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October 13, 2011
Court of Appeals
Division III
State of Washington

COA NO. 29532-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

PAMELA DESKINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY

The Honorable Allen C. Nielson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's constitutional right to a unanimous jury verdict on the count of unsafe animal confinement was violated.

2. The superior court erred in affirming the conviction for confining animals in an unsafe manner. CP 226-27 (Conclusion A).

3. The district court erred in instructing the jury on an uncharged alternative means of committing the crime of second degree animal cruelty. CP 20, 63.

4. The information charging second degree animal cruelty is defective because it omits an alternative means of committing the crime upon which the jury was instructed. CP 20.

5. The superior court erred in affirming the conviction for second degree animal cruelty. CP 227-28 (Conclusion B).

6. The superior court erred in failing to vacate the district court's animal forfeiture order. CP 231 (Conclusion G).

7. The superior court erred in failing to vacate the district's court's restitution award for "Winnie" the dog. CP 231 (Conclusion H).

8. The superior court erred in concluding appellant "remains on probation for a total of 24 months on all stated conditions." CP 231-32.

9. The district court's imposition of restitution to the sheriff's office violated appellant's right to procedural due process. CP 3.

10. The district court erred in imposing a \$1000 suspended fine for the confinement offense under count I. CP 2.

11. The district court erred in entering the following findings and conclusions:

a. "Given the nature of this case, the court also finds that Ms. Deskins shall not own, acquire or live with pets or livestock during the probationary period after she is released from jail." CP 117 (FF 20).

b. "Due to the nature of this case, the court also orders that all pets or livestock, domestic or commercial, at 5522 Wallbridge Road shall be forfeited to Stevens County Sheriff on March 5th, 2010, except if written proof of ownership by others is provided to the Stevens County Sheriff's Department." CP 118 (CL 28).

c. "The court finds that the following restitution, fines, and assessments are justified and appropriate in this case based upon the jury verdict, the record, facts, and arguments of counsel: civil penalty of \$1,000, criminal conviction fee of \$43, fines and assessments in the amount of \$1000, probation monitoring for \$600, restitution in the amount of \$1400 to Larry and Cindy Tenant 5494-A Wallridge Rd Deer Park WA 99006 and restitution to Stevens County Sheriff's Department in the amount of \$21,582.21 along with the Stevens County District Court in the amount of \$5,797.61." CP 116 (FF 17).

d. "The court concludes that Ms. Deskins and/or Doo Dah Day Inc., are required to pay the Clerk of the Court in Stevens County the amounts found by the court in Paragraph 17 above. The fines, costs, and restitution that are the financial responsibility of Ms. Pamela Deskins and/or Doo Dah Day Inc. come to a total of \$31,379.82." CP 117 (CL 23).

Issues Pertaining To Assignments Of Error

1. Where multiple acts could have formed the basis for conviction for the confinement offense under count I, was appellant's constitutional right to jury unanimity violated by the lack of a unanimity instruction and the failure of the prosecutor to clearly elect a specific incident as the basis for the charge?

2. Where the charging document did not set forth all the alternative means of committing the crime of second degree animal cruelty under count II upon which the jury was instructed, must the conviction be reversed because the information is deficient and the "to convict" instruction contains uncharged alternative means of committing the crime?

3. Must the sentencing order requiring forfeiture of all pets and livestock be vacated because it is overbroad and void due to lack of statutory authority?

4. Must the sentencing order prohibiting owning, acquiring or living with pets and livestock during the probationary period be vacated because it is overbroad and void due to lack of statutory authority?

5. Must imposition of a suspended \$1000 fine for the confinement offense (count I) be vacated because the court lacked statutory authority to impose that amount?

6. Must the restitution award for Winnie the dog be vacated due to lack of statutory authority to impose it as part of the misdemeanor sentence?

7. Did the district court violate appellant's right to due process in awarding restitution to the sheriff's office without adequate notice and opportunity to be heard?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Pamela Deskins in district court by final amended information with willful failure to confine domestic animals in a manner that jeopardized the safety of the animals or the public from May 6, 2008 through September 30, 2008 (count I). CP 19. The State also charged Deskins with second degree animal cruelty (count II), harassment (count III), and tampering with physical evidence (count IV). CP 20. A jury returned guilty verdicts on all counts. CP 43-46.

The district court imposed a total of 850 days of confinement with 300 days suspended, two years of probation, and various sentencing conditions. CP 2-4. Deskins appealed to the superior court. CP 1-4.

The superior court reversed the convictions for counts III and IV and affirmed the convictions for counts I and II. CP 226-30. The superior court affirmed the two-year probation term on the premise that the sentences for count I and II were suspended and applied to those counts. CP 230-31; 2RP¹ 49. The superior court questioned the breadth of the district court's forfeiture order and was unable to cite legal authority for the district court's imposition of restitution for Winnie the dog, but remanded for clarification rather than vacate those orders. CP 231.

The State filed a motion for discretionary review and Deskins filed a cross-motion for discretionary review. The Court of Appeals commissioner denied the State's motion and granted Deskins's motion.

2. Trial

Deskins lives in rural Stevens County on multiple acres of land surrounded by fencing of various heights. 1RP 78-79, 143, 213, 396-407, 441-46. She thought of her property as an animal sanctuary where she took in unwanted animals. 1RP 417-18. She has housedogs and outside dogs.

¹ The verbatim report of proceedings is referenced as follows: 1RP - three consecutively paginated volumes from 2/24/10, 2/25/10, 2/26/10 and 4/13/10; 2RP - 10/15/10.

1RP 422, 429. Michael Benson also lives on the property and has a dog.
1RP 395, 422.

The Feilers, the Strongs, the Madsens, the Tennants and the Ziegmanns are neighbors. 1RP 66, 73-74, 97, 146, 229, 244-45. Laurie Strong testified Deskins's dogs were always chasing and biting three donkeys inside the pen between May and October 2008. 1RP 155. Strong videotaped one such incident in the summer of 2008. 1RP 156, 158-59, 167-68.

On May 6, 2008, the Tennant's dog Winnie was bitten and injured by a group of other dogs. 1RP 43-44, 69, 77, 100-02. Winnie was out loose that day. 1RP 80-81. Terry Feiler identified Deskins's dogs as the attackers. 1RP 104. As Feiler's wife approached, most of the dogs ran back over, under, and through Deskins's fence. 1RP 102. Deskins was not present during the incident and Feiler did not know if she was home when it happened. 1RP 116.

Deskins testified she was unaware any of her animals were unaccounted for on May 6, 2008. 1RP 417. She denied having knowledge of the Winnie incident as of October 1, 2008. 1RP 506. Deskins signed a declaration on October 14, 2008, which states she received a letter from the Stevens County Sheriff's Office on May 11 indicating her dogs had been

declared to be potentially dangerous in connection with the May 6 incident. 1RP 507-10.

On September 17, 2008, Laurie Strong saw dogs running around biting each other inside the fence. 1RP 147-48. Strong and Dawn Madsen saw a number of dogs kill another dog. 1RP 151, 229-30. Strong filmed the event. 1RP 149, 151, 157-58.

About 20 minutes later, Madsen and Strong saw Deskins as she was coming home. 1RP 151, 231. Deskins drove into the pen and put the prone dog in the back of her pickup. 1RP 151-52, 232. Madsen and Strong were on the road next to Deskins's fence. 1RP 152, 163, 232. Deskins told Strong and Madsen she would get her gun and shoot them if they did not leave her property. 1RP 152, 232--34. Deskins did not have a gun with her. 1RP 234.

Deskins testified she was at work during the day of September 17, 2008. 1RP 419. Upon returning home in the evening, she saw some people standing on her property near the fence line. 1RP 420. Several had cameras or camera phones. 1RP 420. Deskins believed her property line ran down the middle of the adjoining road. 1RP 452, 456-57. She considered people who stop and photograph over her objection to be trespassing. 1RP 459. Deskins drove into the field and put a dog lying there in the back of her pickup. 1RP 420-21. She asked the people to leave her property and told them they did not have her consent to take photographs. 1RP 460. Deskins

brought the dog to her house and treated an injury to its ear and determined it did not need to be treated by a veterinarian. 1RP 421-22.

On September 29, 2008, Strong and Feiler saw dogs attacking and biting another dog inside the fence. 1RP 105-06, 153-54. Feiler filmed the incident. 1RP 106, 133-34. A sheriff's deputy arrived on the scene and saw a dog lying on Deskins's property with other dogs around it. 1RP 178-80. He knew the dogs to be aggressive. 1RP 182.

Deskins was at work that day. 1RP 423, 471. She did not know about what happened that day. 1RP 471. Feiler never told Deskins there may be something going on in her yard while she was away from home. 1RP 118.

On October 1, 2008, Terry Feiler, Linda Ziegman and Laurie Strong saw dogs attacking another dog inside the fence. 1RP 108-09, 155, 214-17. Feiler and Strong filmed the event. 1RP 109, 155, 159. Deskins was at work that day, then went to a friend's house for dinner and returned home at midnight. 1RP 425-26.

On October 2, 2008, Betty Feiler was on the road talking to the Madsens when Deskins drove by in her pickup with a big black plastic bag handing off the tailgate. 1RP 237-38. Feiler drove in the same direction and soon saw Deskins walking from the back of the truck. 1RP 238-39. After Deskins left, Feiler drove further and saw a plastic bag in the road. 1RP 239.

She looked back and did not see a bag in the back of Deskins's truck. 1RP 240. Responding to Feiler's complaint, Sheriff's Deputy Gowin arrived at the location and found a garbage bag on the side of road with a dead dog inside. 1RP 7-9. A veterinarian who examined the recovered dog on October 7 opined it had been dead for more than three days. 1RP 29-31. The veterinarian observed injuries consistent with fight or bite wounds from other dogs. 1RP 29-30.

Deskins denied taking a dead dog off her property and dumping a carcass on October 2. 1RP 461-63, 505. She said there could have been a black garbage bag in the back of her truck because she hauls garbage to the transfer station. 1RP 440-41, 462.

On October 2, 2008, Detective Glover executed a warrant, which authorized seizure of Deskins's dogs and search for evidence of animal cruelty. 1RP 258-59, 262, 289. Glover spoke with Deskins's attorney earlier that day regarding the warrant. 1RP 257-58. On Glover's way over, dispatch relayed Feiler's complaint that Deskins dumped a dog. 1RP 263.

Over the course of two days, the Sheriff's Office and SpokAnimal² staff seized 39 dogs from Deskins's property. 1RP 260, 265, 294, 339. Deskins was present during the seizure. 1RP 261. The dogs were

² SpokAnimal is an animal control organization that had a contract with the Stevens County Sherriff's Office. 1RP 268.

comfortable with Deskins, but agitated by those trying to capture them with catchpoles. 1RP 261, 304, 318-19, 336. They were aggressive and tried to avoid capture. 1RP 266. They were all scared. 1RP 305, 335. Two dogs escaped the fenced area during the seizure process. 1RP 265.

There were no structures to separate the dogs from each other. 1RP 260, 292, 312. A SpokAnimal employee said a large group of dogs is unsafe because the dominant dogs tend to injure the less dominant. 1RP 317. Deskins testified she never saw dogs fighting and killing each other, nor had she ever picked up a dead or severely wounded dog inside the pen from May to September 2008. 1RP 439, 506.

C. ARGUMENT

1. THE LACK OF UNANIMITY INSTRUCTION VIOLATED DESKINS'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

This case illustrates what happens when the prosecution overreaches in its zeal to procure conviction without honoring constitutional safeguards. In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. U.S. Const., amend. VI; Wash. Const., art. 1, § 22. "[A] defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Deskins's right to jury unanimity was violated in relation to the unlawful confinement conviction

under count I in the absence of a unanimity instruction or clear election from the prosecutor regarding which of a number of multiple incidents formed the basis for conviction.

The superior court wrongly concluded the error could not be raised for the first time on appeal. CP 227. It is well established a unanimity error amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Greathouse, 113 Wn. App. 889, 916, 56 P.3d 569 (2002) (citing State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991)); State v. Furseth, 156 Wn. App. 516, 520 n.3, 233 P.3d 902 (2010); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

The superior court also appeared to believe no unanimity violation occurred because the "to convict" instruction and the charging document only set forth one alternative means of committing the crime. CP 226-27. If so, the superior court failed to grasp the nature of the unanimity violation here. This is not an alternative means problem. This is a multiple acts problem.

In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to *guilt* for the single crime charged, but unanimity is not required as to the *means* by

which the crime was committed so long as substantial evidence supports each means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). "In multiple acts cases, on the other hand, several acts are alleged and any one of them could constitute the crime charged." Kitchen, 110 Wn.2d at 411. In multiple acts cases, the jury must be unanimous as to which act or incident constitutes the crime. Id.

This is a multiple acts case because the State alleged Deskins committed multiple acts of failing to properly confine her dogs, any one of which could form the basis for committing the crime of failing to confine animals in an unsafe manner: "the defendant did willfully fail to confine and separate 39 dogs on her fenced property, from on or about May 6, 2008, when some of the dogs attacked and severely injured a neighbor's dog, until on or about September 30, 2008 when several of the dogs attacked another of the dogs inside the fenced area and killed it." CP 19.

The evidence showed multiple incidents applicable to count I. On May 6, 2008, dogs attacked the neighbor's dog Winnie outside the fenced area. 1RP 43-44, 69, 77, 100-04. On September 17, 2008, dogs attacked another dog inside the pen. 1RP 151, 229-30. On September 29, 2008, dogs again attacked another dog inside the pen. 1RP 105-06, 153-54. In addition, the dogs were "always" chasing and biting three donkeys inside the pen

between May 6 and September 30. 1RP 155. A video taken in summer 2008 showed one of these attacks on a donkey. 1RP 156, 158-59, 167-68.

"The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them." State v. York, 152 Wn. App. 92, 95, 216 P.3d 436 (2009) (quoting Petrich, 101 Wn.2d at 570). To ensure jury unanimity in a multiple acts case, either the State must elect the act upon which it will rely for conviction or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572; see WPIC 4.25 (Petrich instruction).

"A unanimity instruction is required, whether requested or not, when a jury could find from the evidence that the defendant committed a single charged offense on two or more distinct occasions." State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998). "The unanimity instruction requirement avoids the risk that jurors will aggregate evidence improperly." State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). There was no unanimity instruction here.

In the absence of a unanimity instruction, the State must clearly elect the act it relies upon to establish guilt. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007); State v. Bland, 71 Wn. App. 345,

351-52, 860 P.2d 1046 (1993), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). The State did not elect an act for count I, but instead invited the jury to convict based on any of the incidents occurring within the charged time frame. 1RP 542-43. Because the State did not specify an act for count I, the trial court should have given a unanimity instruction to ensure that the jurors agreed that a specific act, out of the multiple acts described by witnesses, supported the count I conviction beyond a reasonable doubt. York, 152 Wn. App. at 95.

"Without the election or instruction, each juror may arrive at a guilty verdict by responding to testimony about discrete incidents — incidents which, if an election were made, the jury may not all agree occurred." Coleman, 159 Wn.2d at 512. The conviction must be reversed unless the unanimity error is harmless beyond a reasonable doubt. Id. The error is presumed prejudicial, which is overcome "only if no rational juror could have a reasonable doubt as to any of the incidents alleged." Id.

The unanimity error here is not harmless. The offense contains a willfulness element, which at minimum means a person acts knowingly with respect to the material elements of the offense. RCW 16.52.080; RCW 9A.08.010(4).

Regarding the May 6, 2008 incident, there is no evidence Deskins was present when her dogs attacked Winnie or that she knowingly allowed

her dogs to attack Winnie. 1RP 116. Deskins testified she was unaware of any of her animals being unaccounted for on May 6. 1RP 417. She did not notice any of her animals were bloodied or marred. 1RP 417.

A rational trier of fact could conclude the State failed to prove beyond a reasonable doubt that Deskins *willfully* confined her dogs in a manner that jeopardized the safety of Winnie.

The same conclusion applies to the donkey incidents. When asked if she contacted Deskins to let her know about the donkey attacks, Strong answered "I think Ms. Deskin [sic] knew what was going on because it happened every week. She had to have seen it herself." 1RP 169. In other words, Strong speculated Deskins must have known even though Strong never notified her of the incidents. Speculation is not substantial evidence. State v. Prestegard, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). Strong acknowledged she did not contact Deskins on the day that she shot the video to let her know something was going on between the dog and the donkey. 1RP 169-70. A rational trier of fact could conclude the State failed to prove Deskins acted willfully in relation to the donkey incidents.

In the absence of a proper unanimity instruction, there is no way to know all the members of the jury were relying on the same incident when considering each count. Petrich, 101 Wn.2d at 570. The State cannot

overcome the presumption that the unanimity error was prejudicial.

Reversal of the conviction under count I is required.

2. THE COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING ANIMAL CRUELTY FOR WHICH DESKINS DID NOT RECEIVE ADEQUATE NOTICE.

The State failed to notify Deskins in the charging documents that it would seek to convict her based on all of the alternative means set forth in the second degree animal cruelty statute. Reversal of the animal cruelty conviction is required because the jury was allowed to convict Deskins based on an uncharged alternative means.

- a. Second Degree Animal Cruelty Is An Alternative Means Crime.

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

Legislative intent determines whether a statute sets forth alternative means. In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). Legislative intent may be determined by considering "(1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are

consistent with and not repugnant to each other; and (4) whether the acts may inhere in the same transaction." State v. Berlin, 133 Wn.2d 541, 552-53, 947 P.2d 700 (1997) (citing State v. Arndt, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976)).

Under former RCW 16.52.207(2)(a),³ an owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence "[f]ails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention" and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure.

Each of those five kinds of failures is a distinct means of committing the crime of second degree animal cruelty. Application of the Arndt factors supports this conclusion.

Commission of second degree animal cruelty by failing to provide necessary 1) shelter; 2) rest; 3) sanitation; 4) space or 5) medical attention exists under the same title of "Animal cruelty in the second degree." RCW 16.52.207; see Berlin, 133 Wn.2d at 553 (title test supported alternative means analysis where second degree murder intentional murder

³ Laws of 2007, ch. 376 § 1 (eff. July 22, 2007). This was the statute in effect at the time of offense.

and second degree felony murder existed under same RCW 9A.32.050 title of "Murder in the Second Degree").

A readily perceived connection exists where the criminal acts in question accomplish the same result. Arndt, 87 Wn.2d at 380-81. The acts of failing to provide necessary 1) shelter; 2) rest; 3) sanitation; 4) space or 5) medical attention are connected because the each accomplish the result of causing the animal to suffer "unnecessary or unjustifiable physical pain." Former RCW 16.52.207(2)(a).

"The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other." Arndt, 87 Wn.2d at 383. The different ways of causing the requisite suffering are not repugnant to each other because proof of one does not disprove the other. For example, proof of lack of shelter does not disprove lack of rest, sanitation, space or medical attention. The same is true for all the different means of causing the suffering in relation to one another. There is no repugnancy here.

Prohibited acts inhere in the same transaction when one may simultaneously satisfy the elements of both proposed alternatives. Halgren, 156 Wn.2d at 810. Here, there is no barrier to simultaneously failing to provide shelter, rest, space and medical attention. The prohibited acts inhere in the same transaction because an animal may lack

all the listed necessities at the same time. The same transaction test is satisfied.

The means available to accomplish second degree animal cruelty under former RCW 16.52.207(2)(a) describe distinct acts that amount to the same crime. The various failures are alternative means because they are "factual alternatives provided by statute." Halgren, 156 Wn.2d at 810 (presence of "mental abnormality" or "personality disorder" are alternative means for making SVP determination).

This conclusion is consistent with other cases in which alternative means offenses have been found to exist. See, e.g., State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) ("RCW 9A.46.110(1)(a) provides alternative means of committing the crime of stalking: "intentionally and repeatedly harassing or repeatedly following another person."); State v. Roche, 75 Wn. App. 500, 511, 878 P.2d 497 (1994) (robbery is an alternative means crime under RCW 9A.56.190: taking property "from the person of another or in his presence"); State v. Strohm, 75 Wn. App. 301, 305, 307, 309, 879 P.2d 962 (1994) (offense of leading organized crime under RCW 9A.82.060(1)(a) may be committed by alternative means of "Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity;" trafficking in stolen property under RCW

9A.82.050(2) can be committed by eight alternative means: "A person who knowingly [1] initiates, [2] organizes, [3] plans, [4] finances, [5] directs, [6] manages, or [7] supervises the theft of property for sale to others, or [8] who knowingly traffics in stolen property[.]").

b. A Defendant May Not Be Convicted Of An Uncharged Alternative Means of Committing A Crime.

The "to convict" instruction for second degree animal cruelty required the State to prove Deskins owned a dog on or about October 1, 2008 and that she knowingly, recklessly, or with criminal negligence "[f]ailed to provide the animal with necessary shelter, rest, sanitation, space or medical attention and the animal suffered unnecessary or unjustifiable physical pain as a result of the failure." CP 63 (Instruction 14).

The "to convict" instruction tracks the language of former RCW 16.52.207(2)(a). Under that statute, the offense can be committed by failing to provide necessary 1) shelter; 2) rest; 3) sanitation; 4) space or 5) medical attention. As set forth above, each of those five kinds of failures is a distinct means of committing the crime of second degree animal cruelty.

The final amended information, however, alleged "On or about Oct 1, 2008, in Stevens County Washington, the defendant did under

circumstances not amounting to first degree animal cruelty, did knowingly, recklessly or with criminal negligence *fail to take action to confine or separate the 39 or so dogs running loose on her fenced property*, after having knowledge that on September 17, 2008, several of her dogs attacked and killed one of her dogs, *did inflict unnecessary suffering or pain upon other dogs when it was attacked and killed by other dogs within the fenced area.*" CP 20 (emphasis added).

The information at most sets forth two means of committing the crime: failure to provide necessary "shelter" in the sense that the victimized dog was not sheltered from its attackers and failure to provide necessary "space" in the sense that the dogs were confined in a way that allowed them to attack one another. The information does not set forth the alternative means of committing the crime by 1) failing to provide necessary rest; 2) failing to provide necessary sanitation; or 3) failing to provide necessary medical attention.

"One cannot be tried for an uncharged offense." State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). The federal and state constitutions demand that a defendant only be tried and convicted on the charge found in the charging document. State v. Frazier, 76 Wn.2d 373, 376, 456 P.2d 352 (1969); U.S. Const. amend. 6; Const. art. 1, § 22.

Moreover, instruction may not broader than the charge in the information. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986).

Deskins had the constitutional right to be informed of the nature of the charges against her. State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007); U.S. Const. amend. VI; Wash. Const. art. I, § 22. This is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

When the information specifies one alternative means, the manner of committing a crime becomes an element. Bray, 52 Wn. App. at 34. The "to convict" instruction for second degree animal cruelty lists multiple alternative means of committing the crime: "[f]ailed to provide the animal with necessary shelter, rest, sanitation, space or medical attention and the animal suffered unnecessary or unjustifiable physical pain as a result of the failure." CP 63. Deskins's conviction for second degree animal cruelty must be reversed because the charging document does not set forth the elements of 1) failing to provide necessary rest; 2) failing to provide necessary sanitation; or 3) failing to provide necessary medical attention as alternative means of committing the crime.

This result is compelled by State v. Williamson, 84 Wn. App. 37, 924 P.2d 960 (1996). In Williamson, the information alleged the defendant committed the crime of obstruction of a public servant by

means of conduct but the trial court convicted on the uncharged alternative of obstruction by means of speech. Williamson, 84 Wn. App. at 39, 42, 44-45. Reversal was required because the information failed to provide adequate notice of the alternative means ultimately considered by the trier of fact at trial. Id. at 39, 44-45.

In Deskins's case, as in Williamson, the information was defective because it specified certain alternative means but omitted a means for which she was ultimately prosecuted at trial. The information, liberally construed, specified lack of shelter and space. CP 20. The information did not give notice that the State sought to convict Deskins of second degree animal cruelty on the alternative basis that she failed to provide necessary rest, sanitation or medical attention. The information was therefore inadequate to give notice of the crime charged.

Because the lack of rest, sanitation or medical attention elements as an alternative means of committing the crime are neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Deskins's conviction for second degree animal cruelty. Williamson, 84 Wn. App. at 45.

Moreover, when an information charges one of several alternative means, it is error to instruct the jury on the uncharged alternatives, regardless of the strength of the evidence presented at trial. Bray, 52 Wn.

App. at 34. The "to convict" instruction should have omitted each of the uncharged statutory alternatives that Deskins failed to provide necessary 1) rest; 2) sanitation; or 3) medical attention.

Where the instructional error favors the prevailing party, "it is presumed to be prejudicial unless it affirmatively appears the error was harmless." Bray, 52 Wn. App. at 34-35. If it is possible that the jury might have convicted the defendant under the uncharged alternative, then the error is prejudicial. Laramie, 141 Wn. App. at 343; Bray, 52 Wn. App. at 34-35; State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996).

Such error may be harmless where other instructions clearly and specifically define the crime in such a way as to limit the jury's consideration to the charged means. Chino, 117 Wn. App. at 540; State v. Severns, 13 Wn.2d 542, 549, 125 P.2d 659 (1942). The definitional instruction for animal cruelty in Deskins's case, however, included the uncharged means of failing to provide "rest." CP 62 (Instruction 13). Furthermore, the prosecutor in closing argument invited the jury to convict on all of the uncharged alternative means by reciting the "to convict" instruction that contained them. 1RP 543-44. Under these circumstances, the State cannot meet its burden of affirmatively overcoming the presumption that jurors may have convicted based on an uncharged alternative means.

3. THE SENTENCING ORDER REQUIRING FORFEITURE OF ALL PETS AND LIVESTOCK IS OVERBROAD AND VOID DUE TO LACK OF STATUTORY AUTHORITY.

A court may impose only a sentence that is authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). "If the trial court exceeds its sentencing authority, its actions are void." Paulson, 131 Wn. App. at 588.

As a condition of the sentence, the district court ordered "All pets or livestock, domestic or commercial at 5522 Wallbridge Rd shall be forfeit to Stevens County Sheriff on 3/5/2010 except for proof of ownership by others." CP 4. This condition is void because it exceeds the court's statutory authority. The court lacked authority to order forfeiture of all pets and livestock that were not held by animal care authorities.

Former RCW 16.52.200(3)⁴ provides in relevant part:

In addition to the penalties imposed by the court, the court shall order the forfeiture of all animals held by law enforcement or animal care and control authorities under the provisions of this chapter if any one of the animals involved dies as a result of a violation of this chapter or if the defendant has a prior conviction under this chapter. In other cases the court may enter an order requiring the owner to forfeit the animal if the court deems the animal's treatment to have been severe and likely to reoccur.

⁴ Laws of 2003, ch. 53 § 113 (eff. July 1, 2004). This was the version of the statute in effect as of the date of the offenses. Courts must look to the statute in effect when an offense was committed in determining the sentence. State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The plain terms of the statute limit forfeiture to "all animals held by law enforcement or animal care and control authorities under the provisions of this chapter if any one of the animals involved dies as a result of a violation of this chapter." Former RCW 16.52.200(3).

Any forfeiture is limited to the dogs held by the animal care authorities. Deskins owned horses, donkeys and llamas. 1RP 155-56, 170, 292.⁵ But SpokAnimal never held her livestock. The district court lacked authority to order forfeiture of livestock.

Moreover, the record shows SpokAnimal returned 15 dogs to Deskins long before this case went to trial. 1RP 349. SpokAnimal initially held 39 dogs following their seizure from Deskins's property in October 2008. 1RP 260, 265, 294. Four dogs were returned to Deskins and Benson in November 2008. 1RP 349. 11 more dogs were returned in December 2008. 1RP 349. The returned dogs are not subject to forfeiture

⁵ Deskins has been in the commercial animal business since the mid-1980's. 1RP 422, 448-49.

because their return to Deskins meant they did not continue to be held by animal care authorities.

The superior court indicated the word "held" could be interpreted in a broad manner. 2RP 47. If the statute is ambiguous on this point, the rule of lenity applies in favor of Deskins. "Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999).

The district court had no authority to order forfeiture of all livestock and of all pets that were not being held by animal control authorities. CP 4, 118 (CL 28). Contrary to the superior court's ruling, the record is clear that those animals did not fall within the scope of former RCW 16.52.200. The breadth of the forfeiture order is without statutory authority and is void as a matter of law. Paulson, 131 Wn. App. at 588. The superior court therefore erred in failing to vacate the district court's animal forfeiture order and in concluding Deskins lawfully "remains on probation for a total of 24 months on all stated conditions." CP 231 (Conclusion G); CP 231-32.

4. THE SENTENCING ORDER PROHIBITING OWNING, ACQUIRING OR LIVING WITH PETS AND LIVESTOCK DURING THE PROBATIONARY PERIOD IS OVERBROAD AND VOID DUE TO LACK OF STATUTORY AUTHORITY.

As a condition of the sentence, the district court ordered "Do not own, acquire or live with pets or livestock during the probationary period."

CP 4. The trial court imposed this broad prohibition without statutory authority.

- a. The District Court Lacked Authority To Prohibit Deskins From "Living" With Animals During The Probationary Period.

Former RCW 16.52.200(3)⁶ provides in relevant part "If forfeiture is ordered, the owner shall be prohibited from owning or caring for any similar animals for a period of two years." This statute does not prohibit anyone convicted of second degree animal cruelty from *living* with similar animals. It only prohibits owning or caring for such animals. The district court lacked authority to prohibit Deskins from living with animals and the superior court erred in concluding appellant "remains on probation for a total of 24 months on all stated conditions." CP 4, 231-32.

The legislature recently amended this statute, adding a prohibition on "residing" with similar animals: "Any person convicted of animal cruelty shall be prohibited from owning, caring for, *or residing* with any

⁶ Laws of 2003, ch. 53 § 113 (eff. July 1, 2004).

similar animals for a period of time as follows: (a) Two years for a first conviction of animal cruelty in the second degree under RCW 16.52.207[.] RCW 16.52.200(4)(a) (Laws of 2011, ch. 172 § 4, eff. July 22, 2011) (emphasis added).

Each word of a statute is to be given significance. Smith v. Greene, 86 Wn.2d 363, 371, 545 P.2d 550 (1976). The addition of a prohibition on "residing" with similar animals shows such prohibition did not exist before the amendment took effect. "[W]hen a material change is made in the wording of a statute, a change in legislative purpose must be presumed." WR Enterprises, Inc. v. Dep't of Labor and Indus., 147 Wn.2d 213, 222, 53 P.3d 504 (2002) (citing Graffell v. Honeysuckle, 30 Wn.2d 390, 399, 191 P.2d 858 (1948)).

That is, "[w]here a statute is amended, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. To the contrary, the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment." Graffell, 30 Wn.2d at 400 (quoting 50 Am. Jur. 261, Statutes § 275). Under this established rule of statutory construction, an offender was not prohibited from residing with similar animals until the 2011 amendment took effect.

It is also a well-settled principle of statutory construction that "[t]he Legislature 'does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.'" In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (quoting John H. Sellen Constr. Co. v. Dep't of Revenue, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)). The 2011 amendment would have been unnecessary if state law already prohibited an offender from "residing" with similar animals. Lawson v. City of Pasco, 168 Wn.2d 675, 685, 230 P.3d 1038 (2010).

The 2011 amendment does not apply to Deskins because the prohibition did not exist at the time she committed her offense in 2008. "[A]n act which enlarges the prohibited area of conduct cannot be applied to make criminal that which was previously innocent. Such a construction of an act would violate article 1, section 9 of the U.S. Constitution and article 1, section 23 of the Washington State Constitution prohibiting ex post facto laws." State v. Bell, 8 Wn. App. 670, 674-75, 508 P.2d 1398 (1973) (reversible error to instruct in the terminology of statute that was not in effect on the date of the crime).

Criminal sanctions for failure to follow a sentencing condition are "deemed punishment for the original crime" and as additions to the original sentence. State v. Nason, 168 Wn.2d 936, 947, 233 P.3d 848 (2010)

(quoting State v. Watson, 160 Wn.2d 1, 8–9, 154 P.3d 909 (2007). "Ex post facto problems are avoided when a defendant is subject to the penalty in place the day the crime was committed. After the fact, the State may not increase the punishment." State v. Pillatos, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007).

The statute applicable to Deskins is the version enacted in 2003, not the version enacted in 2011. Under the 2003 version, Deskins is not prohibited from residing with similar animals. The district court therefore lacked statutory authority to order Deskins not to "*live* with pets or livestock during the probationary period." (emphasis added).⁷ CP 4.

b. The Prohibition Order Is Too Sweeping In Prohibiting Animals That Are Not "Similar" To Dogs.

The district court also lacked authority to broadly prohibit Deskins from owning, acquiring or living "with pets or livestock during the probationary period." The district court exceeded its statutory authority because the prohibition is limited to "similar animals" subject to forfeiture: "If forfeiture is ordered, the owner shall be prohibited from owning or caring for any *similar animals* for a period of two years." Former RCW

⁷ Deskins's property encompasses multiple acres. 1RP 441. Another person lives on the property. 1RP 150, 395. Deskins is capable of living with similar animals on her property without owning or caring for them.

16.52.200(3) (emphasis added). Livestock and any pet not "similar" to a dog fall outside the statutory prohibition.

At the time of Deskins's offense, the term "similar animals" was not defined by statute.⁸ In the absence of statutory definition, this Court will give a term its plain and ordinary meaning ascertained from a standard dictionary. State v. Webb, 162 Wn. App. 195, 206, 252 P.3d 424 (2011); State v. Lee, 82 Wn. App. 298, 305-06, 917 P.2d 159 (1996). The dictionary defines the adjective "similar" as "having characteristics in common : very much alike" or "alike in substance or essentials : corresponding." Webster's Third New Int'l Dictionary 2120 (1993).

As set forth in section C. 3., supra, the only animals lawfully subject to forfeiture are *the dogs* held by SpokAnimal. Only animals "similar" to dogs may be prohibited. Under no reasonable stretch of the imagination can livestock be considered a "similar" animal subject to prohibition under former RCW 16.52.200(3). "[C]riminal statutes are to

⁸ Former RCW 16.52.011(2)(k) (Laws of 2009, ch. 287 § 1, eff. July 26, 2009) defined the term "similar animal" as "an animal classified in the same genus." Dogs belong to the genus "canis," which includes wolves, jackals, and, in older classifications, foxes. Webster's Third New Int'l Dictionary 327 (1993). The motion for discretionary review, in citing to the 2009 statute, mistakenly overlooked the fact that it was not in effect at the time of the offenses at issue here. RCW 16.52.011(2)(m) (Laws of 2011, ch. 172 § 1, eff. July 22, 2011) currently defines the term "similar animal" as "(i) For a mammal, another animal that is in the same taxonomic order; or (ii) for an animal that is not a mammal, another animal that is in the same taxonomic class."

be strictly construed with doubts as to whether conduct was criminal resolved in favor of the defendant." State v. Russell, 84 Wn. App. 1, 4, 925 P.2d 633 (1996) (citing Bell, 8 Wn. App. at 674). In this regard, loose definitions of prohibited conduct are unacceptable. City of Seattle v. Green, 51 Wn.2d 871, 874-75, 322 P.2d 842 (1958).

A contrary interpretation would raise a serious due process concerns. "[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A statute is unconstitutionally vague if it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed" or "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Bahl, 164 Wn.2d at 752 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). Appellate courts are obliged to adopt a construction of a statute that sustains the statute's constitutionality, if at all possible. State ex rel. Faulk v. CSG Job Center, 117 Wn.2d 493, 500, 816 P.2d 725 (1991).

To avoid constitutional infirmity, the statute's prohibition on "similar animals" must be read to avoid encompassing livestock. In addition, any "pet" that is not similar to a dog is not subject to prohibition.

Any ambiguity in this regard must be resolved in favor of Deskins under the rule of lenity. Hopkins, 137 Wn.2d at 901; State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "[I]n criminal cases the rule of lenity is a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain." Hopkins, 137 Wn.2d at 901. "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). The rule of lenity requires the statute be interpreted in Deskins's favor.

The district court's prohibition order violates its mandate to give criminal statutes strict and criminal interpretation and to avoid entering orders that exceeds its statutory authority. CP 4, 117 (FF 20). Delgado, 148 Wn.2d at 727; Paulson, 131 Wn. App. at 588. For this reason as well, the superior court erred in concluding appellant "remains on probation for a total of 24 months on all stated conditions." CP 231-32. The overly broad prohibition order must be vacated.

5. THE COURT IMPROPERLY IMPOSED A FINE AND RESTITUTION.

a. The Court Lacked Statutory Authority To Impose A \$1000 Fine Under Count I.

The district court imposed a \$1000 fine for count I, suspended on the condition that Deskins comply with probation requirements. CP 2. Count I is the conviction for unsafe confinement under RCW 16.52.080. CP 2.

RCW 16.52.165 unequivocally limits the fine for conviction under RCW 16.52.080 to \$150: "Every person convicted of any misdemeanor under RCW 16.52.080 or 16.52.090 shall be punished by a fine of not exceeding one hundred and fifty dollars[.]" The imposition of a \$1000 fine for count I is void because the district court exceeded its statutory authority. Paulson, 131 Wn. App. at 588.

Appellate courts have the duty to correct illegal sentences when they are discovered. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). Erroneous imposition of financial penalties without statutory authority falls within this established rule. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (challenge to untimely restitution order may be raised for first time on direct appeal); see also State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000), review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001) (challenge to the sentencing court's authority to impose drug fund contribution reviewable for first time on appeal).

b. The District Court Lacked Statutory Authority To Impose Restitution For Winnie The Dog.

The district court ordered Deskins to pay \$1400 in restitution to Tennant, the owner of Winnie the dog. CP 3. The superior court ruled "the restitution granted for the dog 'Winnie' was lawful" but remanded for clarification "to confirm the legal authority to order restitution for misdemeanors." CP 231 (Conclusion H).

"It is the function of an appellate court to determine questions of law." Mid-Town Ltd. Partnership v. Preston, 69 Wn. App. 227, 232, 848 P.2d 1268 (1993). Courts of review cannot evade their duty to determine whether statutory authority supports a lower court's sentencing order by directing the lower court to confirm such authority exists. Either authority exists or it does not.

The authority to impose restitution is not an inherent power of the court and is derived solely from statute. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). In the RALJ, appeal, the State argued RCW 9.94A.753(5) gave the district court statutory authority to order restitution for Winnie. CP 207-08. The Sentencing Reform Act, of which RCW 9.94A.753(5) is a part, only applies to felony sentences. State v. Besio, 80 Wn. App. 426, 431, 907 P.2d 1220 (1995). The Winnie incident formed a

basis for the misdemeanor conviction under count I. RCW 9.94A.753(5) provides no statutory authority for restitution here.

Neither the State nor the district court cited to any statutory authority that allows district courts to impose restitution as part of a misdemeanor sentence such as this one. The superior court could not find any statutory authority to support imposition of restitution. 2RP 15, 48. The superior court concluded the restitution was "lawful" but no statutory authority has been presented to show that it is lawful. CP 231 (Conclusion H). The superior court therefore erred in failing to vacate the district's court's restitution award for "Winnie" the dog. CP 231 (Conclusion H). And the district court's financial penalty calculations are flawed in this regard. CP 116 (FF 17); CP 117 (CL 23).

c. The Court Violated Due Process In Imposing Restitution For Animal Care Costs Without Adequate Notice And Opportunity To Be Heard.

The district court ordered restitution to the Stevens County Sheriff's office in the amount of \$21,582.21. CP 3. In so doing, the court violated Deskins's constitutional right to due process. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Unlike the restitution challenged for Winnie the dog, there is statutory authorization for imposing restitution for animal care costs.

Former RCW 16.52.200(5)⁹ provides in relevant part "the defendant, only if convicted or in agreement, shall be liable for reasonable costs incurred pursuant to this chapter by law enforcement agencies, animal care and control agencies, or authorized private or public entities involved with the care of the animals. Reasonable costs include expenses of the investigation, and the animal's care, euthanization, or adoption."

But the court did not honor Deskins's right to constitutional due process in imposing restitution costs pursuant to former RCW 16.52.200(5). The district court gave the defense 10 minutes to prepare for sentencing after the jury returned its verdicts. 1RP 591. The defense requested a one-week continuance to prepare sentencing issues. 1RP 592. The court denied the request, stating "This Court was scheduled to be done today" and "we have limited schedules." 1RP 592.

When the court asked if the prosecutor had the restitution bills, the prosecutor initially said he did not have them and provided dollar estimates. 1RP 612-13. The prosecutor said he would present the bills on a later date. 1RP 613. Defense counsel again asked for a continuance, in part to address the restitution issue. 1RP 613-14. The court declined. 1RP 614. Later on, defense counsel once again asked that the issue of restitution issue be put off

⁹ Laws of 2003, ch. 53 § 113.

to another day, stating "I don't think that those numbers can just be signed off on." 1RP 619.

The prosecutor, as part of its final presentation, subsequently presented a "statement" by Captain George, who represented "There's a bill that's still outstanding to SpokAnimal for \$5,940.00. . . . the costs of the sheriff's office prior to that for caring for those animals was \$21,582.21." 1RP 625. The statement or bills were passed up to the judge. 1RP 625. They were not filed. There is no evidence that the statement or bills were given to Deskins before the sentencing hearing. Following a recess to allow the court to prepare its oral ruling, the court announced it would impose \$21,582.21 in restitution to the Stevens County Sheriff's Department. 1RP 631.

The trial court rejected defense counsel's request for more time to prepare. But due process requires notice and a hearing before the court may impose the obligation to pay restitution. In re Pers. Restraint of Sappenfield, 92 Wn. App. 729, 742, 964 P.2d 1204 (1998). The opportunity for such a hearing "must be granted at a meaningful time and in a meaningful manner." Halsted v. Sallee, 31 Wn. App. 193, 197, 639 P.2d 877 (1982).

Deskins was not given notice that the court would entertain and enter a restitution order the same day on which the jury returned its verdicts. Deskins was not given an opportunity to contest the charges at a

meaningful time or manner due to the trial judge's precipitous imposition of restitution.

Due process requires defendants be given the opportunity to rebut evidence presented at a separate restitution hearing and that the evidence relied upon to impose restitution be reasonably reliable. State v. Raleigh, 50 Wn. App. 248, 254, 748 P.2d 267 (1988) ("the failure of the court to grant a separate restitution hearing before sentencing violated Raleigh's right to due process."); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (reversing order requiring defendant to pay restitution for shooting a police dog because the State's evidence, an uncorroborated affidavit setting out a rough estimate of the costs associated with purchasing and training a new animal, deprived the defendant of a sufficient basis for rebuttal); see also State v. Von Thiele, 47 Wn. App. 558, 564-65, 736 P.2d 297 (1987) (for restitution purposes, the plaintiff must provide proof sufficient to afford a reasonable basis for estimating loss based on a preponderance of the evidence).

Deskins was not given an adequate opportunity to challenge the accuracy or reasonability of the costs awarded to the Sheriff's Office. "An order based on a hearing in which there was not adequate notice or opportunity to be heard is void." Halsted, 31 Wn. App. at 197. The district court's restitution award to the sheriff's office must be vacated. Its

financial penalty calculations are flawed in this regard. CP 116 (FF 17);
CP 117 (CL 23).

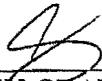
D. CONCLUSION

Deskins requests that this Court reverse the convictions for counts I and II. In the event this Court declines to do so, the improper orders of forfeiture, probation, fines and restitution should be vacated and the case remanded for resentencing.

DATED this 31st day of October 2011.

Respectfully Submitted,

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State v. Pamela Deskins

No. 29532-0-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 13th day of October, 2011, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Shadan Kapri
Stevens County Prosecuting Attorney
skapri@wapa-sep.wa.gov

Signed in Seattle, Washington this 13th day of October 2011.

X *Patrick Mayovsky*

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 29532-0-III
)	
PAMELA DESKINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF OCTOBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PAMELA DESKINS
12128 NORTH DIVISION AVENUE #136
SPOKANE, WA 99218

SIGNED IN SEATTLE WASHINGTON, THIS THE 13TH DAY OF OCTOBER 2011.

x *Patrick Mayovsky*