

62372-9

62372-9

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2009 JUN 25 PM 3:40

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I**

**COA No. 62372-9-1**

---

**CITY OF SEATTLE,**  
Respondent/Plaintiff,

v.

**ADAM PETRO,**  
Petitioner/Defendant.

---

**BRIEF OF RESPONDENT**

---

Rebecca C. Robertson  
WSBA #30503  
Assistant City Attorney  
Attorney for Respondent  
City of Seattle Attorney's Office  
700 Fifth Avenue, #5350  
Seattle, Washington 98104  
206-684-7757

**ORIGINAL**

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii, iii
I. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	1
A. SMC 9.25.081 is not unconstitutionally vague.....	10
1. The terms “injurious” and “move about freely” do not require a more specific definition.....	12
2. The term injurious is used in other cases and statutes.....	14
3. The defendant’s actual conduct fails squarely within the perimeters of the ordinance.....	15
4. The defendant had actual notice that his conduct was criminal.....	17
B. There was sufficient evidence to convict the defendant of Animal Cruelty under SMC 9.25.081.....	18
1. There was sufficient evidence to prove the defendant of Animal Cruelty in general.....	19
2. There was sufficient evidence to prove the defendant guilty of Animal Cruelty on April 24 <sup>th</sup> and May 8 <sup>th</sup> .....	21
3. There was sufficient evidence to prove all of the events took place in Seattle.....	23
C. The defendant was not entitled to an affirmative defense jury instruction under the Equal Protection Clause.....	24
IV. CONCLUSION.....	26

## TABLE OF AUTHORITIES

<u>TABLE OF CASES</u>	<u>Page</u>
 <u>Cases</u>	
<u>Connally v. General Constr. Co.</u> , 269 U.S. 385, 46 S. Ct. 126, 70 L.Ed. 322 (1926).....	14
<u>In Re Coleman v. DSHS</u> , 124 Wn.App. 675, 102 P.3d 860 (2004).....	15
<u>In Re D.T.</u> , 89 S.D. 590, 237 N.W.2d 166 (1975).....	16
<u>Omaechevarria v. Idaho</u> , 246 U.S. 343, 38 S.Ct. 323, 62 L.Ed. 763 (1918).....	14
<u>People in the Interest of V.A.E.Y.H.D.</u> , 199 Colo. 148, 605 P.2d 916 (1980).....	17
<u>People v. Shoose</u> , 15 Ill.App.3d 964, 305 N.E.2d 560 (1973).....	13
<u>People v. Speegle</u> , 54 Ca.App.4 <sup>th</sup> 1405 (1997).....	12, 13
<u>Seattle v. Eze</u> , 111 Wn.2d 22, 759 P.2d 366 (1988).....	11
<u>Spokane v. Douglass</u> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	11, 12
<u>State v. Andree</u> , 90 Wn.App. 917, 954 P.2d 346 (1997).....	16
<u>State v. Armstrong</u> , 142 Wn.App. 333, 178 P.3d 1048 (2008).....	24
<u>State v. Askham</u> , 120 Wn.App. 872, 86 P.3d 1224 (2004).....	21
<u>State v. Barrington</u> , 52 Wn.App. 478, 761 P.2d 632 (1988).....	19
<u>State v. Blilie</u> , 132 Wn.2d 484, 939 P.2d 691 (1991).....	10
<u>State v. Bolar</u> , 129 Wn.2d 361, 917 P.2d 125 (1996).....	12
<u>State v. Coria</u> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	11
<u>State v. Edwards</u> , 17 Wn.App. 355, 563 P.2d 212 (1977).....	25
<u>State v. Finnegan</u> , 6 Wn.App. 612, 495 P.2d (1972).....	21, 22
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	19
<u>State v. Glas</u> , 147 Wn.2d 410, 54 P.3d 346 (1997).....	16
<u>State v. Goble</u> , 131 Wn.App. 194, 126 P.3d 821 (2005).....	23
<u>State v. Jackson</u> , 145 Wn.App. 814, 187 P.3d 321, 323 (2008).....	12, 22
<u>State v. Kincaid</u> , 68 Wn.App. 273, 124 P.684 (1912).....	28
<u>State v. Lee</u> , 135 Wn.2d 369, 957 P.2d 741 (1998).....	11
<u>State v. Leech</u> , 114 Wn.2d 700, 790 P.2d 160 (1990).....	24
<u>State v. Long</u> , 98 Wn.App. 669, 991 P.2d 102 (2000).....	15
<u>State v. Marino</u> , 100 Wn.2d 719, 674 P.2d 171 (1984).....	23
<u>State v. Ralph Williams' North West Chrysler Plymouth, Inc</u> 82 Wn.2d 265, 510 P.2d 233 (1973).....	15
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	11
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	19

<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	19
<u>State v. VJW</u> , 37 Wn.App. 428, 680 P.2d 1068 (1984).....	19
<u>State v. Washington</u> , 64 Wn.App. 118, 822 P.2d 1245 (1992).....	10
<u>State v. Watson</u> , 146 Wn.2d 947, 51P.3d 66 (2002).....	12
<u>United States v. Douglas</u> , 579 F.2d 545 (9 <sup>th</sup> Cir) (1978).....	12
<u>United States v. Lanier</u> , 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d. 432 (1997).....	14

**Statutes and Other Authority**

RCW 7.48.010	
RCW 7.48.050	
RCW 9.95.040	
RCW 15.36.181	
RCW 16	
RCW 16.52.205	
SMC 9.25.081	
Wayne LaFace, <u>Substantive Criminal Law</u> , §2.3(a) (2d ed. 2003)	

## **I. RESPONSE TO ISSUES PRESENTED FOR REVIEW**

- A. SMC 9.25.081 is not unconstitutionally vague.
  - 1. The terms “injurious” and “move about freely” do not require a more specific definition.
  - 2. The term injurious is used in other cases and statutes.
  - 3. The defendant’s actual conduct fails squarely within the perimeters of the ordinance.
  - 4. The defendant had actual notice that his conduct was criminal.
- B. There was sufficient evidence to convict the defendant of Animal Cruelty under SMC 9.25.081.
  - 1. There was sufficient evidence to prove the defendant of Animal Cruelty in general.
  - 2. There was sufficient evidence to prove the defendant guilty of Animal Cruelty on April 24<sup>th</sup> and May 8<sup>th</sup>.
  - 3. There was sufficient evidence to prove all of the events took place in Seattle.
- C. The defendant was not entitled to an affirmative defense jury instruction under the Equal Protection Clause.

## **II. STATEMENT OF THE CASE**

The defendant was charged in Seattle Municipal Court with four counts of Animal Cruelty under Seattle Municipal Code 9.25.081(f) for confining his dogs in a manner that was injurious to them and did not allow them to move about freely. CP 6. Trial commenced on March 14, 2007. CP 8. The defendant was convicted of all four counts. CP 10, 11. This appeal follows.

Four Animal Control officers testified during the defendant’s trial regarding the conditions they observed the defendant’s dogs subjected to

over a period of 11 months. All of them had been trained at the Washington State Animal Control Academy. CP 140, 163, 177, 196.

On July 23, 2005, Officer James Jackson responded to the address of 5947 41 Ave SW in Seattle to conduct a welfare check on 8 dogs that had been left in a car on a hot day. CP 141, 142. When Officer Jackson reached the property, he saw a panel van and could see two dogs tethered to the outside of the van, and at least two dogs in crates inside the van. CP 142. When the defendant, the dogs' owner, let Officer Jackson look in the van, the officer observed a total of six crates, each containing dogs. CP 143. The crates varied in size, as did the dogs, from medium sized to large. CP 144. The crates were clean and there was a fan for ventilation. CP 145, 158. The defendant claimed this was a temporary condition because his house had burned down. CP 145. However, only two of the dogs fit appropriately in their crates, and there were two dogs in one crate. CP 145, 146, 158. The officer informed the defendant that this was not an acceptable situation and that the dogs should be able to stand and move around inside their crates and two should not be together in one crate. CP 146, 159-169. The officer was concerned because it was hot in the van, despite the fan. CP 147. Officer Jackson told the defendant this situation was okay for a temporary fix, and he gave the defendant until the end of

the month to correct the deficiency in the dogs' living conditions. CP 146, 147, 158. The officer told the defendant he could go get free crates at the animal shelter. CP 158. The defendant stated the situation was not permanent, and agreed to rectify the situation. CP 147. He also claimed he took the dogs out during the evening for long periods of time. CP 147.

The officer returned to the van a month later on August 28, but the van and the dogs were gone. CP 147, 148.

On October 21, 2005, Animal Control Officer Goldberg responded to the same address in Seattle regarding a complaint about the health of dogs in a van. CP 163, 164. When he arrived at the property, Officer Goldberg found about 7 dogs in crates in a van parked off the alley. CP 164. The crates were the temporary sort that one would use for transport. CP 165. The officer got a good look at the dogs' conditions and could see the animals in their crates. They had little room to turn around or move, and were trapped in there crates. CP 166. He thought he saw two piles of feces but was not sure. CP 167. He left a note for the defendant to contact him, and spoke to the defendant later about the situation. CP 168. At some point Officer Goldberg brought out a large crate for two of the animals. CP 175.

On November 21, 2005, Animal Control Officer Marcy Beyer went

to 5149 41 Ave. SW to follow up on the case and check on the dogs' welfare. CP 178. From the alley, she could hear the dogs barking from a trailer at the back of the property. CP 179. The trailer was four feet by eight feet with the sides draped with tarps. Id. There were some gaps in the tarps, and two dogs poked their heads out of these gaps and barked at Officer Beyer. CP 179-180. There were two chains attached to the trailer, and numerous piles of feces all around. CP 179-180. Officer Beyer was not allowed onto the property that day. CP 180. However, she spoke to the defendant on the phone the next day and pointed out that the dogs were still in a confined space despite the deadline of late August to fix the situation, and asked if the dogs she could not see the previous day were still in crates. CP 181. The defendant said the dogs were in the crates when he was at work and overnight. CP 182. Officer Beyer told the defendant that the situation was unacceptable, and the dogs should not be housed in crates for longer than four hours. CP 182. She also pointed out that the dogs should be able to stand up and move around and get more exercise than being confined to a crate. Id. During this conversation, the defendant claimed he could not house the dogs any other way and stated they were happy, healthy, and could move around. Id.

Officer Beyer tried to persuade the defendant that this situation was

unacceptable, and told him that only three animals were allowed in the City and if he did not find a way to correct the housing conditions she would report him to zoning and enforce the animal limit. CP 183. Officer Beyer suggested housing the dogs in the garage or tethering them outside, but these options were not acceptable to the defendant because he claimed doghouses were too expensive, the dogs would bark, and there was debris in the garage. RP CP 184, 186, 187, 189. Officer Beyer told the defendant that the shelter had free doghouses. Id. Officer Beyer gave the defendant a deadline of December 11, 2005 to fix the situation. CP 187. The defendant claimed he would be installing a fence and the dogs could be in the yard. CP 187.

Officer Beyer spoke to the defendant about the condition of the dogs again on December 13, 2005. She had been to the property earlier in the day, and saw that the dogs were in still in the crates in the trailer, although she was not able to look inside. CP 185. The defendant claimed that they were only confined in that manner from 6am to 2pm and 7pm to 4:30am. The defendant claimed that he did not want the dogs in the yard because neighbors might throw rocks at them. CP 192.

On December 30, 2005, Officer Rachel Leahy followed up on the defendant's case and checked on the dogs' condition. CP 197. There had

been several calls regarding the dogs being kept in a camper by citizens concerned about their welfare. CP 197. When Officer Leahy arrived at the property, most of the dogs were inside the camper in the temporary crates, and two were outside on chains. There were lots of dogs in a small space, and the smell of urine and feces was overwhelming. CP 198. Two of the dogs were in crates that were too small, and they could not easily stand up, move around, sit, or lie down and stretch. Id. The dogs had to lower their heads to look out. CP 200. The defendant had been warned animal control was coming out, and the crates had just been cleaned. CP 200-201.

The defendant and Officer Leahy had numerous conversations about the dogs, and the defendant again admitted that this was not a good situation for them. CP 200, 201. He admitted he knew some of them did not have room and that this was not good for them. CP 203. The defendant again claimed this situation was temporary, even though it had been going on for six months. CP 202, 203.

Officer Leahy next spoke to the defendant on January 2, 2006. CP 203. She informed him he was in violation of the three animal limit. Id. The officer saw that the dogs were still in their crates. CP 204. She told the defendant it was not healthy to keep the dogs in that situation for 20

plus hours a day, despite the fact that they were currently in good health.

Id. Officer Leahy wanted to work with the defendant, who assured her that by February 28 he would buy a house and get the dogs out of the crates in the camper. CP 205. The defendant was given another chance to find an acceptable solution. Id.

On February 15, 2006, Officer Leahy went to the property because another officer had been there regarding a complaint, and she was following up. She found the same eight dogs living in the same crates in the same trailer. No conditions had changed. CP 206. The defendant again claimed that the dogs would be out by February 28.

On April 13, 2008 Officer Leahy paid a surprise visit to the defendant. CP 207, 208. On all other occasions, the defendant had been warned Animal Control was coming. This time, the defendant was not warned. The officers found the dogs in worse condition than had been previously observed. The dogs were still confined to the crates in the trailer, and there was feces in the crates and on the floor and an overwhelming smell about. CP 208, 213. The officer told the defendant she would be writing up a warrant because the conditions were unacceptable and nothing had changed despite numerous discussions and warnings. CP 212. The defendant again admitted this was not an

acceptable situation. CP 213. The officer wrote up the warrant anyway because the dogs had been in this condition for 10 months and she could no longer leave them in the present situation. Id. The defendant told the Animal Control Officers they would take his dogs over his dead body. Id.

On April 24, the officer drove by the property and the dogs were still in the camper. CP 230.

On April 25, the officer went back to the property, and spoke to the defendant. This time the defendant claimed that on April 27, he would be taking the dogs to Renton every morning and his girlfriend would return them to the crates at 7 or 9 pm. CP 212, 214.

On April 27, the officer followed up and went to the property at around 4pm. The dogs were all still in their crates in the camper. CP 214, 215.

On May 4, the officer went to the property at 4:45pm and heard all the dogs barking in the camper. CP 215.

On May 5, the officer went to the property and saw and heard the dogs barking in the camper. CP 215.

On May 8, 2008, the officer returned to the property again and observed the dogs in the same unacceptable condition, two on chains outside, the rest barking in the trailer. CP 215.

On May 9, Officer Leahy and her supervisor finally went to get a warrant. They went to the property and the dogs were gone. CP 215, 216.

On May 10, the officers went back to the property and found the dogs in the same unacceptable conditions. CP 217. The officers issued the warrant and finally rescued the dogs. CP 217. On that date, Officer Leahy took several photographs of the dogs' conditions. The dogs each had a water bottle stuck to their crate, which was an inadequate system for providing water. CP 219, 220. There was no food for the dogs. CP 220. The photos depict how one of the dogs could not fully stand up in her crate. CP 220. Another depicts two dogs in one crate, where one dog could not turn around unless the other did as well. CP 221. These situations did not meet minimum requirements set forth by Animal Control. Id.

The dogs were brought to veterinarian Andrea Morris on May 15, 2006. CP 243. All were generally healthy except one that had a tumor. CP 244. They appeared clean, but smelled very strongly of feces and urine. CP 250, 252. The defendant's dogs did not appear friendly overall. CP 249.

Dr. Morris testified regarding the dogs' conditions. She stated that while confining a dog to a small crate would not *necessarily* cause

physical injuries to the dog, the longer the dog is confined the more likely it is to suffer injury because it cannot stand up all the way. CP 251, 254.

If a dog was crated for 20 to 22 hours a day it could not lift its head or stretch and this would be detrimental to the dog's overall health. CP 255.

Penny Ratliff, at whose house all of the events took place, testified that in total, the dogs were only out of their crates for about 4 hours each day. CP 298.

### **III. ARGUMENT**

#### **A. SMC 9.25.081 is not unconstitutionally vague.**

The Defendant argues that SMC 9.25.081(f) is unconstitutionally vague because it does not define the terms "injurious" or "move about freely." The court reviews the constitutionality of a legislative enactment de novo. State v. Blilie, 132 Wn.2d 484, 489, 939 P.2d 691 (1991).

A statute is not vague under the due process clause of the Fourteenth Amendment if it "defines the offense (1) so that a person of ordinary intelligence can understand what conduct is prohibited, and (2) in a way that does not encourage arbitrary or discriminatory enforcement." State v. Washington, 64 Wn. App. 118, 122, 822 P.2d 1245 (1992) (citations omitted).

Vagueness challenges not involving First Amendment rights are

evaluated under the particular facts of each case. State v. Lee, 135 Wn. 2d 369, 393, 957 P.2d 741 (1998). “The ordinance is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance’s scope.” Spokane v. Douglass, 115 Wn.2d 171, 182-3, 795 P.2d 693 (1990). A defendant whose conduct clearly falls within the proscriptions of a statute does not have standing to challenge the constitutionality of that statute for vagueness. Id.

Statutes and legislative enactments are presumed constitutional, and the challenging party carries a heavy burden of proving vagueness beyond a reasonable doubt. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). An ordinance is vague if citizens are not afforded fair warning of proscribed conduct, Coria, 120 Wn.2d at 163, and sufficient guidelines are not in place to prevent arbitrary enforcement. State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998). Impossible standards of specificity are not required. Seattle v. Eze, 111 Wn. 2d 22, 27, 759 P. 2d 366 (1988). “[A] vagueness challenge cannot succeed merely because a person cannot predict with certainty the exact point at which conduct would be prohibited. Riles, 135 Wn.2d at 348. The possibility that close questions might arise does not render the ordinance unconstitutionally

vague. United States v. Douglas, 579 F.2d 545 (9<sup>th</sup> Cir. 1978).

1. The terms “injurious” and “move about freely” do not require a more specific definition.

An entire statute is not unconstitutionally vague when a term is not defined and requires a subjective evaluation. Spokane v. Douglass, 115 Wn.2d at 180-181. A term will be given a sensible, practical, and meaningful interpretation. Id. An undefined term is accorded its plain and ordinary meaning ascertained from a standard dictionary. State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), State v. Jackson, 187 P.3d 321, 323 (2008), citing State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The plain and ordinary meaning of the term “injurious” is “causing or tending to cause injury,” as defined in The American Dictionary.

Legislators cannot foresee all of the variations of fact situations which may arise under a statute. While some ambiguous statutes are the result of poor draftsmanship, it is apparent that in many instances the uncertainty is merely attributable to a desire not to nullify the purpose of the legislation by the use of specific terms which would afford loopholes through which many could escape.

Wayne R. LaFave, Substantive Criminal Law, §2.3(a) (2d ed. 2003).

In People v. Speegle, 54 Ca.App.4<sup>th</sup> 1405 (1997), the court upheld the constitutionality of an animal neglect statute, stating “There are an infinite number of ways in which the callously indifferent can subject

animals in their care to conditions which make the humane cringe. It is thus impossible for the Legislature to catalogue every act which violates the statute.” Id. at 1411.

In People v. Shoose, 15 Ill.App.3d 964, 305 N.E.2d 560 (1973), the term “injurious” was found constitutional in reference to the Juvenile Court Act. The Act used the phrase, “whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.” Id. at 966. The court stated “child neglect is by its very nature incapable of a precise and detailed definition...to narrow that statute would have the effect of diminishing the rights of children who have no other means of protecting themselves.” Id. at 967.

Here, it would be impossible to specifically define or provide an exclusive list of all of the ways in which a person might commit Animal Cruelty. To attempt to do so would exclude ways in which one could commit the crime, and allow those who abuse or neglect animals to escape punishment. The terms “injurious” and “move about freely” sufficiently cover the behavior the legislature intended to criminalize, and the ordinance does not specifically list or exclude behaviors so as to avoid legal loopholes. While the terms may require a subjective evaluation, they are of such common usage that a person of reasonable intelligence would

understand what they mean. In terms of the defendant's *actual conduct*, with which the ordinance must be measured, the terms squarely cover the defendant's actions of keeping his dogs in undersized crates for 20 hours a day for a year, despite numerous warnings from animal control officers. The actual conduct of the defendant demonstrates that he created a situation that was injurious to his dogs and limited their ability to move about freely. The defendant cannot satisfy his heavy burden of proving that the terms are vague beyond a reasonable doubt.

2. The term injurious is used in other cases and statutes.

“Words of a statute which otherwise might be considered unduly vague may be considered sufficiently definite because they have a well-settled meaning in the common law, in court decisions, or because of their usage in other legislation.” Wayne R. LaFare, Substantive Criminal Law, §2.3(a) (2d ed. 2003), citing Connally v. General Constr. Co., 269 U.S. 385, 46 S. Ct. 126, 70 L.Ed. 322 (1926), United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d. 432 (1997), Omaechevarria v. Idaho, 246 U.S. 343, 38 S.Ct. 323, 62 L.Ed. 763 (1918).

The term “injurious” is used in many other statutes. See RCW 7.48.010 (regarding nuisances to property “or whatever is injurious to health or indecent or offensive to the senses”), RCW 7.48.050 (moral

nuisance means injurious to public morals), RCW 9.95.040 (deadly weapon includes any weapon containing poisonous or injurious gas), RCW 15.36.181 (Business of distributing milk is included within class of businesses which may be inherently harmful and injurious to public), RCW 16 (Control of predatory birds injurious to agriculture).

Additionally, the term has been used in various cases. State v. Ralph Williams' North West Chrysler Plymouth, Inc., 82 Wn.2d 265, 510 P.2d 233 (1973) (finding no merit in the claim that the phrase “not injurious to public interest” was vague), State v. Long, 98 Wn.App. 669, 991 P.2d 102 (2000) (referencing defendant’s claim that dogs near his property were a public nuisance), In Re Coleman v. DSHS, 124 Wn.App. 675, 102 P.3d 860 (2004) (regarding a foster mother’s conduct that was injurious to her daughter). Because the term “injurious” is used in other statutes and case law and has passed constitutional muster, it can be considered sufficiently definite, especially as applied to the facts of this case.

3. The defendant’s actual conduct falls squarely within the perimeters of the ordinance.

Even if the terms “injurious” and “move about freely” are subjective, that does not render them unconstitutionally vague because all of the defendant’s actions towards his dogs fall well within the bounds of what is prohibited by the ordinance. This court is to give every

presumption in favor of constitutionality because the ordinance seeks to protect safety. State v. Glas, 147 Wn.2d 410, 422, 54 P.3d 147 (2002). The defendant's argument therefore must fail.

In State v. Andree, 90 Wn. App. 917, 954 P. 2d 346 (1997), the Court of Appeals, Division One was asked to determine whether the term "undue suffering" in RCW 16.52.205 (Animal Cruelty in the First Degree) was unconstitutionally vague. In that case, the defendant killed a kitten by stabbing it nine times with a hunting knife. The Court stated:

As the phrase only applies to killing an animal, the question in this case, therefore, is whether a person of ordinary intelligence would understand that killing a kitten by stabbing it nine times with a hunting knife would cause undue suffering. Evaluated in this context, the phrase gives fair notice of an objective standard of reasonableness, which is clearly within a layman's understanding. The phrase is therefore not vague.

Andree, 90 Wn. App. at 921.

In In Re D.T., 89 S.D. 590, 237 N.W.2d 166 (1975) the court upheld a child neglect statute because a reasonable person could not be in doubt that a child who sleeps on the floor on a dirty mattress amid animal excrement or in a car on a cold night was in an environment "injurious to his welfare."

Applying the analysis used in Andree and D.T., the terms "injurious" and "move about freely" are not unconstitutionally vague as

applied to the facts of this case. A person of ordinary intelligence would understand that housing dogs for extended periods of time (up to 20 hours a day) in quarters that were of insufficient size to permit the dogs to stand, sit, lie down, and turn around were quarters that were of insufficient size to permit the dogs to move about freely and the situation was injurious to the dogs. The unique facts of this case fall squarely within the spectrum of conduct the ordinance prohibits. The ordinance gives fair notice of an objective standard of reasonableness and can clearly be understood by any layman. The Defendant's argument that the ordinance is unconstitutionally vague must therefore fail.

4. The defendant had actual notice that his conduct was criminal.

The defendant now claims that he was unable to discern whether his conduct was prohibited by the ordinance. Given that the animal control officers told him numerous times before his was cited that his dogs' living conditions were unacceptable and that his conduct violated the ordinance, this argument is without merit.

In People in the Interest of V.A.E.Y.H.D., 199 Colo. 148, 605 P.2d 916 (1980), a mother appealed the termination of her parental rights, claiming that the term "whose environment is injurious to [the child's] welfare" was unconstitutionally vague. Id. at 151. The Court found that

the mother had been repeatedly warned by authorities about what behavior was injurious to the child, and thus she could not later claim she was unaware that her conduct was prohibited. Id.

Here, the defendant was put on notice *for an entire year* that the living situation he provided for his dogs was unacceptable and violated the law. He admitted numerous times that the dogs' living situation was unacceptable. He was given numerous chances to rectify the situation. He was given opportunities to receive help from Animal Control. He failed to avail himself of this assistance, and he continued to keep his dogs in unacceptable and injurious quarters where they were unable to move about freely. He cannot now claim he did not know his conduct was prohibited.

B. There was sufficient evidence to convict the defendant of Animal Cruelty under SMC 9.25.081.

The defendant claims that the terms “injurious” and “move about freely” were vague, and thus there was insufficient evidence to convict. The defendant also claims that there was insufficient evidence to convict him for violations that occurred on April 24, 2006 and May 8, 2006, and that the City did not prove that the events occurred in the City of Seattle. Given that the terms “injurious” and “move about freely” are constitutional and there was enough evidence to convict the defendant on all charges, the defendant's argument fails.

1. There was sufficient evidence to prove the defendant guilty of Animal Cruelty in general.

In reviewing a challenge to the sufficiency of the evidence, the court must examine whether, viewing the evidence in the light most favorable to the City, a rational trier of fact could find the elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence admits the truth of the City's evidence and any reasonable inferences that flow from that evidence. State v. Barrington, 52 Wn.App. 478, 484, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989). All reasonable inferences from the evidence must be drawn in favor of the City and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The existence of a hypothetical explanation consistent with innocence does not mean that the evidence is insufficient to support the conviction. State v. VJW, 37 Wn.App. 428, 433, 680 P.2d 1068, review denied, 102 Wn.2d 1001 (1984).

The defendant argues that the terms "injurious" and "move about freely" are unconstitutionally vague. As argued above, the terms are not

vague when applied to the facts at hand. The defendant's sufficiency argument therefore fails. Reviewing the evidence in the light most favorable to the City, the facts which support the defendant's convictions are as follows: For a period of 11 months, the defendant kept his dogs in crates for over 20 hours a day. The crates were placed inside a van or camper. At least one of the crates was inadequate for the size of the dog, who could not lie down and stretch or fully stand up. Two dogs were in one crate, which was also not of adequate size. The Animal Control Officers testified that a crate of adequate size would allow a dog to move about freely by being able to turn around, stand, sit, and lie down and have enough room so the dog would not have to sit in its own waste. RP III 68, 69, 80, 108. And only two of the dogs actually fit in their crates. The defendant did not clean up the dogs' feces. Water bottles attached to the crates were insufficient to provide the dogs water. There was not adequate ventilation.

A veterinarian testified that the sort of confinement that the defendant's dogs were subjected to could cause physical injuries to the dogs, and the longer an animal is confined, the more likely it is to suffer injuries or damage.

The dogs' were kept in this condition for 20 hours a day for a year, despite repeated warnings and offers of help from Animal Control. The defendant admitted these conditions were unacceptable. Given these facts, which the defendant must admit are true, there was sufficient evidence for the jury to convict the defendant beyond a reasonable doubt. Therefore, the defendant's argument fails.

2. There was sufficient evidence to prove the defendant guilty of Animal Cruelty on April 24 and May 8.

The defendant claims that because the officers did not have permission to enter the defendant's property on April 24 and May 8 and had to observe the conditions of the dogs from the alley, there was insufficient evidence to convict. However, there was enough circumstantial evidence for the jury to have found the defendant guilty beyond a reasonable doubt.

A crime may be established through direct or circumstantial evidence, and one is no more valuable than the other. State v. Askham, 120 Wn.App. 872, 880, 86 P.3d 1224 (2004). Circumstantial evidence is sufficient if it permits the jury to infer the finding beyond a reasonable doubt. So long as there is a factual basis from which an inference can be drawn, the jury can reach that inference. State v. Finnegan, 6 Wn.App.

612, 495 P.2d 674 (1972). In fact, a trier of fact can rely *exclusively* on circumstantial evidence to support its decision. State v. Jackson, 187 P.3d 321, 322 (2008) (emphasis added).

Here, Officer Leahy testified that on April 24, she drove by the property and the dogs were still in the camper. RP III 139. On May 8, 2008, she returned to the property again and observed the dogs were in the same condition, two on chains outside, the rest barking in the trailer. RP III 124. She had also testified that on nine other occasions, she had visited the property and seen the dogs in the exact same condition, or worse, every single time. At no time were the dogs in any better condition. Officer Leahy testified that when she drove by the camper the dogs would bark at her. She had done this on many occasions. She also testified that whenever she was allowed into the camper, the dogs were confined to their crates. It is therefore a reasonable inference that on April 24 and May 8, the dogs were in the same conditions as they had been on all other occasions, in too-small crates in the camper.

There was circumstantial evidence based on prior observation and testimony that would allow the jury to infer that the dogs were subjected to unacceptable conditions on April 24 and May 8. Thus, there was sufficient evidence to prove the defendant committed Animal Cruelty on

April 24 and May 8, 2006.

3. There was sufficient evidence to prove all of the events took place in Seattle.

The defendant claims that the City did not prove that the events on several of the dates charged occurred in the City of Seattle. However, it was clear from the evidence that all of the events occurred at the same address, 5947 41 Ave SW in Seattle.

Although jurisdiction must be proved, direct evidence is not required, and inferences from circumstantial evidence are sufficient. State v. Marino, 100 Wn.2d 719, 727, 674 P.2d 171 (1984).

In State v. Goble, 131 Wn.App. 194, 202, 126 P.3d 821 (2005), jurisdiction of Lewis County was proved beyond a reasonable doubt when evidence established that the offense took place in a city within Lewis County, the defendant was charged in Lewis County, the officer was a Lewis County Deputy, and the trial was heard in the Lewis County Superior Court.

Here, there was sufficient circumstantial and indirect evidence to prove that the crimes occurred in the City of Seattle. Every witness testified that all of the events occurred at the same property, in Seattle. The City of Seattle charged the defendant in Seattle Municipal Court. The trial was held in Seattle Municipal Court, and all the jurors were Seattle

residents. There was no evidence that the crimes occurred anywhere else. There was sufficient circumstantial evidence that all of the crimes occurred in one location in the City of Seattle, at 5947 41<sup>st</sup> Ave SW. The defendant's argument therefore fails.

C. The defendant was not entitled to an affirmative defense jury instruction under the Equal Protection Clause.

The defendant claims that he has suffered an equal protection violation because he was not allowed to claim poverty as a defense to his charge under SMC 9.25.081(f) like he could under the RCW Animal Cruelty Statute. However, the SMC Animal Cruelty ordinance and the RCW Animal Cruelty statute contain different elements, and thus an equal protection claim is not available to the defendant.

When a statutory scheme proscribes crimes that require proof of different elements, then there is no equal protection violation. State v. Armstrong, 142 Wn.App. 333, 338, 178 P.3d 1048 (2008) quoting State v. Leech, 114 Wn.2d 700, 711, 790 P.2d 160 (1990). Because the crimes have different elements, there are no arbitrary discretionary decisions that a prosecutor can make. Id.

The defendant claims that the terms "injure" and "injurious" are the same. They are not. The felony Animal Cruelty statute uses the phrase "to cause injury or pain not amounting to first degree animal cruelty

defined in RCW 16.52.205.” The City charged and tried the defendant under SMC 9.25.081(f) which prohibits “[keeping] an animal in quarters that are injurious to the animal due to inadequate protection from heat or cold, or that are of insufficient size to permit the animal to move about freely.” The plain and ordinary meaning of the term “injurious” is “causing or tending to cause injury,” as defined in The American Dictionary.

The two statutes, part of two different statutory schemes, criminalize different behaviors. The defendant could not have been charged under the RCW Animal Cruelty statute because that statute requires actual injury, while SMC 9.25.081(f) does not.

In State v. Edwards, 17 Wn.App. 355, 563 P.2d 212 (1977), the court found that because the defendant was subject to prosecution under only one statute, there was no denial of equal protection. The Court also pointed out that despite the defendant’s claim that there was a denial of equal protection through discriminatory application, there was no evidence of any arbitrary action or willful intent by the prosecutor to discriminate against him or any class he claimed to be a part of. Id.

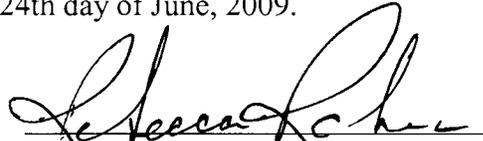
The defendant’s case is identical. He could only have been charged under SMC 9.25.081(f). There is no showing that the City

engaged in any discriminatory or arbitrary application of the SMC Code. There are no affirmative defenses available under the SMC Code, and the therefore defendant was not entitled to an instruction regarding his economic status. The defendant's equal protection claim must fail.

**IV. CONCLUSION**

For the foregoing reasons this Court should affirm the King County Superior Court and the defendant's convictions.

Respectfully submitted this 24th day of June, 2009.

A handwritten signature in black ink, appearing to read "Rebecca C. Robertson", written over a horizontal line.

Rebecca C. Robertson,  
WSBA# 30503  
Assistant City Attorney  
Attorney for Respondent

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JUN 25 PM 3:49

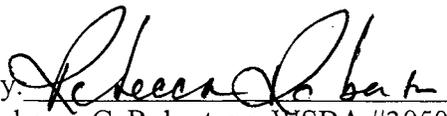
DIVISION I OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

Adam Petro, )  
 )  
 ) Petitioner, ) 62372-9-1  
 )  
 ) vs. ) CERTIFICATE OF MAILING  
 )  
 ) City of Seattle, )  
 )  
 ) Respondent. )  
 )  
 )  
 )  
 )

I certify that I caused to be delivered a copy of the Brief of Respondent to the Petitioner's attorney, Twyla Carter, at 810 Third Ave, Ste. 800 Seattle, WA 98104, via e-mail and ABC Legal Messengers, on June 24, 2009.

DATED this 24th day of June, 2009.

THOMAS A. CARR  
Seattle City Attorney

By:   
Rebecca C. Robertson, WSBA #30503  
Assistant City Attorney  
700 5<sup>th</sup> Ave. Ste. 5300  
P.O. Box 94667  
Seattle, WA 98124-4667

**ORIGINAL**