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**SUPREME COURT
STATE OF WASHINGTON**

JERRY L. VANDERHOUWEN

Petitioner,

vs.

STATE OF WASHINGTON

Respondent.

**PETITION FOR REVIEW
CASE NO. 226093-III**

Submitted by:

**Russell J. Mazzola
Attorney for Petitioner
Jerry L. Vander Houwen
314 North 2nd Street
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I. IDENTIFY OF PETITIONER

The Petitioner is Jerry L. Vander Houwen. He is filing his Petition for Review through his attorney, Russell J. Mazzola. Jerry L. Vander Houwen was the defendant in the Yakima County District Court action where these proceedings were first initiated. He appealed certain rulings of the District Court to the Yakima County Superior Court and then sought Discretionary Review as Petitioner in the Court of Appeals, Division III.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' decision filed in Cause No. 226093-III, which decision was filed on July 12, 2005. (Appendix B) Petitioner filed a Motion for Reconsideration of the July 12, 2005 Court of Appeals' opinion. The Motion for Reconsideration was denied on September 22, 2005. (Appendix C) However, the concurring opinion was amended. (Appendix C-1)

III. ISSUES PRESENTED FOR REVIEW

No. 1

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

No. 2

Did the Yakima County District Court's giving of Jury Instruction No. 15 based upon WPIC 18.02 cure the Trial Court's failure to give Petitioner's requested Jury Instruction No. 1 as modified by Jury Instruction No. 7?

No. 3

Did the Yakima County District Court err 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)

IV. STATEMENT OF THE CASE

The Petitioner, Vander Houwen and the State of Washington agreed to Findings of Facts, (CP 202, 203 and 204) (hereinafter referred to as "FF") which Agreed Findings of Fact were supplemented by Supplemental Agreed Findings of Fact (CP 200-201) (herein after referred to as SFF) and are fully set forth in Appendix "A" and "A-1" respectfully attached hereto.

The Petitioner was charged in ten (10) 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. Vander Houwen, farmed various cherry and apple orchards in the area of Tieton, Washington near 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. Vander Houwen 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 at least four times during the 1999-2000 winter to notify them of the migrating elk and seek their assistance to stop the elk damage occurring to his orchard. (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 estimated at 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. Vander Houwen lost from elk damage in the 37-acre block would be \$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. Vander Houwen contacted the Department. There were about 15 inches of snow on the ground that date. Mr. Vander Houwen 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. (SFF) Mr. Vander Houwen told Officer Beireis he could not wait that long and

he would have to lower his sights and shoot them. At trial, Mr. Vander Houwen testified Officer Beireis told him if he did shoot them he must let them lay. The State disputes 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. Sergeant Kohl had come to view the dead elk 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 using a metal detector, located bullet slugs in two of the elk. The elk carcasses were scattered outside and inside of 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 after submission of the case to the jury, the jury acquitted Petitioner of ten (10) Counts of Waste of Wildlife and eight (8) Counts of Killing Game Out of Season. The jury did convict Petitioner Vander Houwen of two (2) Counts of Killing Game Out of Season. The counts for which Jerry Vander Houwen 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) and Motion for Arrest of Judgment. (CP 186-187 and 198-199) 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 the Court of Appeals – Division III, which was granted.

In its decision the Court of Appeals held the failure of the trial court to give Petitioner's proposed Jury Instruction No. 1 (CP 181) or Petitioner's proposed Jury Instruction No. 7 (CP 236) was not error. The Appellate Court further held the trial court's giving of Jury Instruction No. 15 (CP 207-230) was proper and further held that jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury and properly inform the jury of the applicable law.

The Court of Appeals did not address the issue of jury unanimity in multiple act cases as it thought it did not have the authority to do so. Approximately two pages of Petitioner's Brief (Petitioner's Brief p. 15-

16) focused on this issue as well as approximately one and one-half pages of Petitioner's Reply Brief. (Petitioner's Reply Brief p. 11)

The Court of Appeals' decision did not address the issues raised by the Petitioner as to sufficiency of the evidence or the consistency of the verdicts. The Petitioner raised these in his brief.

V. ARGUMENT

The Court should accept review based upon the following grounds provided in RAP 13.4 (b):

The Appellate Court's published opinion upholding the trial courts refusal to give Petitioner's requested Jury Instruction No. 1¹ (amended by proposed Instruction No. 7²) significantly impacts the constitutional right of a citizen farmer to protect his/her property as established in State v. Burk 114 Wash. 370. 195 P. 16 (1921)

The property rights of farmers often conflict with the State's interest in protecting its wild life. It is in the public's interest for the Supreme Court to provide clarification of these competing interests. The need for clarification is now greater with the issuance of the opinion of the Court of Appeals.

The Court of Appeals held:

¹ Instruction No. 1 – 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 such purpose.

² Instruction No. 7 – 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 defense of his or her property.

(a) The failure of the trial court to give Petitioner's proposed Jury Instruction No. 1 (CP 181) or Petitioner's proposed Jury Instruction No. 7 (CP 236) was not error.

(b) The trial court's giving of Jury Instruction No. 15³ the necessity instruction (CP 223) was proper as it permitted the parties to argue their theories of the case, did not mislead the jury and properly informed the jury of the applicable law.

1. Failure Of The Trial Court To Give Petitioner's Proposed Instructions No. 1 And No. 7 Was Not Cured By The Trial Court Giving Its Instruction No. 15.

The trial court failed to give to the jury Mr. Vander Houwen's proposed Instruction No. 1 or No. 7. These proposed instructions were 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. Vander Houwen'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

³ Instruction No. 15 – Necessity is a defense to a charge of unlawful big game hunting in the second degree and/or waste of wildlife in the first degree if (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; (3) the threatened harm was not brought about by the defendant; and (4) no reasonable legal alternative existed. This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

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. This constitutional right has long been recognized in this State.

These proposed instructions by Petitioner were based upon Petitioner's constitutional right under State vs. Burk, *supra*, to protect his property. It was not, as the Court of Appeals held, an instruction based on necessity.

In State vs. Burk, 114 Wash. 370, 375 195 P. 16 (1921) the court quoting from State vs. Ward, 170 Iowa 185, 152 N.W. 501 at p. 357 stated:

By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding the same plea may not be interposed in justification of the killing of a goat or a deer. The right of defense of *person and property* is a constitutional right . . . and is recognized in the construction of all statutes. If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing. (emphasis added)

The Burk court then went on to uphold that the appellant Burk had a constitutional right to show, if he could, that it was reasonably necessary

for him to kill elk for the protection on his property.

Since the trial court did not give petitioner's proposed Jury Instruction No. 1 or Jury Instruction No. 7 the petitioner had no choice but to submit an instruction that would allow him to argue to the jury the issue of his right to protect his property. The only vehicle to do this was WPIC 18.02 the necessity instruction (the court's Jury Instruction No. 15) (See RP – Defendant's Exceptions to Jury Instructions p. 2.)

The defense of necessity was first set out in Washington State vs. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979). A defendant seeking to use a necessity defense must prove it, as it is an affirmative defense. State vs. Niemczyk, 31 Wn. App. 803, 807, 644 P.2d 759 (1982). The necessity defense is available "when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law". State vs. Turner, 42 Wn. App. 242, 247 711 P.2d 353 (1985).

The Petitioner's constitutional right to protect his property as quoted in State vs. Burk, *supra*, is an analogous to the constitutional right that a citizen has to use lawful force in defense of self and others. RCW 9A.16.050. No Appellate Court would have any hesitation in reversing a trial court which gave a defendant charged with homicide or assault and claiming self-defense a necessity instruction based on WPIC 18.02 rather than an instruction based upon WPIC 16.02 on the premise the defendant was able to argue his/her theory of the case.

In its opinion the Court of appeals reasoned that the Burk holding which allowed for the killing of elk if “reasonably necessary” places a burden upon a defendant to show reasonableness and that this is no greater burden than that set forth in the court’s Jury Instruction No. 15 based upon WPIC 18.02.

The significant difference between the burdens created by instruction WPIC 18.02 and WPIC 16.02 is that under WPIC 18.02 the Petitioner must establish the elements by preponderance of the evidence while under WPIC 16.02 (Justifiable Homicide) the state has the burden of proving beyond a reasonable doubt that the force used by a defendant was not lawful. WPIC 16.02 goes on to say that if the state has not proved the absence of this defense beyond a reasonable doubt a verdict of “not guilty” should be returned. In WPIC 16.02 the word “reasonably” shows up four times. The use of the word “reasonably” in Petitioner’s proposed Jury Instructions No. 1 and No. 7 does not by itself place any more of a burden on Petitioner to “prove” the killing of the elk was reasonably necessary then the use of “reasonably” in WPIC 16.02 requires a defendant claiming self defense to prove self-defense was reasonably necessary.

State vs. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 held

. . . that when self-defense is properly raised the jury should be informed that the State has the burden to prove absence of self-defense beyond a reasonable doubt.

As stated previously, there need only be some evidence, admitted in the case from whatever source to raise the issue of self-defense.

In State vs. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) the court discussed the burden of proof at p. 615.

The due process clause of the 14th Amendment to the U.S. Constitution requires the state to prove beyond a reasonable doubt all facts necessary to the constitute the crime charged . . . There are two ways to determine whether absence of self defense is an element or an ingredient of the crime which the state must prove. (1) The state may reflect a legislative intent to treat absence of self-defense as an element of the crime; (2) proof of self-defense may negate the element of the crime. . . .

The court went on to discuss several statutes where the legislature has clearly provided that a defendant must prove certain defenses by a preponderance of the evidence. The court held that the legislature's silence on the burden of proof of self-defense in contrast to specificity on other defenses is a strong indication that the legislature did not intend to require a defendant to prove self-defense. Here, the basis of both Jury Instruction No. 15 and Petitioner's proposed Jury Instructions No. 1 and 7 are the creation of case law – not legislative intent.

In State vs. Fondren, 41 Wn. App. 17, 702 P.2d 810 (1985) the court stated at p. 21

Fondren proposed instructions specifically placing upon the State the burden of disproving accident or self-defense. Although *State v. McCullum, supra*, was decided on January 6, 1983, and Fondren's trial began the following March, apparently neither the prosecutor, defense counsel, nor the trial court was aware of it. The court declined to give Fondren's proposed instructions. The court's instructions basically tracked those approved in *State v. Martineau*, 38 Wn. App. 891, 691 P.2d 225 (1984),

review denied, 103 Wn.2d 1020 (1985), a pre-*McCullum* trial.

If justification or excuse would negate an essential element of the crime charged, then due process requires the State to disprove justification or excuse beyond a reasonable doubt. *State v. Acosta, supra* (self-defense negates knowledge); *State v. McCullum, supra* (self-defense negates intent). . . . (self-defense negates recklessness); *State v. Burt, supra* (excuse may negate criminal negligence).

Jury Instruction No. 15 given by the trial court required Petitioner to admit he committed the crime for the instruction to apply. The effect of this is dramatic as it takes the burden off the state in proving an essential element of the crime beyond a reasonable doubt. Even the Appellate Court fell into this enticing trap where at p. 5 of its opinion the Appellate Court held

Moreover, Instruction No. 15 did not improperly shift the burden of proof because it did not relieve the state of its burden to prove each crime element beyond a reasonable doubt.

Yet, at the bottom of p. 8 of its opinion the Appellate Court states

Moreover, in *raising* the necessity defense, Mr. Vander Houwen *admits the proscribed end conduct*. (emphasis added)

How can it be said the state was not relieved of its burden to prove each crime element beyond a reasonable doubt when Jury Instruction No. 15 requires the defendant to admit the *proscribed and conduct*.

These are the reasons why the jury should have been given Petitioner's proposed Jury Instruction No. 1 and/or Jury Instruction No. 7.

These proposed instructions did not shift the burden of proof and did not require Petitioner to admit a violation of the offense.

The Appellate Court held that Petitioner is precluded from complaining of the submission of the trial court's Jury Instruction No. 15 as invited error. The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. State vs. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979). The court in State vs. Pam, 101 Wn.2d 507, 511 P.2d 680 (1984) held:

The adversary system cannot contenance such maneuvers. Effective appellate review can be achieved only if both the defendant and the state maintain their adversary positions and vigorously litigate their prospective claims. When counsel attempts to circumvent this system, the issues are not adequately presented for review and this system falters.

This is not the case here. Petitioner's counsel had no alternative but to submit an instruction based upon WPIC 18.02 as the trial court refused to give the Petitioner's proposed Jury Instructions No. 1 and No. 7. After refusal to give proposed Jury Instructions No. 1 or 7, Petitioner's counsel was faced with a Hobson choice – take the case to the jury *without* any instruction that would allow Petitioner to argue he had to kill the elk to save his orchard or use an incorrect jury instruction that at least gave him the opportunity to argue the reasons he had to kill elk. The election by Petitioner was done solely to maintain an adversary posture and allow Petitioner to vigorously litigate his defense. The

Appellate Courts have authority under RAP 12.3 to act in the interest of justice. It is an established principle of law that constitutional claims may be heard for the first time on appeal. State vs. McCullum, *supra* at p. 487. See State vs. Studd, 137 Wn.2d 533, 97 P.2d 1049 (1999) for a situation where the court did not bind the defendant on a submitted instruction.

2. Petitioner Is Entitled To Raise As An Argument “Failure Of The Trial Court To Give An Unanimity Instruction”.

The Appellate Court did not address the issue regarding unanimity as it thought it did not have authority to do so pursuant to RAP 10.3(a)(3). RAP 10.3(g) states, “the appellant court will only review a claimed error which is included in an Assignment of Error *or* clearly disclosed in the associated issue pertaining thereto. (Emphasis added.)

Petitioner clearly set forth the issue of Unanimity Instruction in his briefing.

The Petitioner’s Brief (Petitioner’s Brief p. 15-16) addressed this issue as well as Respondent’s Brief (Respondent’s Brief p. 15-16). The issue was also addressed in the Petitioner’s Reply Brief. (Petitioner’s Reply Brief p. 11) The Petitioner respectfully disagrees that the issue of unanimity was “briefly” argued as Petitioner’s Brief focused on this issue as well as Petitioner’s Reply Brief.

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 nor was there an appropriate instruction given to the jury.

3. This Appellate Court's Opinion Fails To Address The Issue Of Consistency Of The Verdicts.

The Appellate Court fails to address the issue raised by the Petitioner with respect to the sufficiency of the evidence or consistency of verdicts. The Petitioner raised this issue in his brief. The question is "how could 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 that addressed the issue". The evidence showed 10 dead elk.

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.

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".

Even accepting the Appellate Court's reasoning under its

analysis of Evidence Sufficiency and Consistency of Verdicts the Appellate Court does not address the issue of how the trier of fact (the jury) was able to ascribe a particular dead elk to specific Cause Nos. to wit: Yakima County Cause No. Y00-00045 and Y00-00046.

The jury concluded the Petitioner had killed two elk, which were the basis of complaints Y00-00045 and Y00-00046. Why not Y00-00042 or Y00-00043 or Y00-00044?

Even assuming arguendo the jury determined that the two (2) slugs found by the game officers (FF10.) were the basis for the (2) 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?

There were eight (8) other complaints for which the jury acquitted the Petitioner. No distinction was made in the presentation of evidence between Complaint No. Y00-00037 thru Y00-00046. It is this point that Petitioner relies on in urging this Appellate Court to accept review upon the insufficiency of the evidence or in the alternative consistency of the verdict. The verdict of acquittal of eight (8) counts of Count One is inconsistent with the finding of guilty on two (2) counts of Count One as no act is related to a specific cause number.

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

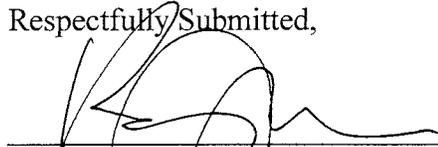
Count 1 is inconsistent with a finding of guilty on two counts of Count 1. See State v. Hayes, 81 Wn. App. 425, 430, 914 P 2d. 788 (1996).

CONCLUSION

It is requested that this court accept discretionary review to address the constitutional issues raised in Petitioner's Brief as well as clarify a landowner's rights when his or her property is being damaged by wildlife. Petitioner submits that he had a constitutional right to defend his property from destruction by the migrating elk herds, which were causing him significant economic loss. He established he had taken reasonable steps, without success, to stop such damage. The burden of proving the reasonableness of his actions should not have fallen on Petitioner as required by the Necessity Instruction. The State should have been required to carry the burden to prove beyond a reasonable doubt the absence of defense of property.

Additionally, this court should reverse the conviction as there was insufficient evidence to convict the Petitioner, there was not jury unanimity and the convictions were inconsistent with the acquittals on Count 1 of Complaints Y00-00037 to Y00-00044.

Respectfully Submitted,



RUSSELL J. MAZZOLA, WSBA 5440
Attorney for Petitioner

APPENDIX

A

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YAKIMA COUNTY
DISTRICT COURT

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

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STATE OF WASHINGTON,)	
)	NO. Y00-00032 through Y00-00046
Plaintiff,)	
vs.)	AGREED FINDINGS OF FACT
)	
JERRIE L. VANDERHOUWEN,)	
)	
Defendant.)	

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.

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

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

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

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

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

20 11. The officers contacted Jerrie VanderHouwen who met with them and admitted to
21 shooting at the elk. Defendant was unable to tell whether he had killed any of the elk or whether the
22 rounds he fired at them went over their head. Defendant admitted to owning a .270 caliber rifle. A
23 .270 caliber rifle is a commonly owned hunting weapon.

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

27 13. That there was no evidence presented by the State that related a specific count of a
28 specific complaint to a charged specific dead elk.
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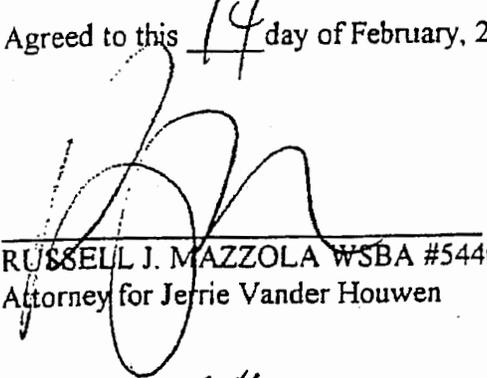
14. That upon submission of the case to the jury, the jury acquitted Defendant of 10 Counts of Waste of Wildlife and 8 Counts of Killing Game Out of Season. The jury convicted Defendant VanderHouwen of 2 Counts of Killing Game Out of Season. The specific cause numbers for which the jury convicted Jerry VanderHouwen were Yakima County Cause No. Y00-00045, Count 1 and Y00-00046, Count 1.

Dated this 28th 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 28th day of February, 2002.


KEN RAMM WSBA# 16500
Attorney for the State of Washington

APPENDIX

A-1

FILED
SEP - 8 2003
YAKIMA COUNTY
DISTRICT COURT

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

1	STATE OF WASHINGTON,)	
2)	
3)	NO: Y00-00045 YDP
4	Respondent,)	NO: Y00-00046 YDP
5)	
6)	SUPPLEMENTAL AGREED
7)	FINDINGS OF FACT
8)	
9	v)	
10)	
11	JERRIE VANDER HOUWEN,)	
12)	
13	Appellant.)	
14)	

This matter coming on regularly upon stipulation of the parties to set forth Supplemental 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:

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

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

Dated this 8th day of September, 2003.


JUDGE RUTH REUKAUF

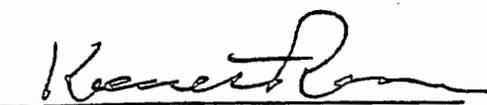
RUSSELL J. MAZZOLA
LAW OFFICE
314 N. SECOND ST.
YAKIMA, WA 98901
(509) 575-1800
FAX (509) 452-4601

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 6th day of Aug 2003
3 ~~September, 2002.~~

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

10 Agreed to this 6th day of Aug 2003
11 ~~September, 2002.~~

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15 Kenneth Ramm, WSBA # 16500
16 Deputy Prosecuting Attorney

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APPENDIX

B

**Court of Appeals Division III
State of Washington**

Opinion Information Sheet

Docket Number: 22609-3-III
Title of Case: State of Washington v. Jerrie Leonard Vander Houwen, Sr.
File Date: 07/12/2005

SOURCE OF APPEAL

Appeal from Superior Court of Yakima County
Docket No: 01-1-00949-0
Judgment or order under review
Date filed: 11/07/2003
Judge signing: Hon. Michael E Schwab

JUDGES

Authored by Stephen M Brown
Concurring: Frank L. Kurtz
John A. Schultheis

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Yakima, WA 98901-2639

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
) No. 22609-3-III
 Respondent,)
) Division Three
 v.) Panel Five
)
 JERRIE L. VANDER HOUWEN,) PU OPINION
)
 Petitioner.)

BROWN, J.--In this discretionary review of Jerrie L. Vander Houwen, Sr.'s two convictions for second degree unlawful hunting of big game, we conclude the necessity jury instruction was proper, the verdicts were not inconsistent, and the evidence was sufficient. Accordingly, we affirm.

FACTS

The facts are agreed except where noted. Mr. Vander Houwen farms in Yakima County including some 37 acres of new cherry trees. From 1998 into 2000, elk came through the Washington State Department of Fish and Wildlife's fences onto Mr. Vander Houwen's property causing significant damage. Mr. Vander Houwen attempted to repair the fences and to feed hay to the elk, but was unsuccessful in minimizing the damage. Mr. Vander Houwen alleged he complained to the Department on four occasions during the 1999-2000 winters about the elk damage.

In January 2000, Mr. Vander Houwen began shooting over the elks' heads to drive them from his orchard. On January 12, he again complained to the Department. He told one of the Department's officers there was about 40 elk in his orchard over the last couple days and shooting over their heads was not working. The officer told Mr. Vander Houwen the Department could not respond for about a week due to an upcoming holiday. Mr. Vander Houwen told the officer he could not wait that long, so he would have to start lowering his sights and shooting directly at the elk. He alleges (and the State disputes) the officer told him if he shot the elk he must let them lie.

A Department officer drove by his orchard on January 18 or 19 and saw dead elk, but did not stop. On January 27, 2000, the Department received another report of dead elk near Mr. Vander Houwen's orchard. Two responding officers found 10 dead elk, some in and some out of Mr. Vander Houwen's orchard. Using a metal detector, the officers located two slugs in two of the elk from a .270 caliber rifle. Mr. Vander Houwen admitted shooting at the elk and owning a .270 caliber rifle.

Mr. Vander Houwen was charged with 10 counts of second degree unlawful hunting of big game and 10 counts of first degree waste of wildlife. No

evidence was presented by the State relating a specific count to a specific elk. Mr. Vander Houwen presented the affirmative defense of necessity at trial, but the district court declined to give his constitutional right instruction based on *State v. Burk*, 114 Wash. 370, 195 P. 16 (1921). Instead, the trial court gave a necessity instruction based upon WPIC 18.02. The jury found Mr. Vander Houwen guilty solely of two counts of second degree unlawful hunting of big game. The superior court affirmed. We granted discretionary review.

ANALYSIS

A. Necessity Defense Jury Instructions

The issue is whether the trial court erred in rejecting Mr. Vander Houwen's proposed jury Instructions (No. 1 and No. 7), and instead giving the jury 11 Washington Pattern Jury Instructions: Criminal 18.02 (WPIC), the necessity defense instruction (Instruction No. 15).

RALJ 9.1(a) provides, 'The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.' RALJ 9.1(b) provides, 'The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.' We follow RALJ 9.1 as well. *Spokane County v. Bates*, 96 Wn. App. 893, 896, 982 P.2d 642 (1999).

Proposed Jury Instruction No. 1 states: '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 such purpose.' Clerk's Papers (CP) at 181. Proposed Jury Instruction No. 7 states: '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.' CP at 236. Instead of giving either of these instructions, the court gave another instruction proposed by Mr. Vander Houwen (No. 8), Jury Instruction No. 15 based on 11 Washington Pattern Jury Instructions: Criminal 18.02, at 63 (2d ed. Supp. 1998) (WPIC):

Necessity is a defense to a charge of unlawful big game hunting in the second degree and/or waste of wildlife in the first degree if

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
 - (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;
 - (3) the threatened harm was not brought about by the defendant;
- and
- (4) no reasonable legal alternative existed.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true

than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP at 223.

We review a trial court's refusal to give a proposed jury instruction for an abuse of discretion. *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). We review de novo alleged errors of law in jury instructions. *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Id.*

First, Mr. Vander Houwen contends he has an absolute constitutional right to kill the elk. Proposed Jury Instructions No. 1 and No. 7 are derived from *State v. Burk*, 114 Wash. 370, 195 P. 16 (1921). There, our Supreme Court recognized a necessity defense under facts similar to ours: '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. *Burk*, 114 Wash. at 376 (emphasis added); See e.g., *State v. Bailey*, 77 Wn. App. 732, 740, 893 P.2d 681 (1995) (necessity defense recognized in wildlife cases under limited circumstances where wildlife was killed to protect property).

Mr. Vander Houwen mistakenly argues, under *Burk*, he was constitutionally permitted to kill in defense of his property in an absolute sense. We disagree. The *Burk* holding allows a necessity defense. Therefore, the trial court had a tenable basis to reject Mr. Vander Houwen's proposed absolute defense instructions. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Second, Mr. Vander Houwen contends the trial court improperly shifted the burden of proof in its necessity instruction. However, Instruction No. 15 conforms to Mr. Vander Houwen's alternative Proposed Jury Instruction No. 8 found in Clerk's Papers at 237. We are precluded from reviewing jury instructions when the defendant invites it. *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000).

Moreover, Instruction No. 15 did not improperly shift the burden of proof because it did not relieve the State of its burden to prove each crime element beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Here, the 'to convict' jury instruction for unlawful hunting of big game put the burden on the State to prove beyond a reasonable doubt each element of the charged crime.

Washington uses a two-tiered test to evaluate whether the State or a defendant has the ultimate burden of proof for an affirmative defense. 'First, the court must determine whether the defense is an element of the crime or whether the defense negates an element of the crime. . . .

Second, if there is no due process requirement, the court must determine whether the Legislature intended, nevertheless, to place the ultimate burden of persuasion on the State to prove the absence of the defense

beyond a reasonable doubt.' *State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996) (citing *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983)). First, in applying the test, the necessity defense does not negate an element of an offense as does a consent defense in a rape case. Instead, a necessity defense attempts to justify, excuse, or explain otherwise proscribed end conduct in a way making that conduct lawful by exception. For example, Instruction No. 6, the 'to convict' instruction for the Unlawful Hunting charge required the State to prove Mr. Vander Houwen hunted elk without the necessary documentation or disregarded specified rules governing elk hunting (the end conduct). Unlike a rape prosecution, where the State retains the ultimate burden of disproving lack of consent beyond a reasonable doubt, the State has no ultimate burden of disproving defense of property.

Second, in common law, necessity is an affirmative defense. See *State v. Niemczyk*, 31 Wn. App. 803, 807, 644 P.2d 759 (1982) ('Necessity is an affirmative defense and should not be considered by the jury unless the defendant has submitted substantial evidence to support it.'). Normally, affirmative defenses must be proved by the defendant by a preponderance of the evidence. *State v. Riker*, 123 Wn.2d 351, 366, 869 P.2d 43 (1994). The necessity instruction is consistent with these principles.

Accordingly, we conclude the court did not err in giving Instruction No. 15.

B. Unanimity Instruction

Although the State separately charged Mr. Vander Houwen with 10 counts, he briefly argues he was entitled to a unanimity instruction because the State alleged he committed 10 different sets of illegal acts. However, this argument lacks a specific assignment of error as required under RAP 10.3(a)(3). An appellate court will not consider the merits of an issue if the appellant fails to raise the issue in the assignments of error section of the appellant's brief in violation of RAP 10.3(a)(3). *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). And, the issue was not argued below.

C. Evidence Sufficiency and Consistency of Verdicts

The issue is whether the guilty verdicts are supported by sufficient evidence, and if so, whether they are consistent with the not guilty verdicts in the other unlawful hunting counts and all not guilty verdicts in the waste of wildlife counts.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.' *Id.* Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We 'defer to the trier of fact on issues

involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.' *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The law proscribes second degree unlawful hunting of big game when one:

- (a) Hunts for, takes, or possesses big game and the person does not have and possess all licenses, tags, or permits required under this title;
- (b) Violates any rule of the commission or director regarding seasons, bag or possession limits, closed areas including game reserves, closed times, or any other rule governing the hunting, taking, or possession of big game; or
- (c) Possesses big game taken during a closed season for that big game or taken from a closed area for that big game.

RCW 77.15.410(1).

Here, the State alleged conduct (a) and (b). The agreed facts show several dead elk were found on Mr. Vander Houwen's property and he admitted shooting at the elk. Additionally, two slugs from a .270 caliber rifle were found in two of the elk. Mr. Vander Houwen admitted owning a .270 caliber rifle. Based on the above, sufficient evidence exists to support Mr. Vander Houwen's two convictions for second degree unlawful hunting of big game. Moreover, in raising the necessity defense Mr. Vander Houwen admits the proscribed end conduct.

We defer to the trier of fact on issues involving the persuasiveness of the evidence. *Hernandez*, 85 Wn. App. at 675. Regarding consistency, the jury could find the two slugs found in two elk solely supported two guilty verdicts. Seemingly inconsistent verdicts can be upheld 'w}here the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt.' *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988).

Affirmed.

Brown, J.

I CONCUR:

Kurtz, J.

SCHULTHEIS, J. (concurring) -- At the outset, I acknowledge the statutory scheme enacted by the legislature to address damage caused by wildlife. Chapter 77.36 RCW. At trial, Jerrie Vander Houwen proffered two jury instructions regarding statutory defenses based on this legislation. The trial court refused to give one of the instructions, but allowed the other. His RALJ appeal before the superior court embraced statutory defense issues, and he continued to argue them before our commissioner in his motion for discretionary review. The order granting discretionary review did not expressly limit the issues upon which review was granted. See RAP 2.3(e). However, Mr. Vander Houwen did not raise statutory defense issues or even mention the statutory scheme in his briefing once discretionary review was granted. Issues to which no error is assigned and that are not briefed or supported by citation to the record or authority, are generally waived. In re Det. of A.S., 138 Wn.2d 898, 922 n.10, 982 P.2d 1156 (1999); see RAP 10.3(a)(3), (5). Mr. Vander Houwen waived the statutory defense issues.

As to the issues addressed, analytically, I agree generally with the majority's assessment of the law, but I am sympathetic to Mr. Vander Houwen's predicament. In a similar case, a Pennsylvania judge ultimately held that 'the owner of real estate has an indefeasible right to destroy a deer when necessary to protect his crop. Any legislation which undertakes to deprive him of that right contravenes the Constitution.' Commonwealth v. Gilbert, 5 Pa. D. & C. 443, 446 (1924). In so doing, the judge explained his or her reasoning and the inequity in holding otherwise: A portion of this county has become a great fruit-growing district. Fruit here has become a valuable article of commerce. Great tracts of land that were practically untillable have been cleared and planted in fruit trees. Very large sums have been spent in providing these and they have yielded very abundantly and have been a source of very ample return to the owners. A large number of wild deer have been for years living in this mountain. They not only damage the fruit but the vegetables and the gardens and the crops in the fields as well. They have rendered it almost impossible to have a vegetable garden. They have driven fruit farmers from their farms and, if allowed to continue their maraudings, these farmers, who have made large investments and who year after year spend much time and labor in caring for the fruit trees, will be compelled to abandon them; and there will be, instead of blossoms and ripe fruit found in abundance, thistles, thorns and briars. Why should all this be allowed? Aside from the beauty of the deer as they are seen roaming about the mountain, they must necessarily be preserved for food and the entertainment of the sportsman. It is recognized by every one who knows anything of the subject that the value of the deer for food is very insignificant. Must, then, the

orchardist and the farmer and laborer who owns and cultivates his own garden be deprived of their property in order to preserve the game that the lover of sport may for a few days, or weeks at most, each year enjoy the sport of deer hunting? Must they endure this without any hope of compensation? If a cow goes astray from its owner and wanders into the neighbor's property and does damage, the person damaged has recourse to the owner of the cow for compensation. If swine enter upon one's land and root out his potatoes or damage his corn, the owner of the swine is responsible for the damage, and this whether the land be fenced or not. If marauding men and night prowlers were to enter the orchard and commit the same depredations that the deer commit, the State of Pennsylvania would reach out its strong arm and compel payment of damages and punish them as well. But when wild deer commit depredations, the injured person is compelled to sit by and bear his loss in silence. If a citizen of the State must sit by and see the fruits of his labor destroyed by wild deer owned by the State, then is the guarantee of the Constitution, which reads, 'All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property,' a farce.

Id. at 445-46.

Unlike orchardists in Pennsylvania, those in Washington are not meant to be completely without redress for damage done by wild game. RCW 77.36.040 allows an orchardist to make a claim to the State for losses due to damage caused by its game. But those damages are limited. Claims are limited to \$10,000 each and embrace only the value of the crop. RCW 77.36.040(1). The statute excludes claims for 'lost profits, consequential damages, or any other damages whatsoever.' RCW 77.36.040(1). Mr. Vander Houwen claims he has suffered economic damages of more than \$236,000 over the past two years due to elk migration into his orchard. Because the damages were to his trees and not to the crop, the statute does not appear to benefit him.

I agree with the judge in Gilbert, but I am constrained to concur with the majority.

Schultheis, J.

APPENDIX

C

APPENDIX

C-1

FILED

SEP 22 2005

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 22609-3-III
)	
Respondent,)	
)	
v.)	ORDER AMENDING
)	CONCURRENCE
JERRIE L. VANDER HOUWEN,)	
)	
Petitioner.)	

IT IS ORDERED the concurrence filed July 12, 2005 is amended as follows:

The first paragraph, which reads:

At the outset, I acknowledge the statutory scheme enacted by the legislature to address damage caused by wildlife. Chapter 77.36 RCW. At trial, Jerrie Vander Houwen proffered two jury instructions regarding statutory defenses based on this legislation. The trial court refused to give one of the instructions, but allowed the other. His RALJ appeal before the superior court embraced statutory defense issues, and he continued to argue them before our commissioner in his motion for discretionary review. The order granting discretionary review did not expressly limit the issues upon which review was granted. *See* RAP 2.3(e). However, Mr. Vander Houwen did not raise statutory defense issues or even mention the statutory scheme in his briefing once discretionary review was granted. Issues to which no error is assigned and that are not briefed or supported by citation to the record or authority, are generally waived. *In re Det. of A.S.*, 138 Wn.2d 898, 922 n.10, 982 P.2d 1156 (1999); *see* RAP 10.3(a)(3), (5). Mr. Vander Houwen waived the statutory defense issues.

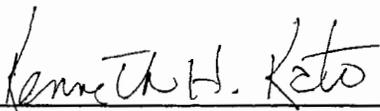
No. 22609-3-III
State v. Vander Houwen

shall be amended to read:

At the outset, I acknowledge the statutory scheme enacted by the legislature to address damage caused by wildlife. Chapter 77.36 RCW. At trial, Jerrie Vander Houwen proffered two jury instructions regarding statutory defenses based on this legislation. The trial court refused to give one of the instructions, but allowed the other. His RALJ appeal before the superior court embraced statutory defense issues, and he continued to argue them before our commissioner in his motion for discretionary review. The order granting discretionary review did not expressly limit the issues upon which review was granted. *See* RAP 2.3(e).

DATED: September 22, 2005

FOR THE COURT:



KENNETH H. KATO, Chief Judge