

No. 226093-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

Respondent

v.

JERRIE L. VANDER HOUWEN, SR.,

Petitioner.

RESPONDENT'S BRIEF

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I. ISSUES AND ANSWERS PRESENTED FOR REVIEW.

A. ISSUES PRESENTED FOR REVIEW.

- (1) Did the trial court err in not submitting to the jury the appellant's instructions regarding the necessity defense in light of State v. Burk, 114 Wash. 370, 195 Pac. 16 (1921)?
- (2) Did the trial court's instructions to the jury impermissibly shift the burden of proof to the defense?
- (3) Were their multiple acts presented to the jury requiring a separate unanimity instruction?
- (4) Were the jury's verdicts inconsistent, thus requiring reversal?
- (5) Was there sufficient evidence presented to support the verdicts of the jury?

B. ANSWERS TO ISSUES PRESENTED FOR REVIEW.

- (1) The instructions given to the jury allowed the defense to present their theory of the case.
- (2) The trial court's instructions did not impermissibly shift the burden of proof to the defense.
- (3) The State did not present multiple acts that were not alleged in the complaints.

- (4) The verdicts were not inconsistent when one considers the evidence presented regarding the recovery of the two spent rifle slugs in two of the elk. Even if so, reversal is not required.
- (5) There was sufficient evidence to support the verdicts.

II. STATEMENT OF FACTS.

The facts presented to the jury, as stated in Appendixes A and B, are summarized as follows: During the month of January, 2000, the appellant contacted the Department of Wildlife several times to complain that elk were entering his orchard and eating his young trees. (CP 203). On one telephone call to Officer Beireis, the appellant stated that shooting over the heads of the elk was not scaring them or preventing them from eating his trees. (CP 200). Officer Beireis said that he would attempt to organize a drive to move the elk behind the elk fence, but that he could not do that until the following week due to the upcoming Martin Luther King holiday on Monday. (CP 200). Appellant told Officer Beireis that he could not wait that long and that he would have to lower his sites and shoot them. (CP 200).

On January 27, 2000, a report was made to the Department of Wildlife that dead elk were seen in the appellant's orchard. (CP 203).

Sergeant Kohls and Officer Beireis went to appellant's orchard and located ten elk that were dead. (CP 203). The officers, through the use of a metal detector, located bullet slugs in two of the ten dead elk. The two slugs found by the officers were determined to be from a .270 caliber rifle. (CP 203).

Elk carcasses were scatted throughout the area of the orchard, both inside and outside the orchard. (CP 203). The officers contacted appellant at the orchard. Appellant admitted to shooting at the elk. Appellant also admitted owning a .270 caliber rifle. (CP 203).

The jury returned verdicts of guilty to two counts of Unlawful Hunting Big Game in the Second Degree. (CP 204). The appellant filed an appeal to Yakima County Superior Court. (CP 173). Judge Michael Schwab denied appellant's appeal. (CP 4-5). The appellant's motion for discretionary review was granted, and this appeal followed.

III. ARGUMENT

- (1) THE INSTRUCTIONS GIVEN TO THE JURY ALLOWED THE DEFENSE TO PRESENT THEIR THEORY OF THE CASE.

The trial court instructed the jury regarding the necessity defense. (Appendix C). That instruction advised the jury that it is a defense to a charge of unlawful big game hunting if the defendant reasonably believed

the commission of the crime was necessary to avoid or minimize a harm, the harm was greater than the harm resulting from the violation, the threatened harm was not brought about by the defendant, and no reasonable legal alternative existed. The instruction required that the defense be established by a preponderance of the evidence by the defendant. This instruction is came from WPIC 18.02. This instruction allowed the appellant to argue his theory of his case.

In State v. Souther, 100 Wn. App. 701, 998 P.2d 350 (2000), the court stated:

“Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading and permit the defendant to argue his theory of the case.” *State v. Tili*, 139 107, 126, 985 P.2d 365 (1999). A trial court’s decision regarding a jury instruction is reviewed for abuse of discretion if the decision is based on factual issues. See *State v. Walker*, 136 Wn.2d 767, 772-73, 966 P.2d 883 (1998). A trial court’s decision regarding a jury instruction is reviewed de novo where the decision is based on a ruling of law. See *id.* at 773.

Souther, 100 Wn. App. at 708.

Additionally, comparing WPIC 18.02, which was used by the court, and the proposed instruction by the appellant, one finds that the appellant’s proposed instruction does not set forth any requirements to establish necessity, nor did it advise the jury that the appellant had the

burden of proving by a preponderance of the evidence that there was a necessity. See State v. Diana, 24 Wn. App. 908, 604 P.2d 1321 (1979).

The appellant is mistaken in his analysis of State v. Burke, 114 Wash. 370, 195 P. 16 (1921), to the facts of this case. In Burk, the trial court refused to permit the defendant therein to present any testimony to show justification or necessity to kill the elk in that case. Burk, *infra* at 372. However, the trial court herein allowed the defendant to present testimony concerning his asserted justification or necessity for killing the elk. (CP 202-203). So in this case the trial court followed the court's holding in Burk to the extent that it permitted the appellant to present his theory of the case.

Nevertheless, the appellant asserts that he has a constitutional right or common law right to protect his property from elk that might damage it and was entitled to instruct the jury with his specific instruction. However, the appellant's right to protect his property must be balanced with the State's right to protect its wildlife. "[T]he State's property right to regulate wildlife is superior to [the defendant's]: 'Wildlife is the property of the state.'" State v. Long, 98 Wn. App. 669, 676, 991 P. 2d 102 (2000), citing RCW 77.12.010. "Game is not a property right appurtenant

to land. Game belongs to the State.” State v. Long, 98 Wn. App. 669, 676, 991 P. 2d 102 (2000), quoting State v. Quigley, 52 Wn. 2d 234, 236, 324 P.2d 827 (1958).

“[T]he State has the absolute right to maintain its game and wild animals upon any and all private lands, and in that act there is no element of trespass or taking.” Cook v. State, 192 Wash. 602, 607, 74 P.2d 199 (1937). “This absolute power to control and regulate passed with the title to the game and wild life to the several states, subject only to the applicable provisions of the Federal Constitution.” Cook v. State, 192 Wash. 602, 607, 74 P.2d 199 (1937), citations omitted.

Further, in Cook v. State, the court in 1937 analyzed the 1921 State v. Burk decision by saying that the Burk decision stands for the proposition that a landowner can kill an animal that is damaging his property. But, the court in Cook points out that “[w]e are not advised that the Legislature has in any way sought to abrogate or modify the rule laid down in that case, or that it has attempted to give the Game Commission, or anyone else the authority to prevent one from protecting his property under such circumstances.”

In 1947, a statutory scheme to compensate landowners for

damages to private property caused by deer or elk was enacted. Laws of 1947, ch. 275, § 4, p. 904, codified in RCW 77.36. The intent of the Legislature as it relates to protection of private property and conservation of wildlife is set out in RCW 77.36.005.

The legislature finds that: (1) As the number of people in the state grows and wildlife habitat is altered, people will encounter wildlife more frequently. As a result, conflicts between humans and wildlife will also increase. Wildlife is a public resource of significant value to the people of the state and *the responsibility to minimize and resolve these conflicts is shared by all citizens of the state.* (2) In particular, the state recognizes the importance of commercial agricultural and horticultural crop production and the value of healthy deer and elk populations, which can damage such crops. The legislature further finds that damage prevention is key to maintaining healthy deer and elk populations, wildlife-related recreational opportunities, and commercially productive agricultural and horticultural crops, and that the state, participants in wildlife recreation, *and private landowners and tenants share the responsibility for damage prevention.* Toward this end, the legislature encourages landowners and tenants to contribute through their land management practices to healthy wildlife populations and to provide access for related recreation. **It is in the best interests of the state for the department of fish and wildlife to respond quickly to wildlife damage complaints and to work with these landowners and tenants to minimize and/or prevent damages and conflicts while maintaining deer and elk populations for enjoyment by all citizens of the state.** (3) A timely and simplified process for resolving claims for damages caused by deer and elk for commercial agricultural or horticultural products is beneficial to the claimant and the state.

RCW 77.36.005, (emphasis added).

In RCW 77.36.040-080, the Legislature sets out the procedure for payment of claims from private citizens for property damage by elk. Read together, all of RCW 77.36 indicates that the intent of the Legislature was to facilitate the cooperation of the State and private citizens to prevent damage to private property and to conserve wildlife. The very reason the legislature enacted RCW 77.36 was to provide a mechanism for compensation for loss in order to discourage property owners from destroying elk or game that are their damaging property.

The State submits that RCW 77.36 is a clear indicator that the Legislature has sought to abrogate and modify the rule laid down in Burk by providing a system of compensation for property damaged by wildlife. The legislature's enactment of RCW 77.12.260-270 and RCW 77.36 was to establish a system to compensate landowners for property losses.

With this in mind, the trial court properly exercised its discretion by instructing the jury as to the defense of necessity pursuant to the WPIC 18.02, which properly set forth the requirements of necessity, and the burden of proving the affirmative defense, instead of the instruction requested by the appellant.

(2) THE TRIAL COURT'S INSTRUCTIONS DID NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

The appellant asserts that by requiring him to prove necessity by a preponderance of the evidence, the instruction impermissibly shifted the burden of proof to him. (Appellant's Brief, pg. 12). The Due Process Clause requires that a conviction must be based upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). However, proof of the nonexistence of all affirmative defenses has never been constitutionally required. Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

The appellant cites the case of State v. McCullum, 98 Wn.2d 484, 656 P.2d 1065 (1983), for the proposition that it was a due process violation for the court to require him to prove the existence of the necessity defense by a preponderance of the evidence. (Appellant's Brief pg. 13). In McCullum the court set for the analysis one must take to determine who carries the burden of proof regarding a defense. There the court stated:

The State bears the burden of proving beyond a reasonable doubt the absence of a defense if the absence of such defense is an ingredient of the offense and there is some evidence of the defense. *Patterson*, at 214-15. There are two ways to determine if the

absence of a defense is an ingredient of the offense: (1) the statute may reflect a legislative intent to treat absence of a defense as one "of the elements included in the definition of the offense of which the defendant is charged", *Patterson*, at 210; or (2) one or more elements of the defense may "negate" one or more elements of the offense which the prosecution must prove beyond a reasonable doubt, *Hanton*, at 132-33.

McCullum, 98 Wn.2d at 490.

In this case, with the crime of unlawful hunting of big game in the second degree, the elements were set forth in the jury instructions as follows:

(1) that the defendant unlawfully hunted for big game and he did not have and possess all licenses, tags, or permits as required; (2) violated 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; and (3) the acts occurred in the State of Washington. (CP 214).

Unlike the appellant in McCullum, the appellant herein has not put forth any argument whether the defense of necessity or justification is an "ingredient" of any of the elements of the crime of unlawful hunting of big game. Although an element of the crime is that the defendant "unlawfully hunted" big game and "did not possess all licenses or permits necessary," there is no such similar defense set forth in the game statutes as there are for

self defense and defense of others found in the criminal code.

The appellant seeks to equate self defense with defense of his property. Even in Burk the court recognized the difference between the two defenses when it stated that “a stronger showing would have to be made by one undertaking to justify his violation of the law in defense of his property than he would be required to make in defense of his life.” State v. Burke, *infra* at 374.

In State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994), the court held that when a duress defense is asserted, that it is the defendant who must prove the defense by a preponderance of the evidence. The court reasoned that a successful duress defense does not create a reasonable doubt that the defendant did the crime charged, but rather condones the defendant’s admittedly unlawful conduct. . . . Generally, an affirmative defense which does not negate an element of the crime charged, but only excuses the conduct, should be proved by a preponderance of the evidence.” Riker at 368.

Similarly, in State v. Box, 109 Wn.2d 320, 745 P.2d 23 (1987), the court rejected a similar argument regarding whether requiring a defendant to prove the insanity by a preponderance of the evidence. The court in Box

rejected the defendant's argument that it impermissibly shifted the burden to the defense. Like the affirmative defenses of insanity, the absence of the affirmative defense of necessity, is not a necessary element of the crime of Unlawful Hunting of Big Game.

Where facts amounting to a justification are shown, it is error to take the consideration of such facts from the jury. As a general rule it is for the jury to determine. Burk at 379-80. Necessity is a form of a justification defense. See United States v. Paoello, 951 F.2d 537, 540 (3d Cir. 1991). The necessity defense is available to a defendant "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 v. Gallegos, 73 Wn. App. 644, 650, 871 P.2d 621 (1994) (quoting State v. Diana, 24 Wn. App. 908, 913, 604 P.2d 1312 (1979), overruled on other grounds by Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997)).

With regard to who should carry the burden of proof, the U.S. Supreme Court stated in Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934), that "within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a

defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.” *Id.* at 88-89. Clearly a review of the facts regarding the convenience and opportunities for knowledge are with the defendant when the necessity defense is asserted.

In *State v. Bailey*, 77 Wn. App. 732, 893 P.2d 681 (1995), the court acknowledged that the necessity defense was available, under limited circumstances, where the wildlife was killed to protect property. *Id.* at 740. The court further held that the necessity defense requires proof by a preponderance of the evidence that there was no legal alternative. *Id.* at 740-41.

In *State v. Diane*, 24 Wn. App. 908, 604 P.2d 1312 (1979), the court held that the

[d]efendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence. *People v. Lovercamp, supra; People v. Condley*, 69 Cal. App. 3d 999, 138 Cal. Rptr. 515, 519 (1977); *James v. United States*, 350 A.2d 748 (D.C. App. 1976), *cert. denied*, 429 U.S. 872 (1976); *Patterson v. New York*, 432 U.S. 197, 225 n.9, 53 L. Ed. 2d 281, 97 S. Ct. 2319,

2323 n.9, 2327 (1977).”

State v. Diana, 24 Wn. App. at 916.

Since the common law rule permitting necessity as a defense placed the burden on the defense to prove the necessity for the action, the trial court did not err by requiring the appellant herein to establish the necessity defense by a preponderance of the evidence. This burden of proof did not impermissibly place an undue hardship upon the appellant.

(3) THE STATE DID NOT PRESENT MULTIPLE ACTS THAT WERE NOT ALLEGED IN THE COMPLAINTS.

The appellant asserts there was a lack of jury unanimity due to the fact that each complaint did not designate a specific elk out of the ten killed applied to each count. (Appellant’s Brief, pg. 16). A separate cause number was used for each elk found killed on January 27, 2000. The jury was instructed that each count was separate, and that they must decide each count separately. (CP 212). “Jurors are presumed to follow the court’s instructions. State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).” State v. Harvey, 34 Wn. App. 737, 664 P.2d 1281, (1983).

The fact that each elk was not designated by a name or number did not make the counts indefinite. The legislature has expressed its intent to punish each animal unlawfully taken, as a single unit of prosecution, by

the enactment of RCW 77.15.030, which states:

Individual animal unlawfully taken—Separate offense.

Where it is unlawful to hunt, take, fish, possess, or traffic in big game or protected or endangered fish or wildlife, then each individual animal unlawfully taken or possessed is a separate offense. Where it is unlawful to hunt, take, fish, possess, or traffic in big game or protected or endangered fish or wildlife, then each individual animal unlawfully taken or possessed is a separate offense.

Since the legislature intended to punish each animal unlawfully taken as a separate and distinct crime, charging the appellant for each count, although the conduct giving rise to the charges occurred out of one incident, was clearly appropriate. Thus multiple counts, although having occurred during one incident, does not offend due process or double jeopardy principles.

Given that it was appropriate to charge multiple counts, was it error for the court not to give a unanimity instruction? The appellant cites State v. Marko, 107 Wn. App. 215, 27 P.3d 228 (2001), in support of his assertion that it was constitutional error not to do so. The court in Marko stated that “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.” Marko, supra at 220. Here, the State elected the acts by charging as separate counts each elk killed.

There was no prejudice to the appellant by not having each elk killed so that they were named, numbered or otherwise labeled. The evidence presented was that the appellant fired on the group of elk as they were in his orchard. The act of shooting into the herd was like dipping a net into the waters and catching numerous fish at one time. How do you distinguish one fish from the other? What difference does it make? The answer is that it is a distinction without a difference. It is one act with multiple consequences.

Most of the case law regarding multiple illegal acts comes from sexual abuse cases involving children, where there are a number of illegal acts having occurred over the course of an extended period of time. In State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996), the court held:

In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find “separate and distinct acts” for each count when the counts are identically charged.

Hayes, supra at 431.

Unlike sex offenses, the charges that were brought forth against the appellant were done so using multiple counts and cause numbers, for an offense that was the result of one incident. The defense presented by the appellant was not alibi. The defense was necessity and insufficient evidence.

In the case at hand, the State charged each act separately, and there were no other acts that were not charged resulting from the incident on or about January 27, 2000. The jury was instructed that a separate crime is charged in each count and that they must decide each count separately. (CP 212). Two counts for each elk killed, one for unlawful hunting and one for waste. (CP 204).

The only thing to distinguish the elk that were killed was that Sergeant Kohls and Officer Beireis located two .270 caliber slugs in two of the dead elk. (CP 203). When the appellant was contacted later that day, he admitted shooting at the elk the night before, and admitted that he owned a .270 caliber rifle. (CP 203). The elk killed the night before were found both inside and outside the appellant's orchard. (CP 203). None of the elk had been gutted or skinned, which would indicate that this was not the usual

incident of poaching, where you just find entrails. (CP 203). Taking these facts into consideration, the appellant was not prejudiced by the fact that there was not a distinction as to which elk was which, by naming or numbering.

- (4) THE VERDICTS WERE NOT INCONSISTENT WHEN ONE CONSIDERS THE EVIDENCE. EVEN IF THEY WERE INCONSISTENT, REVERSAL IS NOT WARRANTED WHERE THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

The jury returned guilty verdicts on two of ten counts of Unlawful Hunting Big Game. Although there is little to distinguish one count from another, there was evidence present to differentiate the two verdicts in which there were guilty verdicts. Specifically, the facts that two spent rifle slugs from two of the killed elk were recovered by law enforcement. (CP 203). Furthermore, the spent rifle slugs were from a .270 caliber rifle, and that the appellant owned a .270 caliber rifle. (CP 203). Those facts support the jury verdicts and differentiate two verdicts from the others.

The Washington State Supreme Court has held that even irreconcilable verdicts do not necessitate reversal in Washington. Where a jury's verdict is "supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not

reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count.” State v. Ng, 110 Wn.2d 32, 46, 750 P.2d 632 (1988). The Ng court relied upon the U.S. Supreme Court’s holding in U.S. v. Powell, where the court rejected an argument that inconsistent verdicts justified dismissal. The Powell court stated that a variety of factors can lead to inconsistent verdicts such as “mistake, compromise or lenity. . . .” U.S. v. Powell, 469 U.S. 57, 65, 83 L. Ed. 2d 461, 105 S. Ct. 471 (1984). A court’s independent review of the sufficiency of the evidence is adequate protection against jury irrationality or error. See Powell, 469 U.S. at 67-68.

Thus, although the jury’s verdicts here may be considered inconsistent, those verdicts should not be overturned since the court in State v. Ng, *infra*, rejected inconsistent verdicts as a basis for challenge.

(5) THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE JURY’S VERDICTS.

In reviewing a claim of insufficient evidence, the court must review the evidence presented to the jury with the following in mind:

[4] The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

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

From the evidence presented, a rational trier of fact could conclude that the appellant shot all ten of the elk found inside and just outside his orchard on January 27, 2000. The facts presented were that Sergeant Kohls and Officer Beireis found 10 elk that had been shot. (CP 203). They were located both inside and outside the appellant's orchard outside of Tieton, Washington, in Yakima County. (CP 203). The appellant admitted shooting at the elk the night before. (CP 203). Two slugs found in two of the elk killed were consistent with the type of firearm the appellant owned. (CP 203). None of the elk had been gutted or skinned, which would negate the proposition that a poacher was responsible for the elk that were killed. (CP 203). Thus, the evidence supports the jury's verdicts.

IV. CONCLUSION

In conclusion, the trial court properly permitted the defense to present evidence of necessity which was in accord with the Burk decision. The trial court's instruction regarding the necessity defense did not

impermissibly shift the burden of proof to the defense. There was no need for a separate unanimity instruction, since the appellant was charged with each act separately and the jury was instructed to treated each count separately. Although the verdicts may appear to be inconsistent, that does not invalidate them since the jury could have acted out of mistake, compromise or lenity. Finally, there was sufficient evidence presented to the jury to support the verdicts. Therefore, the Court should affirm appellant's conviction.

Respectfully submitted this 16th day of December, 2004.



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TEL 509-574-1200
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APPENDIX A

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FILED
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

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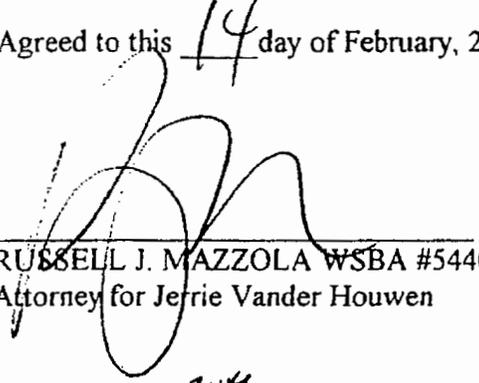
14. That upon submission of the case to the jury, the jury acquitted Defendant of 10
Counts of Waste of Wildlife and 8 Counts of Killing Game Out of Season. The jury convicted
Defendant VanderHouwen of 2 Counts of Killing Game Out of Season. The specific cause numbers
for which the jury convicted Jerry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

Dated this 28th day of February, 2002.

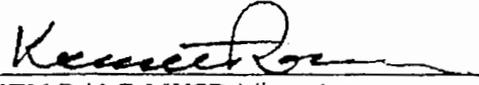

COURT COMMISSIONER/JUDGE

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

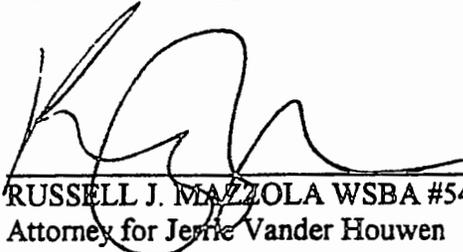
Agreed Findings of Fact - 3

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APPENDIX B

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

4 Agreed to this 6th day of Aug 2003
5 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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14 Kenneth Ramm, WSBA # 16500
15 Deputy Prosecuting Attorney
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APPENDIX C

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.