johnson, an informant had reported to law enforcement that Mr. Johnson had a large marijuana growing operation on his property. Law enforcement approached Mr. Johnson's property to investigate the tip, but found that there was a fence and a closed gate at the boundary to the property. On both sides of the fence, as well as on a tree within the property, were "Private Property" and "No Trespassing" signs. The investigating officers did not enter the property at that time, but returned later, under the cover of darkness (at approximately 1:00 a.m.), and surreptitiously opened the closed gate and proceeded onto the property at issue. They

² Ms. Provost states on page 16 of her appellate brief that "the court itself acknowledged it would be improper to take additional testimony, yet took it anyway. (10/29/2010 RP 28)" However, a review of the pertinent transcript clearly shows that the court was merely attempting to clarify the position of Ms. Provost's trial counsel; it was not stating that witness testimony would actually be improper. (10/29/10 RP 28)

then approached a barn that was situated on the property, and detected the odor of marijuana near the barn. The barn was approximately 75 to 100 yards from a residence that was also on the property. The officers used their observations to later obtain a search warrant. Johnson, 75 Wn.App. at 695-697.

The Johnson court analyzed the case under the following framework:

...[T]he critical inquiry under the Washington State Constitution focuses on 'those privacy interest which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.' [citations omitted.] In other words, did the law enforcement officers unreasonably intrude into the defendant's "private affairs"?

Id. at 703, citing to State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).

The court noted that the officers "...furtively entered the Johnsons' property under cover of darkness..." and that "... the access way to the property was not open, the Johnsons manifesting their subjective intent to close their property by fencing it, erecting a gate, and placing signs near the gate saying 'No Trespassing' and 'Private Property'." Id. at 705.

The Johnson court concluded:

[T]he Johnsons manifested their desire to exclude others from their 'open fields'. They posted multiple signs, including ones which read 'No Trespassing' and 'Private Property'. In addition, they placed a chain link gate and fence around their property and closed their gate. Indeed, the Johnsons appear to have done everything that one could imagine to warn others that they did not want uninvited visitors on their land. Nevertheless, [law enforcement officers] unreasonable intruded into the Johnsons' "private affairs", in this case the Johnsons' "open field", when in the early morning hours they ignored the Johnsons' fence, gate, and signs and trespassed on their property.

Id. at 707-708.

The facts of the Johnson case are easily distinguishable from those in the instant case. In Johnson, the officers furtively crept onto the property under the cover of night. Here, Deputy Buriak entered during broad daylight with no attempt to conceal his visit to the property. In Johnson, the access road to the property was not open: the gate was closed and "No Trespassing" and "Private Property" signs were posted near the gate, warning potential intruders not to enter onto the property. Here, Deputy Buriak saw no such signs, and the gate to the property was open. Furthermore, the Johnson property was residential, whereas here, the Smart Rd. property was not.

The facts of this case bear much more similarity to those in State v. Crandall, 39 Wn.App. 849, 697 P.2d 250 (1985). In Crandall, a hunter reported to the defendant's neighbor that there was marijuana growing on defendant's property. The neighbor in turn reported this to law enforcement, and law enforcement crossed a 1-wire barbed wire fence onto defendant's property and saw marijuana growing in a fenced-in garden. An officer reached into the garden and removed a marijuana plant, then later obtained a search warrant for the property. Crandall, 39 Wn.App. at 850-851. In analyzing the case, the court stated:

Here, the isolated instances of trespass by Deputy Anderson onto open fields which were not posted and were admittedly frequented by hunters do not offend the constitution. Any hunter might have observed the marijuana and directly notified the police in this instance. This property was not an area in which one traditionally could reasonably expect privacy, [citations omitted], and therefore does not rise to a privacy interest held by the citizens of this state. [citation omitted] We conclude that in this case the search and seizure did not constitute an unreasonable governmental intrusion violative of the Washington Constitution.

Id. at 854.³

³ See also State v. Hansen, 42 Wn.App. 755, 714 P.2d 309 (Div. III, 1986), wherein law enforcement travelled over the defendant's land while responding to an emergency call from the defendant's neighbor, and in doing so discovered marijuana growing on the defendant's property. Hansen, 42 Wn.App. at 757. The court held that the case was

In Crandall, the criminal activity was reported by a hunter; here, it was reported by a concerned citizen who had visited the property to purchase a dog but was appalled at what she found. Both informants were expected to be on the property. The fact that potential purchasers of Ms. Provost's dogs visit the Smart Rd. property, along with the facts that the gates to the property were open and there were no "No Trespassing" signs, show that Ms. Provost had no reasonable expectation of privacy in the Smart Rd. property and that Deputy Buriak's visit to the property was not an unreasonable intrusion into Ms. Provost's private affairs.

3. There was a nexus between Ms. Provost's home and criminal activity such that a warrant allowing the search of Ms. Provost's home was appropriate.

A search warrant must be supported by probable cause, and "probable cause requires 'facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.'" State v. Nelson, 152 Wn.App. 755, 772, 219 P.3d 100 (Div. III, 2009); quoting State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). In other words, probable

similar to State v. Crandall, supra, and that "the fields here were not posted and were clearly visible to both Mr. Hansen's neighbors and to any passersby. Thus, Deputy Nichols' discovery of the [marijuana garden] involved no unlawful intrusion into Mr. Hansen's private affairs under our state constitution." Hansen, 42 Wn.App. at 763.

cause requires “a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” State v. Goble, 88 Wn.App. 503, 509, 945 P.2d 263 (Div. II, 1997). “It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.” State v. Emery, 161 Wn.App. 172, 202 (Div. II, 2011), quoting State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

In this case, Deputy Buriak set out sufficient facts and circumstances in his affidavit to support the warrant for the search of Ms. Provost’s house. Among the facts listed was that Ms. Provost was running a puppy mill from her residence. (CP 81) Furthermore, Deputy Buriak stated that he heard dogs barking in the yard outside the house, described the deplorable conditions of the Smart Rd. property, and stated that a large number of dogs (some of them dead) were living in sheds on the Smart Rd. property, which were similar to sheds observed behind Ms. Provost’s residence. (CP 81-82) Unsafe and unsanitary conditions were observed at both sites, and were described in Deputy Buriak’s affidavit. (CP 81-82) Deputy Buriak also stated in the warrant

affidavit that approximately a year prior to this incident, Deputy Verhey had been out to Ms. Provost's residence and had counted 63 dogs on the property at that time, and those dogs were living in very poor conditions at that time. (CP 81)

It was appropriate to issue a warrant authorizing the search of Ms. Provost's home. Since Ms. Provost was running a puppy mill out of her house, in a manner that appeared to constitute animal cruelty, it was reasonable to expect that evidence of the crime of animal cruelty could be found within the house. Furthermore, considering the sheer number of neglected animals that had been observed by Deputy Buriak both at the Smart Rd. property and behind Ms. Provost's residence, and the number of neglected animals that had been previously observed by Deputy Verhey at Ms. Provost's residential property, it was reasonable to assume that there would be animals living in poor conditions inside the house, as well.

In sum, the facts set out in Deputy Buriak's warrant affidavit suggested a probability that evidence of animal cruelty would be located within Ms. Provost's residence. As such, there was sufficient probable cause to support the search warrant for Ms. Provost's residence.

B. Dr. Grant's testimony was allowable at trial because the physician-patient privilege did not apply.

Ms. Provost argues that the statements she made to Dr. Grant during the course of her evaluation were protected by the physician-patient privilege. However,

[A] forensic examination by a physician is not within the statutory testimonial prohibitions of the doctor patient privilege. [citations omitted.] The reasons are: the relationship of doctor and patient does not exist; the examination is not for the purpose of treatment, but for the publication of results. In Strafford v. Northern Pac. R. Co., 95 Wash. 450, 453, 164 P. 71 (1917), this court said:

“In order to render a physician incompetent, the information which he is called upon to disclose must have been acquired while he was attending the patient in a professional capacity for the purpose of treating her ailments; there is no privilege when the examination is made by the physician for the express purpose of publishing the results...”

State v. Sullivan, 60 Wn.2d 214, 223-224 373 P.2d 474 (1962).

See also State v. Winnett, 48 Wn. 93, 92 P. 904 (1907), and State v. Thomas, 1 Wn.2d 298, 304-305, 95 P.2d 1036 (1939).

Here, Ms. Provost did not meet with Dr. Grant for the purposes of treatment. Rather, she met with him because she was

ordered by the court to do so, and was even told by Dr. Grant that any information she gave to him would be disclosed to the court and to the attorneys on either side. (10/29/2010 RP 11-14)⁴ Therefore, under Sullivan, there was no physician-patient privilege and Dr. Grant was thus allowed to testify as to what Ms. Provost disclosed to him.⁵

C. The photographs depicting the interior of Ms. Provost's home were properly admitted at trial.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 402 states that "[a]ll relevant evidence is admissible," except as limited by any pertinent constitutional, statutory, or regulatory requirements.

Ms. Provost argues that the trial court erred in admitting photographs at trial which depicted the living conditions inside her

⁴ Dr. Grant had no independent recollection of informing Ms. Provost of this, but he testified that he always does so at the beginning of such evaluations.

⁵ Furthermore, even if Ms. Provost had met with Dr. Grant for the purposes of treatment, the physician-patient privilege would have been destroyed by the presence of third parties, Ms. Provost's attorney and her pastor. Ms. Provost argues that the attorney-client privilege and the clergy privilege contained in RCW 5.60.060 would cause her physician-patient privilege to be preserved. However, a close reading of the statute shows that those privileges are too narrow in scope to apply to the facts of this case, and even if there were an attorney-client privilege and clergy privilege in this instance, such would not operate to prevent Dr. Grant from testifying.

home, and claims that the trial court abused its discretion in admitting the photographs because they were unduly prejudicial.

This issue is governed by ER 403, which provides that evidence which is relevant may still be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice. . .” (Emphasis added.)

Here, the photographs at issue were highly probative of whether Ms. Provost confined animals in an unsafe manner at her 3rd Street property in Lind, which is what forms the basis of count five in the State’s Second Amended Information (CP 292). The interior of her house was part of that property, and the house contained dead animal carcasses on the date the photographs were taken and also appeared to have recently contained live animals, as evidenced by the large amounts of fecal matter scattered throughout the house. (6/22/2011 RP at 364-369)

Appellant argues that “[t]he only arguable purpose of these photographs was to paint Ms. Provost as a disgusting human being . . .” (Appellant’s Brief at 30) However, the actual purpose of introducing these photographs was to show that live animals had recently been in the house, and had endured horrific conditions.

"The admissibility of photographs is generally within the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal, absent the showing of abuse of discretion." State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). Ms. Provost has not established that the trial court abused its discretion in admitting these photographs into evidence. Thus, the trial court's decision on this issue should be affirmed.

D. Deputy Verhey's testimony regarding the August, 2007 complaint made about the welfare of Ms. Provost's dogs was properly admitted at trial.

Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b)

Thus, although evidence of prior bad acts would not be admissible for the purpose of showing criminal propensity because of a criminal character, such evidence could be admissible "if it is relevant for some other purpose, even though it also tends to show bad character." State v. Gogolin, 45 Wn.App. 640, 644, 727 P.2d 683 (Div. I, 1986).

“To be admissible, evidence of prior crimes, wrongs or acts must be relevant to a material issue before the jury, [citation omitted], and if relevant, its probative value must be shown to outweigh its potential for prejudice.” *Id.*

Here, Deputy Verhey's testimony was not mere character evidence, offered for the purpose of showing that Ms. Provost had a bad character and was acting in conformity therewith on the dates in question. Rather, it was evidence that was admissible under ER 404(b) to show both knowledge and absence of mistake.

At trial, Ms. Provost's main defense was that she was not the one who caused the death of the dogs at issue. (6/22/2011 RP 422-427, 442-444; 6/23/2011 RP 510-512) Therefore, evidence of how Ms. Provost cared for her animals and evidence of the conditions the animals lived in was highly relevant for the purposes of determining whether Ms. Provost was at fault for the animals' deaths. See State v. Womac, 130 Wn.App. 450, 123 P.3d 528 (Div. II, 2005), affirmed in part, reversed in part, 160 Wn.2d 643, 160 P.3d 40 (2007) (evidence that the defendant had struck his other children on prior occasions was admissible in a prosecution for homicide of a child by abuse, to show absence of mistake or accident.)

The relevance of Deputy Verhey's testimony outweighed the danger of unfair prejudice. Therefore, his testimony was properly allowed under ER 404(b).

E. Each of the elements of First Degree Animal Cruelty was sufficiently established at trial.

For each of the four counts of first degree animal cruelty, the State was required to prove that Ms. Provost, with criminal negligence, starved, dehydrated, or suffocated an animal and as a result caused its death, and that this occurred in the State of Washington. (RCW 16.52.205(2); CP 304-307) Ms. Provost argues that the evidence was insufficient to show that she caused the deaths of the four dogs at issue.

Appellate courts review a case for sufficiency of evidence utilizing the following guidelines:

The test . . . is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. . . ."[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. . . . A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonable can be drawn therefrom.

State v. Thompson, 69 Wn.App. 436, 444, 848 P.2d 1317 (Div. I, 1993), citing to State

v. Salinas, 119 Wn.2d 192, 201, 829 P.2d
1068 (1992).

When the evidence is viewed in the light most favorable to the State, a rational trier of fact could certainly have concluded beyond a reasonable doubt that Ms. Provost was responsible for the four deaths at issue in the animal cruelty counts. Because the four dead dogs had been removed from the property between the time of Deputy Buriak's initial visit and his execution of the search warrant, an official veterinary examination of those dogs was not possible. However, the circumstantial evidence was sufficient to show both that the dogs were deceased and that Ms. Provost caused their deaths.

Deputy Buriak testified that the four dogs appeared to be deceased, that one was hanging by its neck, and that he called to another one and it did not respond, and that it was partially buried in debris. (6/21/2011 RP, at 310-314) One does not need to be an expert to know whether a dog is dead or not; Deputy Buriak was fully qualified to testify that the dogs appeared to be deceased.

Furthermore, the dogs were solely in Ms. Provost's care, and the care Ms. Provost provided was completely unacceptable. Deputy Buriak testified that the property was littered with debris, garbage, and large amounts of feces, and there was an inadequate

amount of food, visibly dirty water containing debris, and living dogs mixed in with the dead ones. (6/21/2011 RP, at 310, 317-319) Furthermore, an animal protection services worker testified that the kennels were constructed in a manner which was unsafe for the animals (particularly because of the strangulation risks if animals are tethered), that there was inadequate shelter provided for the animals, that the feces on the property posed numerous health and safety issues, that the water bin with dead rodents floating in it posed the risk of contamination and infection, that the lack of sufficient fresh water could lead to severe dehydration and death, and that the conditions in general on Ms. Provost's property posed extreme health risks for the animals. (6/22/2011 RP. at 378, 382-387) Clearly, the evidence was sufficient for a reasonable trier of fact to conclude beyond a reasonable doubt that Ms. Provost's failure to properly care for her dogs caused the death of the four at issue in the animal cruelty counts.

F. **Ms. Provost's trial counsel was not ineffective for failing to offer a jury instruction on the affirmative defense to Second Degree Animal Cruelty.**

Effective assistance of counsel at trial is guaranteed to criminal defendants by the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington State

Constitution. State v. Hunley, 253 P.3d 448, 451 (Div. II, 2011), citing to In re Pers. Restraint of Riley, 122 Wn.2d 772, 779, 863 P.2d 554 (1993), and State v. Sardinia, 42 Wn.App. 533, 538, 713 P.2d 122 (1986).

Appellate courts review ineffective assistance of counsel claims de novo. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80, 91 (2006). The remedy for ineffective assistance of counsel is a new trial. State v. Thomas, 95 Wn.App. 730, 736, 976 P.2d 1264, 1267 (Div. I, 1999).

In regard to determining whether a defendant was denied effective assistance of counsel, the United States Supreme Court, in Strickland v. Washington, 466 U.S. 668, 686 (1984), stated the following:

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The Court went on to explain the following two-prong test⁶ for determining whether a defendant was denied effective assistance of counsel:

⁶ "Washington follows the ineffective assistance of counsel test set forth in [Strickland v. Washington]." State v. Hunley, 253 P.3d 448, 451 (Div. II, 2011).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

In other words, even if a defendant is able to show that counsel committed unreasonable errors, ineffective assistance of counsel is not established unless that defendant can also show that those errors "actually had an adverse effect on the defense." Strickland, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Instead, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "The defendant . . . bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would

have been different but for counsel's deficient representation." State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251, 1258 (1995), citing to State v. Thomas, 109 Wn.2d 222, 225-26, 742 P.2d 816 (1987).

The first portion of the Strickland test requires Ms. Provost to show that trial counsel's performance was so deficient that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Ms. Provost has not met this test, particularly since, in assessing attorney performance for ineffective assistance of counsel purposes, an appellate court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Ms. Provost argues that her trial counsel was deficient in failing to request a jury instruction for the affirmative defense to Second Degree Animal Cruelty. Such affirmative defense is provided in RCW 16.52.207(4), which states, in part:

In any prosecution for animal cruelty in the second degree. . . , it shall be an affirmative defense, if established by the defendant by a preponderance of the evidence, that the defendant's failure was due to economic distress beyond the defendant's control.

RCW 16.52.207(4),

To support the argument that her trial counsel should have requested this jury instruction, Ms. Provost cites to State v. Powell, 150 Wn.App. 139, 206 P.3d 703 (Div. II, 2009). In that case, the court stated that the trial attorney should have requested an instruction on a statutory defense available to the defendant where:

(1) the evidence supported such an instruction; (2) defense counsel, in effect, argued the statutory defense; and (3) the statutory defense was entirely consistent with the defendant's theory of the case.

Powell, 150 Wn.App. at 155

Here, the affirmative defense would have been completely at odds with the position Ms. Provost took at trial, which was that she had no trouble taking care of her dogs, because they were her first priority. (6/22/2011 RP at 416) Furthermore, her trial counsel argued essentially that Ms. Provost's care of her dogs was adequate. (6/22/2011 RP at 512) Therefore, it would have been irrational for her trial counsel to then turn around and argue for an instruction stating that Ms. Provost failed to take adequate care of her dogs, but that such failure was due to economic distress. Therefore, Ms. Provost cannot meet the first prong of the Strickland test.

Furthermore, Ms. Provost cannot satisfy the second prong of the Strickland test because she cannot show that trial counsel's alleged deficiency resulted in prejudice. Even if Ms. Provost's trial counsel had erred in not requesting the instruction on the affirmative defense, any such error would not have influenced the outcome of the case. Ms. Provost was charged and then convicted of First Degree Animal Cruelty. The jury was instructed on both First Degree Animal Cruelty and Second Degree Animal Cruelty, but chose to convict on First Degree Animal Cruelty. The affirmative defense on which Ms. Provost now claims the jury should have been instructed applied only to the charge of Second Degree Animal Cruelty. Therefore, since the jury decided that there was sufficient evidence to convict on First Degree Animal Cruelty, the presence or absence of a defense to Second Degree Animal Cruelty was immaterial.

Ms. Provost attempts to analogize her case to other cases in which courts decided that the failure to include an instruction on an available defense was prejudicial error and thus constituted ineffective assistance of counsel. However, those three cases are all readily distinguishable from Ms. Provost's. In both Pers. Restraint of Hubert, 138 Wn.App. 924, 158 P.3d 1282 (Div. I, 2007)

and State v. Powell, 150 Wn.App. 139, 206 P.3d 703 (Div. II, 2009), the respective defendants were charged with and convicted of second degree rape, and their counsel failed to request a jury instruction for a statutory defense to second degree rape which was supported by the evidence. In State v. Smith, 154 Wn.App. 272, 223 P.3d 1262 (Div. II, 2009), the defendant was charged with first degree animal cruelty, but the evidence supported a rational inference that the defendant committed only second degree animal cruelty. Trial counsel in the Smith case failed to request a lesser included offense instruction, leaving the jury with the choice of either convicting the defendant of first degree animal cruelty or letting him “go free despite evidence of some culpable behavior.” Smith, 154 Wn. App. at 278.

Here, the jury convicted Ms. Provost of First Degree Animal Cruelty, and as discussed in the previous section above, the evidence supported the charges of First Degree Animal Cruelty. Again, this renders the instruction on the affirmative defense to Second Degree Animal Cruelty wholly irrelevant, and therefore trial counsel's failure to request such instruction was not prejudicial. As a result, Ms. Provost's claim of ineffective assistance of counsel fails.

G. Ms. Provost was not denied her right to a fair trial through cumulative errors.

Under the cumulative error doctrine, “[a] defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair.” State v. Saunders, 120 Wn.App. 800, 826, 86 P.3d 1194 (Div. II, 2004). “Absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial.” Id.

Ms. Provost argues that the issues raised in her assignments of error constitute cumulative errors which deprived her of her right to a fair trial in this case.

However, as explained in each of the preceding Argument sections, there were no errors committed which could have deprived Ms. Provost of her right to a fair trial.⁷ Furthermore, even if this court were to find that Ms. Provost is correct in any of her assignments of error, there would nonetheless be sufficient untainted evidence remaining to support Ms. Provost’s convictions in this case, and thus there was no prejudicial error. Therefore, the cumulative error doctrine does not entitle Ms. Provost to a new trial.

⁷ Ms. Provost failed to cite any legal authority to support her assertion that trial counsel erred in failing to cross-examine some of the State’s witnesses. Furthermore, under State v. Johnston, 143 Wn.App. 1, 20, 177 P.3d 1127 (Div. III, 2007), in order to show the requisite prejudice for establishing inefficient assistance of counsel, “the defendant must show that the testimony that would have been elicited on cross examination could have overcome the evidence against the defendant.” Ms. Provost has not done so in this case.

H. **The State recommends that this case be remanded to the trial court for resentencing purposes only.**

Ms. Provost was convicted in this case of four separate counts of First Degree Animal Cruelty. (6/23/2011 RP 515; CP 320-323) At the sentencing hearing, the trial judge ordered that Ms. Provost was not to own, harbor, care for, or live with dogs or cats for twenty years. (7/15/2011 RP 567)

RCW 16.52.205(5)(a) explicitly states that a court may order a defendant who has been convicted of First Degree Animal Cruelty not to “harbor or own animals or reside in any household where animals are present.” This is an example of a crime-related prohibition, as such an order “prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted. . .” RCW 9.94A.030(10). [T]rial courts may impose crime-related prohibitions . . . for a term of the maximum sentence to a crime.” State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). The statutory maximum sentence for First Degree Animal Cruelty, a class C felony, is five years. RCW 9A.20.021; 16.52.205(4).

Under RCW 9.94A.589(1)(a), when a person is to be sentenced for multiple current offenses, that person’s sentences “shall be served concurrently. Consecutive sentences may only be

imposed under the exceptional sentence provisions of RCW 9.94A.535. . . ." It does not appear that the exceptional sentence requirements of RCW 9.94A.535 were met in this case. Therefore, the State concedes that the prohibition on owning, harboring, caring for, or living with dogs or cats should have been limited to five years, and thus asks the Court to remand this case for resentencing purposes only.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Ms. Provost's conviction.

DATED this 4th day of APRIL, 2012.

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By: 
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