

**COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III**

**STATE OF WASHINGTON**

*Respondent,*

**vs.**

**JERRY L. VANDERHOUWEN**

*Petitioner.*

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**BRIEF OF PETITIONER  
Case No. 226093-III**

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**Submitted by:**

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Attorney for Petitioner, Jerry L. Vander Houwen  
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**A. ASSIGNMENT OF ERROR**

**No. 1**

The Yakima County District Court erred in failing to give Petitioner's requested Instruction No. 1 which instruction was subsequently modified as Petitioner's Instruction No. 7. (Clerk's papers 181 and 236)

**No. 2**

Did the Trial Court's giving of Instruction No. 15 cure the Trial Court's failure to give Petitioner's requested Instruction No. 1 or Instruction No. 7.

**No. 3**

The court erred in failing to grant Petitioner's Motion for a New Trial based on the insufficiency of evidence or inconsistency of the verdict to support the two counts for which the Petitioner was convicted. (CP 185 and 197)

***Issues Pertaining to Assignment of Error***

**No. 1**

During the winters of 1998, 1999 and 2000, elk migrated into Petitioner's orchard causing extensive damage to his crops. Petitioner tried to stop the migration on his own and also made requests to the Washington State Department of Fish and Wildlife (hereafter "Department") to stop the migration of elk onto his property. Ultimately, the efforts of the Petitioner and

the Department failed and Petitioner found it necessary to shoot above the heads of the elk to frighten them out of the orchard. Dead elk were found in and outside the Petitioner's orchard over a period of several weeks in January of 2000.

Does a property owner who has made considerable effort to stop the migrating of elk damaging his orchard and has requested the assistance of the Department to stop the migration of elk on his property have the constitutional right to kill such elk if reasonably necessary to protect his property? (Assignment of Error No. 1).

***No. 2***

The Petitioner was charged with killing elk on real property that he was farming. The Petitioner testified it was necessary for him to shoot over the heads of the elk in order to frighten them out of the orchard and stop the damage occurring to his orchard. Dead elk were found inside and outside of the boundaries of the orchard the Petitioner was farming. The Trial Court gave its Instruction No. 15 (necessity instruction) based on WPIC 18.02. This instruction was in lieu of Petitioner's requested Instruction No. 1 or No. 7.

Did the court's giving of Instruction No. 15 effect the presumption of innocence by shifting the burden of proof to the Petitioner requiring the Petitioner to prove the four elements of necessity by a preponderance of the evidence? (Assignment of Error No. 3)

*No. 3*

The Petitioner proceeded to trial on ten (10) individual complaints with each complaint containing two (2) counts for a total of 20 counts. The complaints were numbered from Cause No. Y00-00037 to Y00-00046. The jury acquitted the Petitioner on all ten (10) counts of Count 2 of the complaints (Waste of Wildlife) and eight (8) counts of Count 1 of the complaints (Killing Game Out of Season). Petitioner was found guilty of Count 1 of Complaint Y00-00045 and Count 1 of Complaint Y00-00046. During the trial no evidence was presented by the State that related a specific count of any specific complaint to any of the ten dead elk. The Petitioner sought a Motion for New Trial based on the insufficiency of the evidence as to the two (2) counts for which the Petitioner was found guilty.

Does the Petitioner's conviction on the two counts fail the sufficiency of evidence test if there was no basis for the jury to attribute evidence relating to any one dead elk to any specifically numbered complaint and/or was the jury verdict inconsistent as it was upon the same evidence presented that Petitioner was acquitted of eight (8) counts of Count 1 of the complaints filed? (Assignment of Error No. 4)

**B. STATEMENT OF THE CASE**

The Petitioner, VanderHouwen and the State of Washington agreed to Findings of Facts, (CP 202, 203 and 204) which Agreed Findings of Fact

(hereinafter referred to as “FF”) were supplemented by Supplemental Agreed Findings of Fact (CP 200-201) and are fully set forth in Appendix “A” and “A-1” attached hereto.

The Petitioner was charged in individual criminal complaints with each complaint containing two (2) counts. The complaints were numbered from Cause No. Y00-00037 to Y00-00046. Count 1 of each complaint was Killing Game Out of Season and Count 2 was Waste of Wildlife. (CP 190-191 and 205-206)

In 1998, 1999 and 2000, the Petitioner, Jerrie L. VanderHouwen, farmed various cherry and apple orchards in the area of Tieton, Washington, referred to as Section One Road. The most western portion of the orchard was an approximately 37-acre block of new cherry trees. (FF 1 and 2)

During the years 1998 and the fall of 1999, elk came through the Washington State Department of Fish and Wildlife’s (hereinafter Department) fences and entered Petitioner’s orchard causing significant damage. (FF 3) During those years, Mr. VanderHouwen took steps on his own to stop and/or minimize the damage to his orchards, but his efforts were not successful. These steps included feeding hay and repairing Department game fences. (FF 4) The migration of elk continued from 1998 into the winter year 2000. (FF 5) The Petitioner contacted the Department on at least four occasions during the 1999-2000 winter to notify them of the migrating elk and seek their assistance

to stop the damage occurring to his orchard from the migrating elk. (FF 6) The migration of elk primarily occurred in the twilight and evening hours. Petitioner became frustrated from what he felt was a lack of support by the Department in controlling the elk coming into his orchard. The elk continued to cause damage to Petitioner's orchard trees - predominately the young cherry trees. (FF 7) By January 2000, the Petitioner had suffered approximately \$13,448.00 of damage to the orchard. This damage was the cost of replacement cherry trees, pulling out and replanting trees, and damage to his irrigation system. (RP p. 22)

There was also the potential loss for those trees that had been significantly damaged but had not yet died. This loss was approximately \$6,375.00. (RP p. 22)

In addition to the loss of trees the Petitioner suffered future loss profits (earnings) as a result of the elk damage. Petitioner's expert estimated that future loss of production attributed to the cherry trees that Mr. VanderHouwen lost from elk damage in the 37-acre block would have been \$236,000.00. (RP p. 23)

During the month of January 2000, the elk migrated into the Petitioner's orchard, reaching populations of 40 to 70 animals. As a result of the constant pressure and economic damage to his orchard the Petitioner in January of 2000 began shooting over the heads of the elk to drive them from

the orchard. (FF 8) On Wednesday, January 12, 2000 Mr. VanderHouwen contacted the Department. There were about 15 inches of snow on the ground that date. Mr. VanderHouwen told Officer Beireis of the Department that there had been about 40 elk in his orchard on January 10th and 11th. He explained for a second time it was no longer working to shoot over their heads because it was not scaring the elk or preventing them from eating his trees. Officer Beireis said he would attempt to organize a drive but he could do nothing for about a week because the next Monday was Martin Luther King's day. (Supplemental FF) (Appendix A-1) Mr. VanderHouwen told Officer Beireis he could not wait that long and that he would have to lower his sites and shoot them. At the time of trial, Mr. VanderHouwen testified that Officer Beireis said that if he did shoot them he must let them lay. The State disputed that this statement was made by Officer Beireis. On January 18th or 19th, 2000, the Petitioner was in his orchard when Sergeant Kohls of the Department drove by him in the course of viewing dead elk which were lying in the orchard. (FF 9)

On January 27, 2000, a report was made to the Department that dead elk were seen in the vicinity of the Petitioner's orchard. As a result of that call, Sergeant Kohls and Officer Beireis of the Department came to Petitioner's orchard and located ten elk that were dead. The officers through the use of a metal detector located bullet slugs in two of the elk. The elk

carcasses were scattered outside and inside of the Petitioner's orchard. The two slugs found by the officers were determined to be from a .270 caliber rifle. (FF 10)

The officers contacted Petitioner who met with them and admitted to shooting *at* the elk. (FF 11) Since it was dark, the Petitioner said he was unable to tell whether he had killed any of the elk or whether the rounds he fired at them went over their head. (FF 7 and 11) Petitioner did admit to owning a .270 caliber rifle which is a commonly owned hunting weapon. (FF 11)

There was no evidence presented by the State that tied a specific count of a specific complaint to a specific dead elk. (FF 13)

That upon submission of the case to the jury, the jury acquitted Petitioner of 10 Counts of Waste of Wildlife and 8 Counts of Killing Game Out of Season. The jury convicted Petitioner VanderHouwen of 2 Counts of Killing Game Out of Season. The only counts for which Jerry VanderHouwen was convicted were Count 1 of Yakima County Cause No. Y00-00045 and Count 1 of Yakima County Cause No. Y00-00046. (FF 14)

Petitioner filed a Motion for New Trial as to the two counts for which he was convicted. (CP 185 and 197) He then appealed the denial of his motion and conviction to the Superior Court. The Superior Court affirmed the

conviction (CP 4-5). The Petitioner sought Discretionary Review before this Court which review was granted.

### C. SUMMARY OF ARGUMENT

During the 1998 and 1999 crop seasons Petitioner suffered significant damage to his orchard. During the winter of 1999-2000 he attempted to prevent that damage on his own and by seeking assistance from the Department. When all those efforts failed Petitioner sought to preserve his property by what he felt was a last resort. A property owner/lessee should be entitled to the defense of his property. State vs. Burk, 114 Wash. 370, 195 Pac. 16 (1921) gives that right to property owners.

At the conclusion of the trial, the trial judge gave the jury an instruction based on WPIC 18.02. That jury instruction altered the presumption of innocence and shifted the burden of proof upon the Petitioner to show he killed elk out of necessity. Petitioner submits the giving of such instruction impermissibly shifted the burden of proof to him and does not cure the fact the Trial Court's failed to give Petitioner's Requested Instruction No. 1 or Instruction No. 7.

Lastly, the Petitioner submits the jury's finding of guilt on Count 1 Y00-00045 and Y00-00046 was based on the insufficiency of the evidence. There was no evidence presented by the State that tied a specific count of the complaint to any of the dead elk found. The evidence

upon which the jury acquitted the Petitioner of eight counts of Count 1 was the same evidence on which they convicted the Petitioner of two counts of Count 1.

#### **D. ARGUMENT**

##### **1. Constitutional Defense**

The Court failed to give to the jury Mr. VanderHouwen's proposed Instruction No. 1 or No. 7. It was based on State v. Burk, 114 Wash. 370, 195 Pac. 16 (1921). In Burk, the Court held that one who kills elk in defense of his or her property is not guilty of violating the law if such killing was reasonably necessary for the defense of his or her property. Thus, in addition, to Mr. VanderHouwen's statutory defenses to the charges in this case, he had a *constitutional right* to kill game (elk) when reasonably necessary to protect his property and to do so without seeking permission from the Department. The *statutory* provisions provide a safe harbor to persons who obtain the Department's permission to kill elk to protect crops. If they obtain such permission, they need not further justify their action. But the statutory provisions do not eliminate a citizen's constitutional right to kill game (elk) without permission when it is reasonably necessary for the protection of his or her property. The constitutional right has long been recognized in this State.

Mr. Burk was a Yakima County Farmer who was criminally charged with killing elk on two different occasions. Mr. Burk's defense was that at the time the elk were killed they were damaging and destroying his crops.

Our Supreme Court in the Burk case reviewed several cases from other jurisdictions recognizing the constitutional right to kill animals where reasonably necessary for the protection of property. Our Court held that it is a complete defense to a criminal prosecution if the killing was reasonably necessary to prevent the destruction of the accused's property. The Court gave examples of circumstances establishing a reasonable necessity for the killing of elk. These included the fact that a band of elk were in the habit of trespassing upon the accused's property, destroying crops and doing material damage and that the past damage caused by elk or future threatened damage would be extensive. The Court further held that the defense to prosecution applies so long as the elk which were shot were part of the herd that was causing damage, and that there is no need to show that the particular elk which were shot were causing damage. State v. Burk, supra, at page 378. All these circumstances existed in Petitioner's cause.

The difference between the Burk case and the evidence presented here was there was no dispute as to the damage that was being caused to

Mr. VanderHouwen's crops. Factual disputes at trial arose as to the issue of permission – not to damage. It is the constitutional defense the Trial Court took away from Petitioner VanderHouwen in not giving his requested Instruction No. 1 or No. 7. In State v. Burk, *supra*, the Court states at p. 375:

Viewing the statute in this light, it may be justly said that one who kills an elk in defense of himself or his property, if such killing was reasonably necessary for such purpose, is not guilty of violating the law. If such statutes be given the construction contended for by the state, they would probably be unconstitutional, as violating statutory and constitutional provisions authorizing one to protect himself and his property.

The Burk case involved questions of fact that had to be resolved by the trier of fact. Here, the material facts regarding the reasonable necessity for Mr. VanderHouwen to shoot at elk to protect his property are largely undisputed. Even if the State disputes Officer Beireis acquiesced in shooting the elk, permission, is not a requisite for the constitutional right to protect property.

The reasoning of the Burk case was later adopted by our Supreme Court in Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937). Our Court held at page 611 that one has the constitutional right to kill protected animals such as beavers or muskrats to protect their business even if the game commission refuses to trap them and refuses to grant the land owner permission to trap or kill them.

Drolet v. Armstrong, 141 Wash. 654, 252 Pac. 96 (1927), is another case out of Yakima county recognizing a person's constitutional right to kill animals to protect property. Our Supreme Court relied upon

State v. Burk, *supra*, to affirm the trial judge's holding that the owner of chickens had a right to kill dogs that were killing or injuring his chickens even though the dogs would run away when approached by humans. The fact that the dogs had recently come upon the owner's land to kill two chickens and were shot while in the process of killing more chickens was held to constitute reasonable and apparent necessity for killing the dogs.

The law of our State is consistent with the law of other jurisdictions.

**2. Impermissible Shifting of the Burden of Proof**

The Trial Court gave its Instruction No. 15 based upon WPIC 18.02. The Court's Instruction No. 15 was given in lieu of Petitioner's requested Instruction No. 1 or No. 7. The giving of Instruction No. 15 by the court took from the Petitioner the presumption of innocence and shifted the burden of proof to him to show necessity. Instruction No. 15 placed additional burdens upon the Petitioner which were not contained in Petitioner's purposed Instruction No. 1 or No. 7. The court's Instruction No. 15 forced Petitioner to prove the following.

1. That the Petitioner reasonably believed the commission of the crime was necessary to avoid or minimize a harm.
2. That the harm sought to be avoided was greater than the harm resulting in a violation of the law.
3. That the threatened harm was not brought about by the Petitioner.

4. That no reasonable legal alternative existed.

For Instruction No. 15 to apply the finder of fact must find the Petitioner *violated* the law based upon the facts presented and then accept the justification for his or her conduct.

Instruction No. 15 not only destroys the presumption of innocence but also shifts the burden of proof to the Petitioner. The Petitioner consequently has lost the presumption of innocence and the legal burden of proof beyond a reasonable doubt to be carried by the State.

In State v. McCullum, 98 Wn. 2d 484, 656 P.2d 1064 (1983) the Court dealt with a self-defense claim. The instruction the Court gave placed the burden on the Petitioner to prove the homicide was done in self-defense. There the Court in responding to the Trial Court's jury instruction stated as follows at page 497:

The italicized portions of the Trial Court's jury instruction erroneously indicated to the jurors that the Petitioner had some burden of persuasion to carry which, if not met, would preclude their ability to acquit or find Petitioner guilty of a lesser criminal act. As indicated above, there need only be some evidence of self-defense admitted in the case to raise the issue. As instruction requiring Petitioner to create a reasonable doubt in the minds of the jurors places an unconstitutional burden of persuasion upon him. State v. Kroll, 87 Wn.2d 829, 839-40, 558 P.2d 173 (1976).

It remains to be determined whether the error in this case was prejudicial or harmless error. Since the error infringed upon a constitutional right of the Petitioner, the error is presumed prejudicial, and the State has the burden of

proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

Giving Instruction No. 15 (the necessity instruction) did not allow Petitioner to argue his theory of the case. Instruction No. 15 places additional burdens upon the Petitioner which were not contained in Petitioner's proposed Instruction No. 1 or No. 7. It was error for the Court to give its Instruction No. 15 as it erroneously informed the jury that Petitioner had a burden of proof which if not met precluded a finding of not guilty.

**3. Insufficiency of This Evidence Or Alternatively Inconsistent Verdicts**

The Court committed error in not granting the Motion for New Trial. The Petitioner preceded to trial on ten individual complaints each containing two counts. The complaints ranged from cause number Y00-00037 to Y00-00046. The jury acquitted the Petitioner on all ten counts of Count 2 of the complaints (Waste of Wildlife) and found him guilty on two of the ten counts of Count 1 (Killing Game out of Season) of each Complaint.

During the trial there was no evidence presented by the state that related a specific count of any specific complaint to any specific dead elk.

The conviction of the Petitioner on two counts fails for sufficiency of the evidence. The Court gave as its instruction No. 6 (CP 214) the element instruction, which was based on WPIC 4.22. Additionally, the Court gave instruction No. 5 (CP 213), which is a summation of RCW 77.15.410. This is the statute upon which Count 1 of each of the complaints is based.

Count 1 of the Complaint has two subsections, which are charged in the disjunctive. (CP 191-191 and 205-206) In State v. Gill, 103 Wn. App. 435, 13 P. 3d. 646 (2000), the Court stated at page 445:

To convict an accused of a crime, a unanimous jury must conclude that the accused committed the criminal act charged. CONST. ART. I, §21; State v. Petrich, 101 Wn. 2d. 566, 569, 683 P. 2d. 173 (1984), modified by State v. Kitchen, 110 Wn. 2d. 403, 756 P. 2d. 105 (1988). When a defendant is charged with committing a crime by alternative means and the evidence is insufficient to support each alternative means, the Trial Court must instruct the jury that it must unanimously agree on the specific means by which the defendant committed the crime. State v. Savaria, 82 Wn. App. 832, 840, 919 P. 2d. 1263 (1996). Although failure to instruct a jury on unanimity is presumed prejudicial, it will be found harmless if a rational trier of fact could find that each alternative means presented to the jury occurred beyond a reasonable doubt. State v. Camarillo, 115 Wn. 2d. 60, 64, 794 P. 2d. 850 (1990).

The Appellate reports are replete with cases discussing jury unanimity in multiple act cases. Most of those cases arise from a background where the defendant has been charged with sexual

molestation. In State v. Marko, 107 Wn. App. 215, 27 P.3d. 228 (2001)

the Court stated at page 220:

Marko also contends that this is a multiple acts case and he is entitled to have jury unanimity as to which distinct act established the crime. Where defendant is charged with multiple acts and any one of them could constitute the crime charged, the jury must be unanimous as to which act constituted the crime, otherwise there is constitutional error. State v. Kitchen, 110 Wn. 2d. 403, 756 P. 2d. 105 (1998) There are two ways to insure jury unanimity in multiple act cases. The state may elect the act on which it will rely for conviction or the Trial Court must instruct the jury that all of them must agree the same act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn. 2d. 566, 569, 683 P. 2d. 173 (1984).

While not identical to Gill and Marko, is the jury's verdict under the evidence presented here any more constitutional? How could the Petitioner defend against any one count in any one complaint when there was neither election by the state as to which animal applied to which complaint nor was there an appropriate instruction given to the jury. Here, the evidence at best showed ten elk found dead. There was no testimony that the Petitioner was seen shooting the elk. The Petitioner did admit shooting toward the elk but was uncertain if he killed any of them. The state elected to go to trial charging ten separate complaints, one complaint for each dead elk. There was no testimony presented during the course of the trial wherein the state attempted to relate a dead elk to a particular

numbered complaint. The net effect in the form of charging selected by the state was "the Petitioner killed all ten of the elk or he was innocent of killing any of the elk". No distinction was made in the presentation of evidence between complaint Y00-00037 through Y00-00046. Yet the jury concluded the Petitioner had killed two elk which were the basis of complaints Y00-00045 and Y00-00046. Why not Y00-00043 or Y00-00044 or Y00-00042? Even assuming arguendo the jury determined that the 2 slugs found by the game officers (FF10.) were the basis for the two convictions how did the jury decide those two dead elk were the elk that were the animals contemplated in Count 1 of complaints Y00-00045 and Y00-00046?

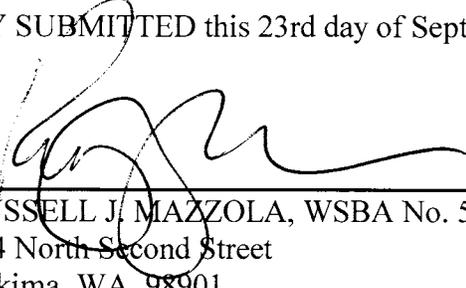
In summary, the convictions of the Petitioner as to count 1 of Y00-00045 and Y00-00046 must fail based on the insufficiency of the evidence. Or in the alternative, the verdict of acquittal of eight counts of Count 1 is inconsistent with a finding of guilty on two counts of Count 1. See State v. Hayes, 81 Wn. App. 425, 430, 914 P 2d. 788 (1996).

#### **E. CONCLUSION**

This court should reverse the Superior Court's Order Affirming Conviction and remand the matter back to the Trial Court to allow the Petitioner to argue to the jury his constitutional defense as submitted in his proposed Instructions No. 1 or No. 7 and not be forced to meet the burden

of proof required in the Court's Instruction No. 15. Additionally, this court should reverse the conviction as there was insufficient evidence to convict the Petitioner on Count 1 of Complaints Y00-00045 and Y00-00046 or the alternative – the conviction is inconsistent with the acquittals on Count 1 of Complaints Y00-00037 to Y00-00044.

RESPECTFULLY SUBMITTED this 23rd day of September 2004.



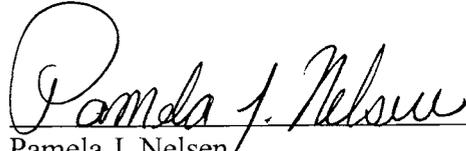
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Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury that on July 6, 2004, I deposited into the U.S. Mail, postage prepaid for First Class delivery, a true copy of Petitioner's Brief to the Clerk of the Court of Appeals, Division III, P.O. Box 2159, Spokane, WA 99201; and to Deputy Prosecuting Attorney, Kenneth L. Ramm, Yakima County Courthouse, 3rd Floor, Yakima, WA 98901.

**DATED** this 23rd day of September 2004.

  
Pamela J. Nelsen



# Appendix

“A”



FILED  
YAKIMA COUNTY  
DISTRICT COURT

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, )

Plaintiff, )

vs. )

JERRIE L. VANDERHOUWEN, )

Defendant. )

NO. Y00-00032 through Y00-00046

AGREED FINDINGS OF FACT

THIS MATTER coming on regularly on stipulation of the parties to set forth certain Findings of Fact pursuant to RALJ 6.1 in order to present issues for the appeal filed herein.

NOW, THEREFORE, the parties do agree to the following:

**FINDING OF FACTS:**

1. The Defendant, Jerrie VanderHouwen, at all times material hereto, farmed various cherry and apple orchards in the area of Tieton, Washington, referred to as Section One Road.

2. That the most western portion of the orchard above-described was an approximate 37-acre block of new cherry trees.

3. That during the years 1998 and the Fall of 1999, elk came through the Washington State Department of Fish and Wildlife, referred to as Department, fences and entered Defendant's orchard causing significant damage.

4. That in 1998/1999, Jerry VanderHouwen took steps on his own to stop and/or minimize the damage to his orchard. These steps included among other things feeding hay and repairing Department game fences.

Agreed Findings of Fact - 1

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5. That the migration of elk continued from the Fall of 1999 into the Winter of year 2000.

6. That Jerry VanderHouwen testified he contacted the Department on four occasions during this time frame to notify them of the migrating elk and seek their assistance to stop the damage occurring to his orchard from the migrating elk.

7. That the migration of the elk occurred in the twilight and evening hours. That Defendant became frustrated from what he felt was a lack of support by the Department in controlling the elk coming into his orchard. The elk continued to cause damage to Defendant's orchard trees - predominately the young cherry trees.

8. During the month of January 2000, the elk migrating into Defendant's orchard reached populations from 40 up to 70 animals. As a result of the constant pressure and economic damage to his orchard in January of 2000, the Defendant took to shooting (over the heads) of the elk to drive them from the orchard.

9. On January 18 or 19, Jerrie VanderHouwen testified he was in his orchard when Sergeant Kohls drove by him in the course of viewing dead elk that were lying in the orchard.

10. On January 27, 2000, a report was made to the Department that dead elk were seen in the vicinity of the Defendant's orchard. As a result of that call, Sergeant Kohls and Officer Beireis came to Jerrie VanderHouwen's orchard and located ten elk that were dead. The officers through the use of metal detector's located two bullet slugs in two of the elk. The elk carcasses were scattered throughout the area outside of Jerrie VanderHouwen's orchard with some elk inside the orchard. The two slugs found by the officers were determined to be from a .270 caliber rifle.

11. The officers contacted Jerrie VanderHouwen who met with them and admitted to shooting at the elk. Defendant was unable to tell whether he had killed any of the elk or whether the rounds he fired at them went over their head. Defendant admitted to owning a .270 caliber rifle. A .270 caliber rifle is a commonly owned hunting weapon.

12. Prior to trial, counsel for Jerrie VanderHouwen filed a Motion in Limine requesting that no mention be made of the elk found in or near the vicinity of Jerrie VanderHouwen's orchard unless they were elk for which the Defendant was accused of killing.

13. That there was no evidence presented by the State that related a specific count of a specific complaint to a charged specific dead elk.

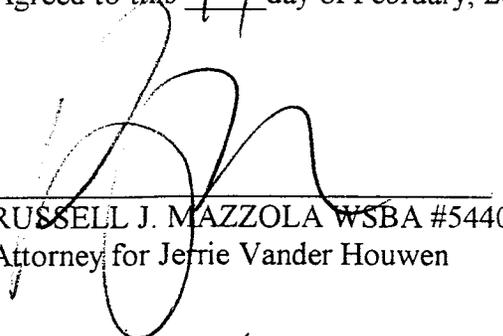
14. That upon submission of the case to the jury, the jury acquitted Defendant of 10  
Counts of Waste of Wildlife and 8 Counts of Killing Game Out of Season. The jury convicted  
Defendant VanderHouwen of 2 Counts of Killing Game Out of Season. The specific cause numbers  
for which the jury convicted Jerry VanderHouwen were Yakima County Cause No. Y00-00045,  
Count 1 and Y00-00046, Count 1.

Dated this 28<sup>th</sup> day of February, 2002.

  
COURT COMMISSIONER/JUDGE

The foregoing Findings of Fact have been agreed to by Counsel as indicated by their signatures  
below. Both counsel reserve the right to supplement the record by additional Agreed Finding of Fact  
or pertinent portions of the trial transcript.

Agreed to this 14 day of February, 2002.

  
RUSSELL J. MAZZOLA WSBA #5440  
Attorney for Jerrie Vander Houwen

Agreed to this 28<sup>th</sup> day of February, 2002.

  
KEN RAMM WSBA# 16500  
Attorney for the State of Washington



# **Appendix**

**“A-1”**



1  
2  
3 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
4 IN AND FOR THE COUNTY OF YAKIMA

5 STATE OF WASHINGTON, )  
6 ) NO: Y00-00045 YDP  
7 Respondent, ) NO: Y00-00046 YDP  
8 )  
9 ) SUPPLEMENTAL AGREED  
10 ) FINDINGS OF FACT  
11 v )  
12 )  
13 JERRIE VANDER HOUWEN, )  
14 Appellant. )

15  
16 This matter coming on regularly upon stipulation of the parties to set forth  
17 Supplemental Findings of Fact pursuant to RALJ 6.1 in order to present issues for the  
18 appeal filed herein NOW, THEREFORE, the parties do agree to the following:

19 Mr. Vander Houwen contacted the fish and Wildlife Department on Wednesday,  
20 January 12, 2000. There were about fifteen (15) inches of snow on the ground by  
21 January 12, 2000. Mr. Vander Houwen told Officer Beireis that there had been  
22 about forty (40) elk in his orchard on January 10 and January 11. He explained  
23 for the second time it was no longer working to shoot over their heads because it  
24 was not scaring them or preventing them from eating his trees. Officer Beireis  
25 said he would attempt to organize a drive, but he could not do anything for about  
26 a week because the next Monday was Martin Luther King holiday. Mr. Vander  
27 Houwen told Officer Beireis he couldn't wait that long and that he would have to  
28 lower his sights and shoot them.

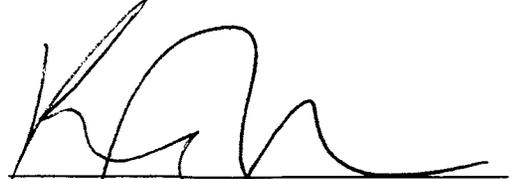
29 At the time of trial, Mr. Vander Houwen testified that Officer Beireis indicated  
30 that if he did shoot them, he must let them lay. (The state disputes this latter  
31 statement was made by Officer Beireis.)

32 Dated this 8th day of September, 2002.

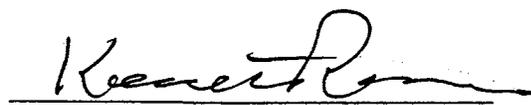
33 [Signature]  
34 JUDGE RUTH REUKAUF

The foregoing Findings of Fact have been agreed to by Counsel as indicated by their signatures below. Both counsel reserve the right to supplement the record by additional Agreed Finding of Fact or pertinent portions of the trial transcript.

1  
2 Agreed to this 6<sup>th</sup> Aug 2003 day of ~~September~~, 2002.

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7   
8 RUSSELL J. MAZZOLA WSBA #5440  
9 Attorney for Jennie Vander Houwen

10 Agreed to this 6<sup>th</sup> Aug 2003 day of ~~September~~, 2002.

11  
12  
13  
14   
15 Kenneth Ramm, WSBA # 16500  
16 Deputy Prosecuting Attorney