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No. 101196-2
Court of Appeals No. 54197-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DENVER SHOOP,

Petitioner.

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

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# Petition for Review

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A. Identity of Petitioner

Petitioner Denver Shoop asks this Court to accept review of the published opinion in *State v. Shoop*, __ Wn. App. 2d __, 510 P.3d 1042 (2022).

B. Opinion Below

Mr. Shoop had long kept a small herd of bison on his Jefferson County property. Living on social security alone he lived in a van parked on the property.

Based on complaints from unidentified individuals regarding a possible dead bison in his field, an animal control officer visited Mr. Shoop and observed the herd from neighboring properties. Not seeing a dead bison, but concerned that the animals appeared malnourished the officer obtained a warrant and seized the bison.

The State prosecuted Mr. Shoop for eight counts of animal cruelty, each alleged to have occurred over a span of months. But the jury was never told Article I, section 22 required them to all agree on a single and separate act for each

charge. In fact, the State told the jury they need not unanimously agree. Additionally, the State charged several alternative means for each of the eight counts yet offered no evidence to support most of those means. As a distinct violation the State offered numerous acts to prove charged crime but the jury was never instructed it must unanimously agree on a single act to support each charge.

The Court of Appeals dismisses both claim. It dismisses the first by brushing aside its own case law defining the charge as an alternative means offense. The court dismisses the second by creating a new rule allowing statements made before the jury was even selected and before they heard any evidence to satisfy the satisfy the rule this Court announced in *State v. Petrich*, Notably, even the state did not advocate for such rule. Instead, the court imagined this new rule on its own.

C. Issues Presented

1. Article I, section 21 requires a jury unanimously agree as to each element of an offense. This in turn requires that

where the State presents evidence of multiple acts which can support an element, the State must either explicitly elect which act the jury is to rely on or the court must instruct the jury they must unanimously agree on one act. Here the State presented evidence of multiple acts which could establish animal cruelty. The State did not explicitly elect which act the jury must rely on to convict Mr. Shoop of the eight separate counts, nor did the trial court instruct them they must unanimously agree on one act for each count. The absence of either an explicit election or instruction deprived Mr. Shoop of his right to a unanimous jury.

2. Where the State charges an offense based upon alternative means, the right to a unanimous jury requires either a clear statement by the jury of which means they relied upon or sufficient evidence to support each alternative. Each of the eight counts of animal cruelty presented three alternative means. The jury did not clearly express which alternative it was relying for each of the eight counts. The State conceded it did not prove

two alternatives for each of the eight counts. Mr. Shoop was denied his right to a unanimous jury.

3. Restitution may only be awarded to victims of the offense for damages caused by the offense. The trial court ordered Mr. Shoop to pay restitution to a third party who voluntarily took possession of livestock after Mr. Shoop was charged with animal cruelty. That third party was not a victim of the offenses and its costs were due to the State's failure to reimburse them. The State is not entitled to restitution for the costs stemming investigation and prosecution unless the State itself is the victim of the offense. Because they were not a victim and their cost were not caused by Mr. Shoop's offense the trial court could not order Mr. Shoop to pay restitution to the third party on the State's behalf.

## D. Statement of the Case

Mr. Shoop kept a small herd of eight bison on his property near Chimacum. Mr. Shoop's income dwindled to the

point he subsisted on social security alone. RP 1299. He began living in a van parked on his property. RP 1297. [1]

His income made it increasingly difficult for him to afford supplemental feed for the bison. RP 1255, 1299.

Alerted to concerns by unidentified individuals regarding the malnourished condition of Mr. Shoop's bison, Terry Taylor, an animal control officer for the Jefferson County Sheriff's Office, visited Mr. Shoop. RP 1247, 1255. Mr. Shoop relayed his inability to afford more feed and showed the officer the hay he did have in the barn. RP 1255, 1257. Mr. Shoop expressed his fear that if he fed his animals more he would run out of hay. RP 1263. The officer also saw dewormer in the barn that could be used to treat parasites.

The following day, Mr. Taylor returned with a warrant and seized the eight bison. RP 1268. Before the animals were

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[1] The transcripts related to the pretrial, trial and sentencing proceedings are cited as "RP". The single volume transcripts pertaining to the restitution hearings on May 1, 2020 and August 14, 2020 are cited as "2RP."

taken, Mr. Shoop put out hay in the field and the bison began grazing. RP 1269.

Seven of the bison were removed and placed at Center Valley Animal Rescue. 2RP 12. While at the center, one of the bison gave birth to a calf. *Id.* The center boarded the animals, including the calf, for about 18 months.

The center's director treated the calf much as a family pet. The calf was raised in her home's living room. 2RP 12

At one point the livestock were transferred to a refuge in Southwest Washington. 2RP 14. However, when that refuge closed the bison returned to the center. Eventually, the bison were sent to a ranch in Texas. 2RP 15.

The State charged Mr. Shoop with eight counts of first degree animal cruelty. CP 30-32.

Dr. Jan Richards, at veterinarian who assisted in the seizure of the bison, testified the malnourishment could have been the result of a lack of sufficient food or a parasitic infection or metabolic disorder. RP 1405-06. Dr. Richards

testified further that the animals quickly regained strength and energy after they were taken from Mr. Shoop. RP 1408. Sara Penhallegon, the director of an animal rescue center that housed the bison, claimed each animal gained 20 to 75 pounds in the days following their arrival at her center. RP 1337.

Dr. Erik Splawn explained veterinarians use a body score to help gauge the condition of animals. Dr. Splawn explained that among the eight, there was variation of scores from 1 to 3 on a scale of 1 to 5. RP 1438-40. The bull in the herd had the highest score. *Id.*

Dr. Richard Stroud, a veterinarian, testified one could not assume the malnourishment resulted from the lack of food without first ruling out other options. RP 1508. In fact, veterinarian Dr. Robert Moody testified a sample taken from the bull contained a parasite known as liver fluke. RP 1489.

The jury convicted Mr. Shoop on all eight counts. CP 187-94.

The court subsequently ordered Mr. Shoop to pay restitution to reimburse the animal center for the cost of boarding the animals including the calf.

E. Argument

**1. The State's failure to prove each charged alternative requires reversal of each of Mr. Shoop's eight convictions.**

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

Where a statute defines an outcome that constitutes a crime but sets forth distinct acts or conduct which can achieve that outcome, the crime is an alternative means crime. *State v. Peterson*, 168 Wn.2d 763, 769-70, 230 P.3d 588 (2010); *State v. Linehan,* 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002). The Court of Appeals previously applied that analysis to RCW

16.52.205(2) and determined the terms "starvation, dehydration, and suffocation" are alternative means of committing the crime. *State v. Peterson*, 174 Wn. App. 828, 852, 301 P.3d 1060, *review denied*, 178 Wn.2d 1021 (2013).

But here, the Court of Appeals declined to follow *Peterson*. It offers no explanation for why instead it simply elects to follow another case from Division One. Regardless of which line of reasoning prevails, there is a plain conflict among several published opinion of the Court of Appeals warranting review by this court. RAP 13.4(b)(2)

Departing from Peterson, the court elects to follow the decision in *State v. Jallow*, 16 Wn. App. 2d 625, 482 P.3d 959, (2021). That, the analysis in *Jallow* and in this case is contrary to this Court's well-settled analysis.

Contrary to the Supreme Court's direction, *Jallow* and the court here settle for a superficial analysis which merely counts the statute's enumerated subsections. This Court has rejected such a simplistic approach. *State v. Sandholm*, 184

Wn.2d 726, 734, 364 P.3d 87, 90 (2015) (citing *State v. Lindsey*, 177 Wn. App. 233, 241, 311 P.3d 61 (2013), *review denied*, 180 Wn.2d 1022 (2014)). "[T]he distinctiveness of the conduct is more dispositive than use of the disjunctive 'or' and the structuring of the statute into subsections." *Sandholm*, 184 Wn.2d 726, 735 (citing *Peterson*, 168 Wn.2d at 770). In *Sandholm* the Court found a statute with four subsections actually only defined three alternative means, because two of the subsections defined acts which were closely related and readily capable of commission at the same time. 184 Wn.2d at 735. The Court applied its decades-old analysis that looks at whether it possible to commit the crime under one means but not the other and the degree to which one statutory term "inheres" in another. *Id.* at 734.

In *Owens* the Court examined the trafficking statute which says a person is guilty of the offense if they "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others." RCW

9A.82.050. The Court observed it would be difficult if not impossible for a person to organize but not plan, or to direct but not manage or supervise. *Owens,* 180 Wn.2d at 99. Thus, the court explained, the acts inhered in each other. Because the acts described were so closely related such that a person could not commit one without committing one of the others, they did not define alternative means. *Id.*

Here by contrast the single subsection, RCW 16.52.205(2)(c), defines distinct conduct. A person could provide insufficient nutrition to an animal while providing ample shelter and water. A person could provide ample shelter, food, and water and yet suffocate an animal. One act does not inhere in the other. Application of this Court's analysis makes clear the acts are distinct and thus describe alternative means. Indeed, applying that analysis, the Court of Appeals previously recognized "starvation, dehydration, and suffocation are different ways of committing the crime of animal cruelty in the first degree and are not merely descriptive or definitional but,

rather, separate and essential terms of the offense." *Peterson*, 174 Wn. App. at 852.

This case illustrates that point. Rather than the circumstances in *Sandholm* and *Owens* where it is nearly impossible to imagine one act occurring free of the other, here it is difficult to imagine a scenario where one act necessarily includes the other. The state's factual allegations only concern the nutrition Mr. Shoop provided the bison. Even assuming he underfed the animals, there is no suggestion that also entailed a denial of adequate shelter or resulted in suffocation. The State's own evidence recognizes the alternatives are not mutually exclusive and can easily exist independent of one another.

In place of that analysis, *Jallow* and the Court of Appeals below employ a framework that merely counts the subsections in the statute. *Shoop*, 510 P.3d at 1047 (citing *Jallow*, 16 Wn. App. 2d at 639-40). Such an approach has a simplistic appeal, never mind, this Court's repeated rejection of that approach. *Sandholm*, 184 Wn.2d at 785.

Rather than focus on the acts described within each subsection, *Jallow* broadly recategorizes the subsections themselves such that they describe a single category of act. 16 Wn. App. 2d at 639-40. Only then, and looking past the actual words used in the statute, the court concludes those newly minted categories define three alternatives. Thus, *Jallow* concludes subsection 2 sets forth a single alternative means as each of the acts described relates to the basic necessities of life. While it is certainly true that the acts described are related, that is not the relevant inquiry.

The focus is not on whether the acts are related, their inclusion in a single statute will always suggest they are. Indeed, even the acts described in subsection 1 and 3 are "related." If "related" were the standard than there is only one way to commit the offense and not even the three that *Jallow* describes. If "related" were the standard no criminal statute could have more than one means as every criminal statute is necessarily limited to only related acts.

Instead the focus in on the degree to which the acts inhere in one another. And, the analysis must focus on the statute as written and not as reimagined by a court or prosecutor. As *Peterson* properly observed the acts described in RCW 16.52.205(2), including starve, dehydrate, and suffocate, are alternative means of committing the offense. 174 Wn. App. at 852.

In this case, the trial court instructed jury on each of the three alternative means. CP 163. In the absence of a specific verdict, each of the charged alternatives must be supported by sufficient evidence. *State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017). If any of the charged means are not supported by sufficient evidence, the conviction must be reversed. *Id*. at 165. The State does not dispute the absence of evidence for two of the alternative means. Thus, reversal is required here.

The conflict among published opinions warrants review. So too does the Court of Appeals from the alternative-mean analysis this court has repeated time and again. RAP 13.4.

**2. The lack of either a unanimity instruction or a clear election by the State denied Mr. Shoop his right to a unanimous verdict.**

Article I, section 21 and the Sixth Amendment require a unanimous jury verdict. *Ortega-Martinez*, 124 Wn.2d at 707; *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020).

To protect this right where multiple acts may support a conviction one of two processed must be employed: (1) the State may clearly elect before the jury which act the jury should rely on for each charge; or (2) the court must instruct the jury "that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt." *State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015) (citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)). Neither alternative was followed here.

At trial, the State acknowledged there could be at least three different acts (or failures to act) which could have led to the starvation of the animals. RP 1659-60. But, rather than electing which act or failure constituted the crime, and thereby ensure the jury unanimity, the prosecutor told the jury they need not agree at all. Moreover, the court did not instruct the jury on the need for unanimity.

Thus, one juror was free to rely on the treatment of a single bison on eight different occasions to convict on eight counts. Another juror could pick another bison and eight other occasions, or even the same bison but eight other, different occasions. Still another juror could rely upon the treatment of a separate bison for each count, or the mistreatment of 2 bison on four occasion. Each of the remaining 9 jurors was free to rely on any combination of the above.

The Court of Appeals concludes the prosecutor's comments in their opening statement and the trial judge's passing comment to potential jurors that each of the eight

counts pertained to a separate bison satisfied this requirement. *Shoop*, 510 P.3d at 1049. The state has never argued remarks in its opening statement satisfied the requirements of *Petrich*. The state never argued the trial court's preliminary remarks to potential jurors prior to the start of trial satisfied the requirements of *Petrich*. In fact, the state argued in its brief that no such election or instruction was required. In fact, the State in its closing argument expressly told jurors they did not need to agree on any particular act. RP 1659-60. Even had the State's passing comments to jurors in its opening statement constituted an election, the State's closing argument plainly undercut that effect of that supposed election

Moreover, the opinion does not cite a single case in which comments in opening statements were deemed an election. The opinion does not cite any authority holding that a court's passing comments **before a jury is even selected** constitutes an instruction on the law. Indeed, this is likely the first opinion to ever rest on such strained reasoning.

Beyond the absence of any support for the novel reasoning that every utterance from a judge is an instruction to the jury, such an instruction from the judge would violate article I, section 16. That constitutional provision bars judges from commenting on the evidence, or directing jurors how to resolve factual issues. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Since the charging document itself does not differentiate the eight charges based upon the number of animals, the court instructing the jury to do so would be a comment on the evidence. The court's passing comments before trial began did not and could not meet the requirements of *Petrich*.

The Court of Appeals dismisses the fact a supposed election in opening statements is fundamentally at odds with the sort of election which *Petrich* requires. *Shoop*, 510 P.3d. 1049. When opening statements are made, the jury has not heard any evidence. The jury had not received any actual instructions on the law from the court. Instead, opening statements occur at a

time when the jury has no evidentiary or legal context in which to consider the prosecutor's supposed election.

Again, the state has never suggested its comment in opening constituted an election. Indeed, based upon the prosecutor's view that no election was required it is certain the prosecutor did not intend those comments to be an election.

Finally the Court posits that dehydration and starvation are together a continuing course of conduct, and thus the Court surmises the requirements of *Petrich* do not apply to those distinct mechanisms of harm. *Shoop*, 510 P.3d at 1049. But even if dehydration and starvation could each be a continuing courses of conduct, starvation and dehydration are unquestionably distinct acts from one another. Thus, at best they constitute two separate continuing courses of conduct triggering the requirements of *Petrich* rather than obviating the need to meet those requirements.

The court's reasoning conflates the alternative means analysis, which focus on the outcome that constitutes a crime,

with the multiple acts analysis, which focuses on the acts which establish the crime. While, under the opinion's logic, starvation and dehydration do not constitute alternative means they unquestionably remain distinct acts.

The published opinion's excusing the State and trial court from complying with the simple requirements of *Petrich* is obviously contrary to this Court opinions. Furthermore, it is a significant constitutional issue. This Court should accept review under RAP 13.4.

**3. The State is not entitled to restitution for its investigations costs unless the State is itself a victim of the crime. The trial court could not lawfully order Mr. Shoop to pay restitution to a third party for the costs of the State's investigation.**

A court's authority to impose restitution is limited to only that provided by statute. *State v. Moen*, 129 Wn.2d 535, 543-44, 919 P.3d 69 (1996). The relevant statute, RCW 9.94A.753(3); limits restitution to "easily ascertainable damages" caused by the person's action. *State v. Grffith*, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008).

Restitution is limited only to victims of the offense. *State v. Cawyer*, 182 Wn. App. 610, 617, 330 P.3d 219 (2014). A court may require payment of the investigatory costs only where the State is itself a victim of the offenses. *Id.*

*Cawyer* rejected a restitution award for cost of extraditing the defendant. 182 Wn. App. at 618. This Court explained that because the state was not directly victimized and the costs were not expended to assist a person who was a victim RCW 9.94A.753.

By contrast, in *State v. Tobin* the State could properly seek restitution for the costs associated with investigating and repairing shellfish beds for the defendant's crimes illegally harvesting shellfish. *State v. Tobin,* 161 Wn.2d 517, 519, 524–25, 166 P.3d 1167 (2007). Because the harvesting involved taking shellfish from state waters and state shellfish beds the State was plainly a victim. The State's cost in recovering the defendant's abandoned crab pot and resurveying and repairing the State shellfish beds were not merely costs incurred by law

enforcement they were costs incurred by a victim of the crimes. *Id*. at 527-28. The same is not true here.

The center was not a direct victim of the crimes nor did it incur the costs assisting a person who was direct victim of the offenses. Instead, the center incurred the costs because the state asked them to take possession of the bison, presumably as evidence of crime, and then the State failed to pay them. To the extent the State did so as essentially a means to store evidence, that sort of investigation or prosecutorial is not properly included in restitution by the. *Cawyer*, 182 Wn. App. at 618. The fact that the State failed to pay the center cannot change that outcome. Those are the State's investigatory costs in a case in which it was not a victim and may not be included as restitution.

If the center was not merely acting as an evidence repository on behalf of the State there was no basis to board the bison for 18 months. Instead, the center could have simply sold the livestock at auction for slaughter or any other purpose. It

appears the decision to board them was driven by a desire to place them at a sanctuary rather than being sold for slaughter. That decision by a third-party was not a foreseeable outcome of the alleged crimes. Thus, the costs that flow from that choice were not caused by Mr. Shoop's acts.

The Court of Appeals refuses to address this claim reasoning that because Mr. Shoop did not raise this argument below, he cannot raise it on Appeal. Opinion at 21. But arguments concerning a sentence in excess of the court's statutory authority, including restitution, may always be raised for the first time on appeal. *Moen*, 129 Wn.2d at 543-48. The Court of Appeals's refusal to address the claim is contrary to long-settled case law of this Court. Mr. Shoop is entitle to have claim his claim resolved. This Court should grant review under RAP 13.4(b)(1).

Even if restitution could be had for the boarding costs of the seven animals that were the subject of the neglect charges, the same cannot be true of the calf. The calf was not the subject

of any of the eight charges. The calf would have been born regardless of the crime. The calf was not the product of the crime. No causal connection exists between the calf and the offense.

While the center boarded the bison who were evidence of the crime at the behest of the Sheriff's office, there was no similar need to keep the calf. That was simply a personal choice by the facility and its director to keep the calf as a pet. Mr. Shoop cannot be compelled to pay for such choices as restitution.

The Court of Appeals, with no analysis, concludes the cost of boarding the calf were reasonably foreseeable since one of the bison was pregnant when seized. Opinion at 21. But the opinion never addresses the fact that the Center's cost were entirely a result of the choices of its director. There was no need to board the calf. There was no reason to incur any cost associated with its care. Those costs were not a result of any act

by Mr. Shoop. Instead, they were solely the result of choices made by a third party.

Center Valley was not a victim of the offenses. The damage resulting from the offenses did not affect any of the center's property. Finally, the center's decision to board the calf throughout that period was wholly unrelated to the offense and is only attributable to the center's choice.

This Court should accept review of this issue. RAP 13.4.

## F. CONCLUSION

The published opinion in this case fundamentally misapplies this Court's well-established case law regarding the unanimity requirements of article I, section 21. In doing so the opinion substantially limits the constitutional protection. This Court should accept review under RAP 13.4.

This pleading contains 4187 words and complies with RAP 18.17.

Submitted this 20th day of August, 2022.

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Filed
Washington State
Court of Appeals
Division Two

June 1, 2022

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>DENVER LEE SHOOP,<br>Appellant. | No. 54197-1-II<br>(Consolidated with 55147-1-II)<br><br>PUBLISHED IN PART OPINION |

PRICE, J. — Denver Shoop appeals his convictions for eight counts of first degree animal cruelty and the related restitution order. He argues: (1) RCW 16.52.205(2)(a) is an alternative means statute, and the State neither presented sufficient evidence to support each of the alternative means nor instructed the jury as to unanimity with regard to each of the alternative means, (2) his right to a unanimous jury was violated because the jury was not given a *Petrich*[1] instruction, (3) the State committed misconduct in telling the jury it did not need to be unanimous regarding the cause of starvation, (4) the trial court's denial of funds for an expert evaluation denied him effective assistance of counsel, and (5) the trial court abused its discretion in its order for restitution. Shoop also raises additional issues in a statement of additional grounds.

[1] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *abrogated on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988), *abrogated on other grounds by Pers. Restraint of Stockwell*, 170 Wn.2d 588, 316 P.3d 1007 (2014).

We hold that RCW 16.52.205(2)(a) is not an alternative means statute and that a *Petrich* instruction was not required in this case. In the unpublished portion to this opinion, we determine that all of Shoop's remaining arguments fail. Accordingly, we affirm Shoop's convictions and the trial court's restitution order.

## FACTS

### I. BACKGROUND

Shoop owned bison that he kept in a field on his property along with other animals. An animal control officer received a report of animal cruelty related to the bison and drove to Shoop's property. The officer observed eight bison that appeared emaciated and weak. The officer subsequently obtained a warrant and seized seven out of the eight bison but was unable to take the eighth due to its size. One of the bison was pregnant when it was seized, and it later gave birth to a calf.

Shoop was charged with eight counts of first degree animal cruelty, seven for the bison that were seized and one for the bison that the State was unable to seize. His first trial resulted in a mistrial due to a hung jury.

### II. SECOND TRIAL

#### A. JURY SELECTION AND OPENING STATEMENTS

Prior to jury selection for the second trial, the trial court gave preliminary instructions to the entire pool of potential jurors. The trial court stated that Shoop was charged with eight counts of first degree animal cruelty and the counts "pertain[ed] to different animals." 6 Transcript of Proceedings (RP) at 1016. The trial court subsequently repeated that there were eight counts and each pertained to a separate bison.

Once the jury was selected, the State presented its opening statement. When discussing the charges, the State said that Shoop was being charged with eight counts of first degree animal cruelty, "one for each bison." 7 RP at 1224.

B. TESTIMONY

At trial, the State presented a significant amount of testimony showing that the condition of the bison was due to a parasitic infection from untreated worms and inadequate food. The State also presented testimony indicating that Shoop had intentionally deprived the bison of water for extended periods of time.

An expert for the State said that at the time the bison were seized, on a scale of one to five (with five being ideal), three of the bison received a score of one (imminent danger of sickness or death), four received a score of two (moderately thin), and one received a score of two to three.

Shoop offered testimony showing that he did not deprive the animals of food and water. Witnesses stated that Shoop had provided dewormer medication to the bison and the animals were in good condition prior to being seized. Shoop also presented testimony that the condition of the bison could have been caused by ingesting toxic plants, by weather conditions, or by liver flukes which are difficult to diagnose.

C. JURY INSTRUCTIONS AND CLOSING ARGUMENT

Following the close of the evidence, the case was submitted to the jury as eight separate counts of second degree animal cruelty. The jury was instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict in one count should not control your verdict on any other count." Clerk's Papers (CP) at 154. Additionally, the jury instructions

for each of the counts stated that the jury must find the following elements beyond a reasonable doubt:

> (1) That on or about between October 1, 2017 and April 23, 2018, the defendant,
>
> (2) on an occasion separate and distinct from the act alleged [in all other counts],
>
> (3) with criminal negligence, starved, dehydrated, or suffocated an animal and as a result
>
> (4) caused substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering; and
>
> (5) That this act occurred in the State of Washington, County of Jefferson.

CP at 163-70. Although the jury was instructed generally regarding unanimity, they were not given a *Petrich*[2] instruction.

In its closing argument, the State acknowledged that there was evidence that starvation occurred because of both the lack of food and a parasitic infection but told the jury that

> you don't have to agree on exactly the method of starvation. So that's not what's meant by unanimity. You just have to agree that the elements of the State—of the charge have been proved beyond a reasonable doubt.

9 RP at 1659. The State also said that the charges were based on a six month time range because starvation takes time. Absent from the State's closing was a detailed discussion of how the animal cruelty charges specifically applied to the evidence that had been presented. Also, unlike its opening statement, the State did not mention whether it intended that each charge related to a separate bison or whether multiple charges applied to a single bison.

The jury found Shoop guilty of all eight counts of first degree animal cruelty.

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[2] A *Petrich* instruction instructs the jury that it must be unanimous as to the distinct criminal act. 101 Wn.2d at 569-70.

Following the jury's verdict, Shoop filed a motion for arrest of judgment arguing that starvation, dehydration, and suffocation were alternative means of committing animal cruelty and because the trial court had not instructed the jury to find a specific means by which Shoop had committed animal cruelty, the State was required to introduce substantial evidence on each of the alternatives. And since the State focused mostly on starvation, there was insufficient evidence that the bison were dehydrated and suffocated. The trial court denied Shoop's motion.

Shoop appeals his convictions.

## ANALYSIS

### I. RCW 16.52.205(2)(A) AND ALTERNATIVE MEANS

Shoop argues that RCW 16.52.205(2)(a) is an alternative means statute that requires either a unanimity instruction regarding the alternatives or a showing that the State presented sufficient evidence to support each of the alternatives. We disagree and hold that RCW 16.52.205(2)(a) is not an alternative means statute.

#### A. STATUTORY LANGUAGE

Washington's animal cruelty statute includes several different ways the statute can be violated. Relevant here, RCW 16.52.205(2)(a) provides:

> A person is guilty of animal cruelty in the first degree when . . . he or she, with criminal negligence, starves, dehydrates, or suffocates an animal, or exposes an animal to excessive heat or cold and as a result causes: (i) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (ii) death.

The two other means of committing first degree animal cruelty include the prohibition on torturing animals in subsection 1 and the prohibition of sexual contact with animals in subsection 3. RCW 16.52.205(1), (3).

Here, the jury instructions only addressed subsection 2 and provided that animal cruelty occurred where an individual starved, dehydrated, or suffocated an animal. Shoop argues that these three means—starvation, dehydration, or suffocation—are three alternative means of committing animal cruelty. Since these means are different alternatives, and the jury was not instructed as to unanimity with regard to the alternative means, Shoop asserts that all three alternatives needed to be supported by sufficient evidence.

B. ALTERNATIVE MEANS DOCTRINE

A criminal statute that provides for multiple ways to prove that a defendant committed the crime is characterized as an alternative means crime. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643, 451 P.3d 707 (2019). The alternative means doctrine implicates the criminal defendant's right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); *Barboza-Cortes*, 194 Wn.2d at 643. Alternative means crimes require an expression of jury unanimity as to which means the defendant used to commit the crime. *Barboza-Cortes*, 194 Wn.2d at 643. However, " 'an expression of jury unanimity is not required provided each alternative means presented to the jury is supported by sufficient evidence.' " *Id.* (quoting *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015)).

The alternative means doctrine does not apply where a statute includes alternatives characterized as "a 'means within a means.' " *State v. Jallow*, 16 Wn. App. 2d 625, 638, 482 P.3d 959 (2021) (quoting *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007)). "The alternative means analysis focuses on whether the statute describes the crime in terms of separate, distinct acts (alternative means) or in terms of closely related acts that are aspects of one type of conduct (not alternative means)." *State v. Roy*, 12 Wn. App. 2d 968, 974, 466 P.3d 1142 (2020).

> The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various "alternatives" are merely facets of the same criminal conduct.

*Sandholm*, 184 Wn.2d at 734.

The use of the disjunctive "or" and the structuring of a statute into separate subsections are not dispositive as to the question of whether a statute creates alternative means. *Id.* The analysis instead should focus on whether the supposed alternatives describe "*distinct acts* that amount to the same crime." *Id.* at 734 (quoting *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)). If so, then the alternative means doctrine will apply.

Whether a statute provides alternative means is a question of judicial interpretation that is reviewed de novo. *Barboza-Cortes*, 194 Wn.2d at 643.

C. APPLICATION

Shoop argues that RCW 16.52.205(2)(a) provides alternative means of committing first degree animal cruelty and that the State did not present sufficient evidence to prove each means, depriving him of his right to a unanimous jury. We hold that RCW 16.52.205(2)(a) is not an alternative means statute.

Division One of this court recently held in *Jallow* that RCW 16.52.205(2)(a) is not an alternative means crime, rejecting its prior decision that held the opposite. 16 Wn. App. 2d at 640 (court rejects holding in *State v. Peterson*, 174 Wn. App. 828, 301 P.3d 1060 (2013)). The *Jallow* court determined that the animal cruelty statute *as a whole* is an alternative means crime because there are three subsections that set out three alternative means for committing the crime. *Id.* at 639-40. But it decided that each subsection of the statute, including subsection 2, contained

"means within a means" for committing the crime. *Id.* at 640. These means within a means did not render the subsections themselves alternative means crimes:

> "Each of these subsections begins with the words, 'A person is guilty of animal cruelty in the first degree when . . . .' In each subsection, thereafter follows the words describing the means set forth therein.
>
> The error made in *Peterson* is that the court confused certain subalternatives ('means within a means') for actual alternative means. The words set forth in subsection 2 ('starves, dehydrates, or suffocates') are 'means within a means.' The jury unanimity guarantee does not attach to these subalternatives.
>
> Subsection 1, viewed broadly, criminalizes torturing animals. Subsection 2, viewed broadly, criminalizes withholding life's necessities (air, food, water) from animals. Subsection 3 criminalizes sexual perversion with animals. These are the alternative means."

*Id.* at 639-40 (quoting *State v. St. Clare*, 198 Wn. App. 371, 385-86, 393 P.3d 836 (2017) (Dwyer, J., concurring)).

Thus, *Jallow* determined that RCW 16.52.205(2)(a) gives an alternative means for committing first degree animal cruelty by depriving an animal of *the necessities of life*. *Id.* at 640. "The 'means within the means' of depriving the animal of necessities of life are starving, dehydrating, suffocating, or exposing the animal to excessive heat or cold." *Id.* at 640.

We agree with *Jallow* that RCW 16.52.205(2)(a) makes it a crime to deprive an animal of basic life necessities through criminal negligence. The provision criminalizes neglect of animals that leads to this deprivation, whether that be through failing to provide food or water to the animal, by suffocation, or exposure to excessive temperatures. Each of the situations covered by subsection 2 are "closely related acts that are aspects of one type of conduct"[3] because they

[3] *Roy*, 12 Wn. App. 2d at 974.

generally relate to an individual's failure to take action to ensure an animal is provided with basic life necessities.

Shoop maintains that subsection 2 provides alternative means because one act of the subsection does not necessitate another. For example, an individual could deprive an animal of water while still providing it with shelter and food. However, the alternative means analysis requires a close relationship, not complete overlap. And, again, all of the means in subsection 2 are closely related to basic life necessities.

We hold that because the provision involves closely related means within the means, RCW 16.52.205(2)(a) is not an alternative means crime. Consequently, the fact that it was potentially unclear whether the jury unanimously found only one of the alternative means did not deprive Shoop of his right to a unanimous jury.

### II. *Petrich* Instruction

Shoop next argues that the failure to give a *Petrich* instruction also deprived him of his right to a unanimous jury. We disagree.

#### A. Legal Principles

Criminal defendants have a right to a unanimous jury verdict found in the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution. *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020); *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). Criminal defendants may be convicted only if a jury unanimously determines the defendant committed the criminal act with which they were charged. *Petrich*, 101 Wn.2d at 569. "When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury

which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." *Kitchen*, 110 Wn.2d at 409. The purpose of a *Petrich* instruction is to prevent confusion because where such an instruction is necessary, but not given, "some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Id.* at 411.

In *State v. Carson*, our Supreme Court held that a *Petrich* instruction is required where the State fails to " 'elect the act upon which it will reply for conviction.' " 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (quoting *Petrich*, 101 Wn.2d at 572). "For an election to be effective, 'either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.' " *Id.* (quoting *Kitchen*, 110 Wn.2d at 409). In *Carson*, the court found that a *Petrich* instruction was not required because the State made an election in its closing argument by specifying the three different acts it was relying on and saying that those were the only incidents the jury should, in turn, rely on. *Carson*, 184 Wn.2d at 228-29.

Moreover, neither an election nor *Petrich* instruction is required where the State has filed a single charge based on "a continuing course of conduct." *Petrich*, 101 Wn.2d at 571; *State v. Gooden*, 51 Wn. App. 615, 618, 754 P.2d 1000 (1988). "[A] continuing course of conduct may form the basis of one charge in an information." *Petrich*, 101 Wn.2d at 571. A continuing course of conduct occurs where the State presents evidence of "one continuing offense" as opposed to "several distinct acts." *Id.* at 571 (internal quotation marks omitted) (citing *U.S. v. Berardi*, 675 F.2d 894, 897-900 (7th Cir. 1982)). Evidence that the conduct occurred at different times and places tends to show distinct acts and not a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). However, evidence of a series of actions that are intended to

secure the same outcome tends to support a finding of a continuing course of conduct. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Determination of whether criminal conduct is "one continuing act" requires evaluation of the facts in a commonsense manner. *Handran*, 113 Wn.2d at 17.

We review constitutional issues de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013).

B. APPLICATION

Shoop maintains his right to a unanimous jury was violated because the State presented evidence of multiple acts to support each of the charged offenses but the jury did not receive a *Petrich* instruction.[4] He asserts that although the jury instructions listed eight separate counts, neither the jury instructions nor the State explained precisely to what those eight counts pertained. Shoop argues that there is no way of knowing what effect the failure to include a unanimity instruction had on juror deliberations. He contends that one juror may have found multiple counts over a six month period for a single bison, while another may have found that each count applied to a separate bison. We disagree.

Here, like *Carson*, the jury was clearly informed about the State's election of the acts upon which it was relying for conviction. At the outset of jury selection, the trial court twice explained to the juror pool that the eight separate counts pertained to the eight bison. Later, during its opening

[4] Shoop did not object to the jury instructions at trial. However, a claim of error based on jury unanimity is of constitutional magnitude and may be raised for the first time on appeal. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), *abrogated on other grounds by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

statement to the jury, the State reiterated that it charged Shoop with eight counts, "one for each bison." 6 RP at 1016-17, 7 RP at 1224.

It is true that, unlike *Carson*, these statements were made at the outset of the case, not during closing argument. At oral argument before this court, Shoop contended that this is a critical distinction that makes the State's election here ineffective. We disagree. That the election occurred in the State's opening statement, especially when coupled with the trial court's comments during jury selection, has no effect on its clarity to the jury and, therefore, its effectiveness.[5]

Shoop also argues that as a result of the State's failure to give a proper unanimity instruction, it is unclear which particular act of animal cruelty the State was relying on as the basis for each of its charges, especially since the charging period was over six months in length. Shoop argues this failure to allege a specific act on a specific occasion for each bison for its charges potentially led to juror confusion depriving him of his right to a unanimous jury.

Although an election (or a *Petrich* instruction) was necessary to clarify that the State was charging eight counts, one for each bison, the State was not required to be as specific in time and place as Shoop argues regarding each charge. Acts leading to starvation or dehydration are best characterized as a continuing course of conduct because they are "series of actions intended to secure the same objective . . . rather than several distinct acts." *Fiallo-Lopez*, 78 Wn. App. at 724. Starvation, for example, would rarely be a consequence of one distinct action; rather, it would be

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[5] Additionally, because the number of charges was very specific, Shoop overstates the possibility of confusion to a rational juror. For a juror to drift away during deliberations from the direct statements made at the outset of the trial by both the trial court and the State and assume that the charges could be related to multiple acts on a single bison, the juror would have to view it as a mere coincidence that the case involved eight charges *and* eight bison. Such a specific number of charges exactly matching the specific number of bison makes this speculation highly unlikely.

a series of actions (or inactions) that culminates in the final result of an unhealthy animal. A commonsense evaluation of the facts reveals that these charges were based on a continuing course of conduct.

The State presented evidence of starvation and dehydration of the bison over time, establishing one continuing offense rather than several distinct acts. Each charge pertained to one continuous course of conduct, per bison, over a time period of six months. When a *Petrich* instruction is required, it provides necessary clarity when one charge could potentially apply to multiple acts or when multiple acts could potentially apply to one charge. *See Kitchen*, 110 Wn.2d at 411. Neither is present here.

The rationale for requiring an election or a *Petrich* instruction is minimizing confusion about the jury's verdict and ensuring its deliberations are consistent with requirement for unanimity. Here, the repetition with which the jury was told that there were eight counts, one for each bison, ensured there was no confusion with this verdict. Moreover, because the crimes were charged as a continuing course of conduct, a *Petrich* instruction requiring precision as to a specific act of animal cruelty was not required. Therefore, we hold that there was no error in the failure to give a *Petrich* instruction in this case.

## CONCLUSION

We hold that RCW 16.52.205(2)(a) is not an alternative means statute but rather proscribes means within the means. We further hold that there was no error in the failure to give a *Petrich* instruction. Accordingly, we affirm Shoop's conviction.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

## ADDITIONAL FACTS

### I. Request for Evaluation of Bison

Prior to the second trial, Shoop requested funds for a physical examination of the bison.[6] Shoop argued that an examination was necessary to rebut testimony from the State regarding the condition of the animals when they were seized over a year prior. Over the course of about four months, the trial court held approximately eight hearings during which Shoop's request for an evaluation of the bison was addressed, including discussions of whether such an evaluation would lead to relevant evidence, the logistical and financial difficulties associated with the evaluation, and safety concerns.

At one hearing, the trial court questioned whether an examination of the bison in their current state would be relevant to the starvation of the bison at the time of the seizure. Defense counsel replied that an evaluation might generally reveal "[w]hat condition are the animals in; do they have any lasting physical impairments that relate to this case that were not recovered from; [and] are they alive." 4 RP at 747. And defense counsel generally argued that an evaluation might result in information that would challenge the State's evidence about the condition of the bison when they were seized. But defense counsel could not point to any specific evidence an evaluation might uncover.

[6] During the course of the proceedings, up until just before the second trial, the bison were being cared for by third-party animal care facilities, including Central Valley Animal Rescue.

Shoop subsequently requested that the trial court order Central Valley Animal Rescue, the facility where the bison were being held, to make their premises available and provide equipment for evaluation of the animals. The State responded that Central Valley was unable to comply with Shoop's request due to significant logistical issues and costs, as well as dangers associated with evaluating the bison. Additionally, Central Valley did not possess the equipment necessary to conduct an evaluation.

A witness from Central Valley testified that it would be extremely dangerous for someone to approach the bison for an evaluation and any evaluation of the bison would likely require sedation along with the construction of chutes to contain the animals. The witness estimated that it would cost $30,000 to construct the chutes. Although the bison had been evaluated when they were initially seized during the time the bison were sick and weak, safely conducting an evaluation when they were healthier would be much more difficult.

The possibility of tranquilizing the bison with anesthetic darts was discussed. The State noted that it had asked Central Valley about that option and had been told that, while a dart gun might be available, it had never been used because of the high risk of shooting an animal in the wrong spot and killing or angering it.

When asked again by the trial court to explain the relevance of an evaluation of the bison, defense counsel maintained that it was difficult to say what relevant information an evaluation would uncover because an evaluation had not yet occurred.

The trial court concluded that although it would not hesitate to grant the request if it was dealing with a smaller animal, it was not reasonable to grant the request because of the differences with bison and the logistical issues and expenses involved. If Shoop wanted an evaluation of the

bison, the trial court said he would have to present a different means of doing so. The trial court provided Shoop with additional time to find alternatives to evaluate the bison.

A month and a half later, another hearing was held regarding the request for an evaluation of the bison. Defense counsel again failed to present the trial court with any new options but still requested the trial court provide the funds for an evaluation. The trial court again denied the request, deciding that the defense remained unable to offer a reasonable means for conducting an evaluation and there was almost no chance that an evaluation of the bison would lead to relevant evidence.

## II. Restitution Hearing

At a restitution hearing following Shoop's conviction, the State requested that Shoop be ordered to pay $74,312.54 to Central Valley for costs incurred in caring for the seized bison. In support of its request, the State presented an itemized list of costs from Central Valley accompanied by a declaration along with testimony from Central Valley employees. The request included the cost of care for the calf that was born after the animals were seized.

Shoop objected to the inclusion of costs associated with caring for the calf, arguing that because the calf was not the subject of any of the animal cruelty charges, he should not be required to pay for costs related to it. Shoop also objected to the legal fees Central Valley had to pay in order to sell the bison. Otherwise, Shoop made no objection to the State's request for reimbursement to Central Valley for the care of the animals.

The trial court determined that the total amount requested by Central Valley was reasonable. The trial court found that "the [calf] was a reasonable foreseeable consequence of this entire incident" and that the legal costs were reasonable because Central Valley encountered legal

complications when it attempted to sell the bison. RP (Aug. 14, 2020) at 35. The trial court ordered Shoop to pay the entire amount requested to Central Valley.

## ANALYSIS

### I. Request for Funds for Expert Evaluation

Shoop disputes the trial court's decision to deny his request for public funds to pay for an examination of the bison. Shoop argues that this failure to fund his request constitutes a denial of his right to an effective defense. We disagree.

#### A. Legal Principles

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). This right includes a right to expert assistance necessary for an adequate defense. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 326, 868 P.2d 835 (1994); *City of Mt. Vernon v. Cochran*, 70 Wn. App. 517, 522, 855 P.2d 1180 (1993) ("As part of an indigent defendant's constitutional right to effective assistance of counsel, the State must pay for expert services, but only when such services are necessary to an adequate defense."). "Whether expert services are necessary for an indigent defendant's adequate defense lies within the sound discretion of the trial court and shall not be overturned absent a clear showing of substantial prejudice." *State v. Young*, 125 Wn.2d 688, 691, 888 P.2d 142 (1995); *see also State v. Mines*, 35 Wn. App. 932, 935-36, 671 P.2d 273 (1983) (the determination of whether expert services are necessary for the constitutional right to effective assistance of counsel is governed by CrR 3.1 and therefore is within the sound discretion of the trial court).

B. APPLICATION

About a year after the initial seizure of the bison, Shoop maintained that he needed funds for an evaluation of the bison to rebut testimony offered by the State about the condition of the bison when they were seized. The State countered that an examination was unreasonable because of the risk and expense and also argued that an examination would not lead to relevant evidence because of the delay between the seizure and the potential examination.

Over the course of multiple hearings, the trial court took evidence on the difficulties, dangers, and expense of examining the bison. The trial court also gave Shoop multiple opportunities to propose an alternative examination method that could address some of the more extreme difficulties and dangers associated with examining the bison. Shoop was unable to articulate what specific and relevant information an examination might uncover and make any different suggestions. Following these multiple opportunities, the trial court ultimately denied Shoop's request for funds finding that there was an insufficient showing of the potential relevant evidence considering the significant cost and potential risk to life.

Under these facts, Shoop has failed to support his assertion that examination of the bison was necessary to ensure an adequate defense, much less to show that he was substantially prejudiced by the trial court's decision. The trial court properly based its decision on a determination that the evaluation was not likely to lead to relevant information and, therefore, not necessary to an adequate defense. Because the trial court did not abuse its discretion in this decision, Shoop's right to an adequate defense was not denied.

## II. Prosecutorial Misconduct

During closing argument, the State told the jury that it did not need to agree on the specific mechanism of starvation, it just needed to agree that starvation had in fact occurred. Shoop did not object to this statement. On appeal, Shoop argues that these comments misstated the law and, therefore, the State committed prosecutorial misconduct. We disagree.

In a prosecutorial misconduct claim, the defendant bears the burden of showing that the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). A misstatement of the law by the prosecutor is improper. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Where a defendant did not object at the trial court level, any error regarding prosecutorial misconduct is deemed to have been waived unless the misconduct was "so flagrant and ill intentioned that [a jury] instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61.

RCW 16.52.205(2)(a) criminalizes starvation of animals through criminal negligence that causes substantial and unjustifiable physical pain. As explained above, because we have concluded that this crime is a course of conduct crime, the jury was not required to agree on a specific act that caused the starvation. A jury is simply required to find that criminal negligence resulted in starvation. Indeed, Shoop fails to provide any authority that the statute demands the State prove with precision the exact mechanism of starvation—especially where, as here, the jury found that Shoop's conduct over a period of six months caused the starvation. Thus, the State did not misstate the law when it told the jury that it did not need to agree on the precise means of starvation. Without a misstatement of the law, there was no improper conduct, and we determine that the State did not commit prosecutorial misconduct.

### III. Restitution Order

Shoop next challenges the trial court's order on restitution. Shoop argues that the trial court awarded an unreasonable amount of restitution and he should not be required to pay restitution for the calf that was born after the animals were seized. We disagree.

#### A. Legal Principles

Defendants convicted of animal cruelty "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." RCW 16.52.200(6). "Reasonable costs include expenses of the investigation, and the animal's care, euthanization, or adoption." RCW 16.52.200(6).

If a restitution award is disputed, it must be supported by a preponderance of the evidence. *State v. Deskins*, 180 Wn.2d 68, 82, 322 P.3d 780 (2014). " 'While the claimed loss need not be established with specific accuracy, it must be supported by substantial credible evidence.' " *Id.* (internal quotation marks omitted) (quoting *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008)). " 'Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.' " *Id.* at 82-83 (internal quotation marks omitted) (quoting *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), *overruled on other grounds*).

#### B. Application

Shoop appears to make two arguments regarding the restitution award. First, he argues that the trial court awarded an unreasonable amount of restitution because Central Valley did not need to care for the bison for 18 months but, instead, should have sold the bison much earlier.

Second, Shoop argues that he should not be required to pay restitution for the calf that was born after the animals were seized. Because the calf was not subject to any of the eight charges and would have been "born regardless of the crime," Shoop argues that there was no causal connection of the calf to the offenses such that restitution for its care should be imposed. Second Br. of Appellant at 5. Both arguments fail.

First, we decline to address Shoop's argument about the duration of Central Valley's care. At the restitution hearing, Shoop did not object to the overall amount for care of the bison; he limited his objection solely to payments related to the newborn calf. As a result, Shoop's argument as to the duration of care has not been preserved. *See* RAP 2.5.

Second, although preserved below, Shoop's argument related to the newborn calf also fails. Because the mother of the calf was pregnant when she was seized, caring for the mother would necessarily include caring for the calf. Considering these natural consequences of seizing a pregnant female bison, there was ample connection of the calf-related expenses to the crimes, and there was sufficient evidence that ordering restitution related to the expenses was reasonable. Accordingly, we affirm the trial court's restitution order.

## IV. STATEMENT OF ADDITIONAL GROUNDS

Shoop raises additional issues in his statement of additional grounds (SAG) including arguments relating to witness credibility, the trial court's denial of his motion to change venue, his request for an appointment of a new attorney, and ineffective assistance of counsel. We disagree with, or decline to address, each of them.

A. MOTION TO CHANGE VENUE

Shoop claims that the trial court erred in denying his request for a change of venue due to pretrial publicity. We disagree.

"Adverse pretrial publicity can create a presumption in a community that jurors' claims that they can be impartial should not be accepted, and the totality of the circumstances is examined to decide whether such a presumption arises." *State v. Jackson*, 150 Wn.2d 251, 269, 76 P.3d 217 (2003). A defendant must show that pretrial publicity has created a probability of unfairness. *Id.* However, the relevant question in making a change of venue determination is not whether the jurors were aware of the case, but whether the jurors were able to impartially judge the guilt of the defendant. *Id.*

We review a trial court's decision to grant or deny a motion for a change of venue for an abuse of discretion. *Id.*

Prior to trial, Shoop filed a motion for change of venue due to the local media coverage of his case. The State opposed the motion, maintaining that the media coverage had not been inflammatory and the only media coverage had been several news articles, with the last article having been published more than six months prior. The State argued that increasing the pool of prospective jurors could cure any potential issues with juror familiarity and the population of the area from which jurors were drawn (30,000) was sufficiently large to seat an impartial jury. Moreover, the State noted that government officials had not been involved in the publicity and the severity of the crimes was lower since it did not involve crimes against a person.

The trial court agreed with the State and denied the motion to change venue finding that Shoop had failed to show good cause to grant the motion.

Shoop fails to raise any additional arguments or analysis about how the trial court's decision was an abuse of discretion. Accordingly, his challenge fails.

B. REQUEST FOR APPOINTMENT OF NEW ATTORNEY

Shoop claims that the trial court erred in denying his request for a new defense attorney. We review a trial court's refusal to appoint new counsel for an abuse of discretion. *State v. Lindsey*, 177 Wn. App. 233, 248, 311 P.3d 61 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 248-49.

"In assessing the trial court's decision, we look at (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel." *Id.* at 249.

Ten days before the then scheduled second trial was to start, defense counsel made a motion, on behalf of Shoop, that he be removed as counsel based on Shoop's claim that there was a breakdown in the attorney-client relationship. Defense counsel explained that Shoop believed that he had failed to inform Shoop of his speedy trial rights, and as a result, the trial had been set 8 days outside the 90-day speedy trial deadline. Defense counsel said he had received "an impassioned phone call" from Shoop a couple of days prior regarding his dissatisfaction with counsel over this speedy trial issue. 4 RP at 740. Although defense counsel conceded that there had been "at least—to some degree" a breakdown in the relationship, he also made it clear the motion was made on behalf of Shoop and he was not necessarily joining in the request. 4 RP at 741.

The trial court determined that there was an insufficient basis to grant Shoop's motion. The trial court questioned the accuracy of defense counsel's calculation of the speedy trial issue,

but even if there was an eight day delay, the trial court determined that such a minor issue could not lead to a total breakdown in the attorney-client relationship such that new counsel was justified. The trial court also noted that Shoop had become angry in the past and there was no basis to discharge defense counsel and appoint a new lawyer unfamiliar with the case and the circumstances of the first trial. Moreover, the trial court noted that any appointment of a new attorney would result in further delays—and delays were the source of Shoop's complaints.

Shoop has failed to show that the trial court abused its discretion under the three factors. First, the extent of the conflict appeared to be solely related to an angry phone call from Shoop to defense counsel about his trial date being arguably eight days outside the date required by speedy trial rules. But, as the trial court pointed out, Shoop had become angry in the past. Importantly, defense counsel did not expressly join the motion, only characterizing the breakdown of the relationship as being of "some degree"—far short of a "total breakdown." 4 RP at 741-42. Given that defense counsel had a lengthy relationship with Shoop, having already represented him in the first trial, and that counsel did not join the motion, the trial court's conclusion that the conflict fell short of a total breakdown in the attorney-client relationship was reasonable.

Second, when presented with the issue, the trial court inquired of defense counsel of the nature and scope of the conflict. Because the conflict was related to a trial scheduling issue, the trial court's inquiry, while limited, was adequate.

Third, the timing of the request was problematic. The request was made after the first trial had been completed and just ten days prior to the then set date for the second trial. Dismissal of defense counsel at that late stage would have likely restarted the clock for time for trial, necessitated a continuance, and been detrimental to both parties. Because the factors weighed

against granting Shoop's request for appointment of a new attorney, we find that the trial court did not abuse its discretion in denying this request.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Shoop also appears to argue throughout his SAG that he was denied ineffective assistance of counsel for various reasons. We disagree with each of them.

Prevailing on an ineffective assistance of counsel claim requires the defendant to show: (1) deficient performance and (2) prejudice to the defendant. *Grier*, 171 Wn.2d at 32-33.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* at 33. We engage in a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing " 'no conceivable legitimate tactic explaining counsel's performance.' " *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Shoop claims that defense counsel improperly prevented bone marrow results from being admitted. It appears from the record that Shoop is referring to defense counsel's motion in limine that prevented the State from bringing in evidence of bison carcasses on Shoop's property. Defense counsel argued that the carcasses of these bison were only marginally relevant to the issue of starvation because the bone marrow of the animals had not been "tapped into," indicating that they had not starved. 1 RP at 27. Because the evidence of dead bison could have hurt Shoop more than the bone marrow evidence would have helped him, Shoop cannot overcome the presumption that defense counsel's decision to file a motion in limine regarding the carcasses was reasonable.

Shoop next claims that defense counsel failed to properly challenge "false" testimony that he was not providing adequate food and water to his animals. However, looking at the record as

a whole, defense counsel was zealous in his representation and consistently challenged the State's arguments that Shoop was providing inadequate food and water to his animals. Because the record does not support his claims, Shoop fails to rebut the strong presumption of effective representation. Therefore, defense counsel was neither deficient generally nor for allegedly failing to challenge certain testimony.

D. ADDITIONAL ARGUMENTS

Shoop raises additional arguments that either fail or we decline to address.

Shoop claims that the testimony offered by two of the State's witnesses was false and questioned the credibility of additional statements made by another witness. "Credibility determinations are reserved for the trier of fact, and an appellate court 'must defer to the [trier of fact] on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence.' " *State v. Rafay*, 168 Wn. App. 734, 843, 285 P.3d 83 (2012) (alteration in original) (quoting *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007)). We decline to review Shoop's claims because they are requests for this court to make credibility determinations.

Shoop contends that the State should not have been permitted to charge him with animal cruelty for the bison that was not seized. He also claims that defense counsel was ineffective for failing to inform the trial court that not all of the animals on Shoop's property for which he was charged with animal cruelty were seized. However, RCW 16.52.205(2)(a) does not require that an animal be seized for a charge to be brought under the statute. Therefore, we determine that this argument fails.

Shoop claims that the State failed to provide sufficient evidence of either suffocation or dehydration. As explained above, because RCW 16.52.205(2)(a) is not an alternative means statute, the State was not required to present evidence of either suffocation or dehydration so long as there was sufficient evidence of at least one of the means included within the subsection. And Shoop makes no argument that there was insufficient evidence of starvation. Therefore, we determine that this argument fails.

Shoop raises claims related to his first trial. He claims that the jury failed to properly follow the instructions of the trial court and the State improperly failed to provide the defense with results of blood tests until the end of his first trial. It is not evident what bearing these issues that arose during the first trial have on review of Shoop's convictions in the second trial. Therefore, we decline to address these issues because Shoop fails to "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c).

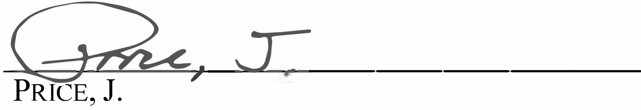
Shoop claims that he was denied an opportunity to testify. Shoop claims that his counsel was ineffective for failing to present evidence that would have aided his case and he was improperly prevented from making statements to the press. To the extent not discussed above, each of these claims involves facts and evidence not in the record, so we decline to address them.[7]

CONCLUSION

The trial court did not abuse its discretion in denying Shoop's request for funds for an expert evaluation of the bison, and the State did not commit prosecutorial misconduct during its closing argument. Additionally, we determine that there was sufficient evidence to support the

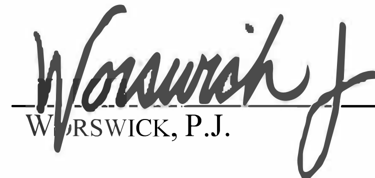
[7] We acknowledge, however, that these claims could possibly be raised in a personal restraint petition. *See* RAP 16.4.

restitution order. The remainder of Shoop's arguments also fail. Accordingly, we affirm Shoop's convictions along with the restitution order.

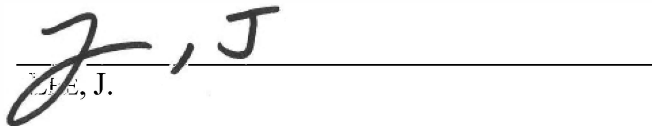


PRICE, J.

We concur:



WORSWICK, P.J.



LEE, J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 54197-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- [x] respondent Jeremy Morris
  [jeremy@glissonmorris.com]
  Jefferson County Prosecuting Attorney
- [ ] petitioner
- [ ] Attorney for other party

NINA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: August 22, 2022

## WASHINGTON APPELLATE PROJECT

### August 22, 2022 - 3:43 PM

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| **Appellate Court Case Title:** | State of Washington, Respondent v. Denver Lee Shoop, Appellant |
| **Superior Court Case Number:** | 18-1-00097-7 |

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