Supreme Court No. 102167-4
COA No. 39502-2-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

THELMA WINGER,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Thelma Winger asks this Court to review the opinion of the Court of Appeals *State v. Winger*, No. 39502-2-III (attached as Appendix 1- 25).

B. ISSUE PRESENTED FOR REVIEW

The prosecution alleged Ms. Winger starved three dogs and a horse on or about April 29, 2018. At trial, the State presented evidence the animals were negligently deprived food for that single day. The trial court found Ms. Winger guilty of animal cruelty for starving and dehydrating the dogs for *several months prior* to April 29, 2018, and for starving the horse for s*everal months or even several years* prior the charged period. 2RP 588-90. The charging document is constitutionally defective: it does not allege the negligent acts of starvation and dehydration happened for an "extended period." An essential durational

element for each first degree animal cruelty charge. The Court of Appeals' ruling that the Information is adequate conflicts with this Court's decision in *Kjorsvik*[1]. Review is warranted under RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

Mason County Police received reports of an emanciated horse. 1RP 361, 442. When police searched the property and barn belonging to Paul and Thelma Winger on April 29, 2018, they found several animals that appeared emaciated and malnourished. 1RP 46-49, 54-55, 62. Police found dog food in front of the dogs at the residence, including some unopened bags. 1RP 48-49, 62. Police also found alfalfa before the horse. CP 106 at 3.

The State charged Ms. Winger with six counts of

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[1] *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

first degree animal cruelty as to a horse, three dogs, a cat, and a bird. CP 11-13. The allegations were that:

> on or about April 29, 2018, [the defendant] did, with criminal negligence, starve, dehydrate, or suffocate an animal . . . and as a result caused death or substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering; contrary to RCW 16.52.205 . . . .

CP 11-13.

The State in its case-in-chief, elicited from all its witnesses only Ms. Winger's negligent conduct that occurred on April 29, 2018. 1RP 54, 96, 111, 169, 422.

In closing, the prosecution argued for the first time: "[t]he facts of the case begin on April 17th, 2018" until on "April 29th, 2018." 2RP at 584-85. April 17, 2018 does not appear in the charging documents. CP 63. For count I, Fred the dog, the prosecution argued, the charged negligent conduct occurred over ***months*** and then again that it took *over six months*. 2RP at

588. And "it took ***months*** [of starvation and dehydration] to get this animal into this condition. . . . That is a period of *over six months*." 2RP at 588(emphasis added).

For Count II, Baby the dog, the prosecution did not argue the starvation and dehydration happened over any specific time period. 2RP 588-89. It only argued Baby was 42 lbs. on April 29, 2018 because she was not being appropriately fed. Her optimal weight was now 66.2 lbs. on July 29, 2018. 2RP 588-89.

For count III, Buddy the dog, the prosecution further argued: "And I would submit to the Court the Court can also find that Buddy suffered from dehydration, based upon the finding of a *week prior* that the dog was dehydrated." 2RP at 590 (emphasis added.)

For count IV, Kissy the horse, the prosecution argued a police officer observed her April 17 and again on April 29, and in those 12 days she had a substantial decrease in body fat and weight and her physical condition had worsened. 2RP 591 (emphasis added).

The trial court concluded the animals had been deprived of adequate food and water over "several months" or "many months" or even years. CP 106 at 3. The written findings of fact and conclusions of law entered were also instructive: Concerning all three dogs, the court entered the findings of fact 13:

> The emaciated condition of the dogs was caused by starvation due to inadequate feeding. The dogs had either not been provided any food or had not been provided adequate food for *several months prior* to April 29, 2018, notwithstanding the dry dog food seen on April 29, 2018.

CP 106 at 3 (emphasis added).

The court entered finding of fact 21 concerning the horse:

> The emaciated condition of the horse Kissy was due to starvation caused by many months or years of neglect by not feeding it appropriately, notwithstanding the alfalfa seen on April 29, 2018.

CP 106 at 3.

The court found on April 29, 2018, the horse had "alfalfa" and the three dogs had food. CP 106 at 3. But it found Ms. Winger guilty of animal cruelty for depriving her animals of adequate food and water over "several months" or "many months" or even years. CP 106 at 3.

On appeal, Ms. Winger challenged the charging document as constitutionally defective as it did not specify the essential time frame for the alleged negligent conduct.

Ms. Winger maintained the trial court found her guilty for negligent acts committed for "fourteen days," "six months," "several months," or "even years," but those extended periods could not be fairly inferred from the language in the charging document: "on or about" April 29, 2018. Br. of Appellant at 33-34 ***citing State v.*** *Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). Because the State in response agreed the charging document is inartful and "vague," Br. of Resp. at 20, Ms. Winger urged the Court of Appeals to hold that the necessary durational element did not appear in any form, or by fair construction of the charging document under *Kjorsvik*'s first prong, and to presume prejudice and reverse the conviction. Reply of Appellant at 5 citing *State v. Zillyette*, 178 Wn.2d 153, 162, 307 P.3d 712 (2013).

In the alternative, Ms. Winger argued if the Court of Appeals construed "on or about April 29, 2018" was "some" language in the information giving notice of the essential missing element, as to satisfy *Kjorsvik*'s first prong, it should nevertheless reverse, because Ms. Winger was clearly prejudiced under *Kjorsvik*'s second prong by the inartful language, She was found guilty of conduct outside what was charged. Br. of Resp. at 20.

The Court of Appeals ruled the information was adequate and that Ms. Winger did not prove she was prejudiced by the defective Information. Ms. Winger seeks review of this opinion of the Court of Appeals.

D. ARGUMENT

The Information is constitutionally deficient as it omits an essential durational element for each first degree animal cruelty charge.

The standards for adequacy of a charging document are determined under the Sixth Amendment to the United States Constitution, under article I, section 22 of the Washington Constitution, and by CrR 2.1. An accused person must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense which has not been charged. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

In *Kjorsvik*, this Court set out a two-pronged test for posttrial challenges to charging documents: "(1) [D]o the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that

he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *State v. Kjorsvik*, 117 Wn.2d at 105-06.

As the Supreme Court recently explained in *Derri*, an information is constitutionally adequate under the federal and state constitutions "only if it sets forth all essential elements of the crime, statutory or otherwise, and the particular facts supporting them." *State v. Derri*, 199 Wn.2d 658, 691, 511 P.3d 1267 (2022) *citing State v. Hugdahl*, 195 Wn.2d 319, 324, 458 P.3d 760 (2020). "Essential elements" are "the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime." *Id*. (*quoting State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008)).

The main purpose of the essential elements rule "is to give notice to an accused of the nature of the

crime that he or she must be prepared to defend against." *Kjorsvik*, 117 Wn.2d at 101. Statutes defining crimes "must be strictly construed." *State v. Shipp*, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980). The requirements of due process and the importance of giving fair notice to the public demand that courts narrowly view the plain terms of a law penalizing certain conduct. *Id.*

a. The ruling conflicts with Kjorsvik as the charge document is missing an "extended" durational element for the negligent acts.

The State charged Ms. Winger by Information of knowingly starving, dehydrating, or suffocating five animals on or about April 29, 2018. See CP 63 at 11-12.

The Information alleged a time period "on or about" a single day and did not allege the negligent treatment occurred during an extended period. CP 63. As a result, the trial court did not require the State to

prove Ms. Winger committed negligent acts over an extended period and those acts caused each animal substantial physical pain that "extended for a period" sufficient to cause considerable suffering as required by RCW 16.52.205.

As charged, a person commits first degree animal cruelty if "[w]ith criminal negligence, [they] cause[] death or substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering…" RCW 16.52.205. The State omitted the durational requirement in the Information, and Ms. Ms. Winger had no notice that the State alleged she negligently mistreated her animals over "extended period of time" sufficient to cause considerable suffering to each animal.

By requiring that the pain last long enough to cause "considerable suffering," the Legislature "clearly

indicated a durational requirement." *State v. Loos*, 14 Wn. App. 2d 748, 766, 473 P.3d 1229 (2020).. "The State must demonstrate that the amount of pain the [animal] victim experienced was considerable and the pain the victim experienced lasted for a significant period of time." *Id.*

This causal link between the criminal negligent conduct charged and the requirement that the negligent acts cause "physical pain that extends for a period sufficient to cause considerable suffering" to the animal is an essential element of the offense and must be provided in the Information . *See* RCW 16.52.205.

For example, in *Peterson,* the Information alleged the negligent treatment occurred during an extended period of 68 days from June 1 to September 9, 2009. *State v. Peterson*, 174 Wn. App. 828, 841, 301 P.3d 1060 (2013), *abrogated on other grounds by State v. Jallow*,

16 Wn. App. 2d 625, 482 P.3d 959 (2021). Similarly, in *Jallow*, the prosecution alleged the underlying conduct occurred within a 35-day period, specifying an extended time of 19th day of October, 2016, through on or about the 9th day of December, 2016. 16 Wn. App. 2d at 636.

Here, Ms. Winger went to trial preparing to defend against the charge that she was criminally negligent, and starved and/or dehydrated, several animals "on or about April 29, 2018." CP 63. The inartful language of the charging document did not fully inform Ms. Winger of full extent of or "the nature of the accusations" against her. *Kjorsvik*, 117 Wn.2d at 101.

If for example, the Wingers neglected to feed Kissy the horse on or about April 29, 2018, that brief hunger and thirst could not cause a 1,000 lbs horse to

weigh 700 lbs as later alleged in closing by the prosecution. 2RP at 591. As another example, one day of hunger and starvation did not make Baby the dog go down from his optimal weight of 66.2lbs to 42 lbs as alleged by the State. *See* 2RP at 588-89. One day of hunger and thirst is not the extended hunger and dehydration that causes an animal substantial pain extending for a period sufficient to cause considerable suffering.

The State's case-in-chief presented evidence of starvation and dehydration on or about April 29, 2018. At the close of the evidence, the State had not proved the hunger and thirst on or about April 29, 2018, extended for a significant period of time. *Loos*, 14 Wn. App. 2d at 767. The brief April 29, 2018 starvation or dehydration is not causally linked to any "substantial

and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering."

Ms Winger was charged with the negligent starvation or dehydration that happened on or about April 29, 2018. The trial court found Ms. Winger guilty negligent acts that she may have happened for "12-days," "many months," and even many "years," which is a much more expansive time frame. CP 106 at 3.

In short, the charging document failed to contain the durational element of the charged crime.

b. The ruling also conflicts with Kjorsvik because it misconstrues the prejudice of omitting that necessary durational element from the charging document.

The Court of Appeals held that the Information was "adequate" based on *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996) because 'on or about' is sufficient to admit proof of negligent acts that occurred at any time within the statute of limitations. App. 9.

Therefore, "[r]ead as a whole, the charging document adequately alleged Ms. Winger's conduct occurred over an extended period of time, to include on or about April 29, 2018." App. 9. The statute of limitation for most felonies is ten years. By this logic the "on or about" April 29, 2018 encompasses all negligent acts of mistreatment Ms. Winger may have committed from April 29, 2008 until April 29, 2018. Which makes no sense.

More importantly, this absurd conclusion runs afoul of this Court's precedent in *Kjorsvik*. That durational element cannot be fairly implied from any language in the charging document.

Under *Kjorsvik's* first prong, Ms. Winger should prevail because the necessary temporal element does not appear in any form, or by fair construction of the charging document. *Kjorsvik*, 117 Wn.2d at105-06.

And even if this necessary temporal element was present by a liberal, fair construction of the charging document, *See State v. Chambers*, 23 Wn. App. 2d 917, 924, 518 P.3d 649 (2022), *review denied*, 200 Wn.2d 1030, 523 P.3d 1179 (2023), the court must reverse because Ms. Winger showed she actual prejudice by the inartful language. *Kjorsvik*, 117 Wn.2d at 105-06.

Ms. Winger demonstrated that she was convicted for conduct that happened days, months, or years before April 29, 2018. The court's findings of fact belie the court's ruling. The trial court's findings of fact 13 was that Ms. Winger committed acts of starvation on each dog that lasted *several months* prior to April 29, 2018, even though on the day in question the dogs had food infront of them. CP 106 at 3 (emphasis added). And the finding of fact 21 was that Ms. Winger starved the horse by not feeding it appropriately for many

months or years, even though the horse appeared to have alfalfa on April 29, 2018. CP 106 at 3.

The Court of Appeals overlooked Ms. Winger's showing of actual prejudice. It is conclusory about the lack of actual prejudice and summarily declares that "nothing" in the record suggests that Ms. Winger was confused about the nature of the charges or that she limited her defense strategy based on the information's wording. App. 9 *citing Derri*, 199 Wn.2d at 691. The Court of Appeals' decision conflicts with *Kjorsvik* and this Court should accept review.

E. CONCLUSION

Ms. Winger respectfully requests this Court to accept review and reverse the first degree animal cruelty convictions for a constitutionally deficient Information.

This brief complies with RAP 18.7 and contains 2,969 words.

DATED this 10th day of July 2023.

Respectfully submitted,

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APPENDICES

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

STATE OF WASHINGTON, Respondent, v. THELMA WINGER, Appellant.	)))))))))	No. 39502-2-III UNPUBLISHED OPINION

PENNELL, J. — Thelma Winger appeals her judgment and sentence, imposed as a result of her convictions for first and second degree animal cruelty. Finding no error, we affirm.

FACTS

After receiving reports of suspected animal mistreatment, law enforcement searched a rural property owned by Paul and Thelma Winger on April 29, 2018. The search revealed several animals that were emaciated and malnourished. Pens and

kennels were soaked in urine and caked in feces. Many of the animals had protruding bones and open sores. The Wingers claimed they were experiencing financial difficulties. However, there was dog food at the residence, including some unopened bags. One of the investigating officers described the scene as one of worst cases of animal mistreatment they had ever witnessed.

Officers seized several of the animals and transferred them to the custody of animal rescue organizations. Veterinarians considered the possibility of euthanasia, but opted instead to provide medically necessary treatment.

The State separately charged the Wingers with six counts of first degree animal cruelty as to a horse, three dogs, a cat, and a bird. The Wingers were also charged with second degree animal cruelty against some turtles and doves. Each of the first degree charges alleged that

> on or about April 29, 2018, [the defendant] did, with criminal negligence, starve, dehydrate, or suffocate an animal . . . and as a result caused death or substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering; contrary to RCW 16.52.205 . . . .

Clerk's Papers (CP) at 11-13. The Wingers waived their rights to a jury trial and their cases were jointly tried to the bench.

At trial, the court heard testimony from treating veterinarians who testified the animals were gravely emaciated. The veterinarians opined that the animals' conditions

were the result of a lengthy and extremely painful period of deprivation of adequate calories. Animal rescue professionals testified that the rescued animals readily ate and recovered—continually gaining weight—as soon as they were provided proper nutrition.

One of the animal rescue volunteers who testified at trial was an individual named Jo Ridlon. Ms. Ridlon explained that she first became aware of possible mistreatment of the Wingers' animals when she received reports from community members, including George Blush, who apparently runs a pet food bank. Ms. Ridlon testified that she and Mr. Blush spoke to Paul Winger by phone a few days prior to the animals' rescue. Ms. Ridlon testified that she told Mr. Winger that her organization would help bring a veterinarian to the Wingers' property if the Wingers did not want to take their horse to a vet, but that the Wingers "refused" to schedule a vet appointment. 1 Rep. of Proc. (RP) (May 19, 2021) at 183-84.

On cross-examination, Ms. Winger's counsel asked Ms. Ridlon how she could remember the specifics of this interaction that happened more than three years prior:

> [DEFENSE COUNSEL]: . . . [Y]ou don't have any record of [the phone conversation], correct?
> [MS. RIDLON]: It's kind of memorialized in an email.
> [DEFENSE COUNSEL]: Between who?
> [MS. RIDLON]: Me and Chief [Ryan] Spurling [of the Mason County Sheriff's Office].
>
> [DEFENSE COUNSEL]: . . . [H]ow do you know there's an email?

[MS. RIDLON]: Because I wrote it.

Id. at 185.

The existence of an e-mail came as a surprise to both parties. The prosecutor thereafter obtained copies of the relevant e-mail correspondence and produced them to the defense.

The defense raised a *Brady*[1] challenge and moved to dismiss the charges. The defense argued that the State had failed to disclose the e-mails for more than three years, and that one sentence in one of the e-mails was exculpatory because it showed the Wingers had obtained food for their animals. The sentence in question is written by Ms. Ridlon and reads: "George [Blush] said when *he delivered dog food to* [*the Wingers*] there were several things that didn't seem right but he didn't say anything." Ex. 3 at 1 (emphasis added); *see also* 1 RP (May 20, 2021) at 192.

Defense counsel explained they had learned from their clients that Mr. Blush had delivered them dog food, and that counsel had thus tried to interview Mr. Blush, who was hostile and refused to voluntarily participate. Defense counsel claimed that, if they had known there was independent evidence that Mr. Blush delivered dog food, the case would have been "a very different ballgame." 1 RP (May 20, 2021) at 212. The prosecutor

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

disagreed, pointing out that "[t]he defense was on notice that food was provided to these animals," *id.* at 218, and noting that defense counsel was still free to interview Mr. Blush and subpoena him for a deposition if he proved uncooperative. *Id.* at 220.

The trial court continued the proceedings and entered an order requiring the State to search for more e-mails at the sheriff's office relating to the Winger case. Although the defense speculated that there were more Ridlon/Spurling e-mails than the ones disclosed, the search of sheriff's office records revealed no additional e-mails. The State acknowledged that, as a matter of policy, county government e-mails were ordinarily retained for only two years, so any e-mails about the Winger case were likely deleted as a matter of course.

The State also informed the trial court that the e-mail "which [defense] counsel is basing their argument on"—that is, the one containing the purportedly exculpatory sentence—was "from and to the same individual." 1 Supp. Rep. of Proc. (June 28, 2021) at 5. An examination of exhibit 3 confirms this: the e-mail that the Wingers alleged was exculpatory was both sent *and* received by Ms. Ridlon's e-mail address. It appears from the exhibit that Ms. Ridlon may have inadvertently replied to herself, because the most recent e-mail in the chain was an e-mail from her to Chief Spurling (stating, "Sorry phone is on 1% I'll be more informative when home."). Ex. 3 at 2. The trial court rejected the

Wingers' *Brady* challenge, basing its denial on the Wingers' failure to show that the e-mail in question was in fact ever received by Chief Spurling.

After the State rested, the court dismissed the first degree charge as to the bird at the State's request. The court also granted the Wingers' motion to dismiss the second degree charges as to the turtles and the doves, concluding the State had presented no evidence those animals were in pain.

The Wingers also moved to dismiss the first degree charge related to the cat. Counsel argued that the State had not proven the cat's condition was not caused by an underlying medical problem. Defense counsel agreed that there was a "prima facie" case of second degree animal cruelty as to the cat and that an amended charge would be "appropriate." 2 RP (Aug. 5, 2021) at 574-75, 577-79. The trial court agreed with defense counsel's assessment and amended the charge pertaining to the cat to animal cruelty in the second degree.

The court convicted the Wingers of four counts of first degree animal cruelty as to the three dogs and the horse, and one count of second degree animal cruelty as to the cat. Ms. Winger was sentenced to 45 days of confinement, 30 days of which were converted to 240 hours of community service. The trial court also forbade Ms. Winger from ever

owning, possessing, caring for, or cohabitating with animals and ordered her to pay $6,963.09 in total restitution to the organizations that cared for the animals she neglected.

Ms. Winger filed a timely notice of appeal. A Division Three panel considered Ms. Winger's appeal without oral argument after receiving an administrative transfer of the case from Division Two.

ANALYSIS

Ms. Winger raises several challenges to her conviction and sentence. We address each in turn.

Sufficiency of charging document

Ms. Winger's first contention pertains to the sufficiency of the State's charging document. She claims the first degree animal cruelty charges failed to allege facts sufficient to support all elements of the offense.

We review the adequacy of a charging document de novo. *State v. Canela*, 199 Wn.2d 321, 328, 505 P.3d 1166 (2022). Criminal defendants are entitled to be informed of the nature and cause of the accusations against them. *See id.* (citing U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; CrR 2.1. Where, as here, a charging document is challenged for the first time on appeal, we liberally construe it in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Under this liberal standard we first

assess whether the necessary elements of the charged offense "appear in any form or by fair construction can be found" in the charging document. *State v. Chambers*, 23 Wn. App. 2d 917, 924, 518 P.3d 649 (2022), *review denied*, 200 Wn.2d 1030, 523 P.3d 1179 (2023). If this initial hurdle is met, we will reject the defendant's challenge unless the defendant can show actual prejudice. *See id.*

The information accused Ms. Winger of first degree animal cruelty under former RCW 16.52.205(2) (2015), which 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 and as a result causes . . . [s]ubstantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering . . . .

Ms. Winger contends her charging document was inadequate because it specified that negligent acts occurred on a single day, April 29, 2018. She argues that this limited time period is insufficient to support an allegation of physical suffering over an extended period of time, as required by the statute.

Ms. Winger's criticism is unpersuasive. The charging document did say that Ms. Winger's conduct occurred "on or about April 29, 2018." CP at 11-13. But it also contained the statutory language that the harm to the animals in Ms. Winger's care "extended for a period sufficient to cause considerable suffering." *Id.*; *see* former RCW 16.52.205(2); *see also Chambers*, 23 Wn. App. 2d at 925 (approving an

information that "used the verbatim language of the statutes"). Read as a whole, the charging document adequately alleged Ms. Winger's conduct occurred over an extended period of time, to include on or about April 29, 2018. *See State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996) (noting the phrase "'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi"). This was sufficient to convey the essential elements of the offense.

Ms. Winger asserts she was prejudiced by the wording of the charging document, but she fails to substantiate this claim. Nothing in the record suggests that Ms. Winger was confused about the nature of the charges or that she limited her defense strategy based on the information's wording. *See State v. Derri*, 199 Wn.2d 658, 691, 511 P.3d 1267 (2022) (noting when a charging document conveys the essential elements of an offense, the conviction will not be reversed in the absence of actual prejudice). Ms. Winger's unpreserved challenge to the sufficiency of the State's charging document fails.

Trial court's oral amendment of information

Ms. Winger contends her second degree animal cruelty conviction as to the cat was also unlawful, claiming the trial court sua sponte downgraded the charge from first degree to second degree. This complaint misrepresents the record. The trial court downgraded this charge at Ms. Winger's invitation. Furthermore, the amendment was appropriate

given the only change was to an inferior degree crime. *State v. Peterson*, 133 Wn.2d 885, 893, 948 P.2d 381 (1997). This challenge fails.

Sufficiency of evidence

Ms. Winger's third claim is that the record contains insufficient evidence of first degree animal cruelty's essential durational element: that Ms. Winger negligently caused substantial pain "extend[ing]" for a sufficient time period. Former RCW 16.52.205(2). She argues that the trial court's factual findings impermissibly relied on evidence outside the charging period, which she claims is limited to April 29, 2018.

For the reasons previously stated, the charging document did not limit Ms. Winger's offense conduct to only April 29, 2018. *See State v. Brooks*, 195 Wn.2d 91, 100-01, 455 P.3d 1151 (2020). Ms. Winger's sufficiency challenge therefore fails.

Failure to disclose exculpatory evidence

Ms. Winger next argues her case should have been dismissed because the State breached its duty to disclose exculpatory evidence when it did not turn over Jo Ridlon's e-mails. The law clearly requires the State to disclose evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). But Ms. Winger fails to show the State violated this obligation.

As an initial matter, we agree with the trial court that the State did not violate its duty to disclose exculpatory evidence because the Ridlon e-mail was never in the State's possession until after it came to light during Ms. Ridlon's trial testimony. Ms. Ridlon's copy of the e-mail indicates she sent it to herself, not Chief Spurling. The State does not violate its duty to turn over exculpatory evidence if it never possessed the evidence in the first place. *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) ("'[T]he prosecution is under no obligation to turn over materials not under its control.'" (quoting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991))).

Nor was the evidence in question exculpatory. The fact that the Wingers had access to dog food and still allowed their animals to become malnourished is indicative of criminal negligence. It is not exculpatory. Nothing about the information contained in Ms. Ridlon's e-mail tends to detract from the weight of the State's case.

Ms. Winger suggests that the e-mail would have impeached Ms. Ridlon's testimony. This mischaracterizes the record. Ms. Ridlon testified that the Wingers refused to accept veterinary treatment for their horse. She never testified the Wingers refused to accept food for their dogs. Moreover, at most, the Ridlon e-mail revealed there was, at one point, dog food delivered to the Wingers' home. The State itself had already furnished evidence of multiple bags of dog food that had been found at the Winger

residence. *See In re Pers. Restraint of Mulamba*, 199 Wn.2d 488, 503, 508 P.3d 645 (2022) (noting evidence is immaterial under *Brady* if it "can be considered cumulative of other trial evidence").

Cumulative error

Ms. Winger argues that cumulative error deprived her of a fair trial. "The cumulative error doctrine applies when a combination of trial errors denies the defendant a fair trial, even if any one of those errors individually may not justify reversal." *State v. Restvedt*, __ Wn. App. 2d __, 527 P.3d 171, 185 (2023). Ms. Winger has not demonstrated any individual errors at her trial. The cumulative error doctrine therefore is not grounds for relief.

Cruel punishment

As part of its criminal sentence, the trial court imposed a lifetime ban on dog and horse possession based on former RCW 16.52.200(4)(b) (2016), and further ordered that Ms. Winger not "harbor or own" any animal "or reside in any household where animals are present" based on former RCW 16.52.205(5)(a) (2016). *See* CP at 79. Former RCW 16.52.200(4)(b) required trial courts to impose a lifetime ban on ownership of "similar"[2]

[2] The legislature defined "similar animal" as, for mammals, any animal in the same taxonomic order; and for nonmammals, any animal in the same taxonomic class. *See* former RCW 16.52.011(2)(q) (2017).

animals based on a conviction for first degree animal cruelty and former RCW 16.52.205(5)(a) provided discretion to impose a lifetime ban on the ownership of *any* animals.[3] Ms. Winger contends her lifetime ban on animal possession is unconstitutionally cruel.[4] She therefore claims this portion of her judgment and sentence must be stricken.

We review the constitutionality of a punishment de novo. *State v. Bassett*, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). The United States Constitution forbids "cruel and unusual punishments." U.S. CONST. amend. VIII. The Washington Constitution similarly forbids "cruel punishment[s]." WASH. CONST. art. I, § 14. Because the state constitutional

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[3] The legislature amended former RCW 16.52.200(4)(b), effective June 11, 2020, to delete the word "similar." *See* LAWS OF 2020, ch. 158, § 5. The present statute now requires trial courts to impose a lifetime ban on *any* animal ownership when a person is convicted of first degree animal cruelty. *See also* RCW 16.52.205(5) ("[T]he court must order that the convicted person not own, care for, possess, or reside in any household where an animal is present."). LAWS OF 2020, ch. 158, § 6. Ms. Winger's offense conduct preceded these statutory amendments.

[4] Ms. Winger also argues that the forced forfeiture of her animals constituted an unconstitutional punishment, but her briefing mainly focuses on the lifetime ban on animal ownership. Former RCW 16.52.085(1) and (4) (2016) authorized the seizure of the animals Ms. Winger was charged with abusing. The details of the forfeiture of her other animals are not evident from the record. *See State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976) ("Matters referred to in the brief but not included in the record cannot be considered on appeal."). In any event, because we conclude Ms. Winger's lifetime ban on animal ownership was constitutional, we necessarily also conclude that the forced forfeiture of her animals was constitutional, because a forfeiture of her animals was logically necessary to effectuate the lifetime ban.

text is more protective than that of the Eighth Amendment to the United States Constitution, if a sentence is not cruel under the Washington Constitution, "it is necessarily not cruel and unusual under the Eighth Amendment." *State v. Moretti*, 193 Wn.2d 809, 820, 446 P.3d 609 (2019); *see also Bassett*, 192 Wn.2d at 78, 80, 82.

Ms. Winger argues the lifetime ban on animal ownership is categorically unconstitutional or that, alternatively, it is disproportionate under the four factors elucidated in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).

A categorical analysis is not applicable to Ms. Winger's case. A claim that a sentence is categorically unconstitutional focuses on "the nature of the offense or the characteristics of the offender." *Bassett*, 192 Wn.2d at 84. There are no distinctive characteristics shared by all animal owners nor by all animal cruelty offenses. We are "free to choose the most appropriate framework" for an individual case, and here a categorical-bar analysis is inapposite. *Id.* at 83.

Apart from the categorical analysis, a punishment may be unconstitutionally cruel if it is grossly disproportionate to the crime of conviction. *See id.* at 82-23. In *Fain*, our Supreme Court adopted four factors to determine whether a punishment is unconstitutionally disproportionate: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other

jurisdictions for the same offense; and (4) the punishment meted out for other offenses in Washington. 94 Wn.2d at 397. We address each of the relevant factors in turn.

1. Nature of the offense

The first *Fain* factor analyzes the severity of the offense and the facts of the defendant's case. *See State v. Morin*, 100 Wn. App. 25, 30-31, 995 P.3d 113 (2000). This factor may weigh against constitutionality where the defendant's crimes were "relatively minor," that is, where they did not "threaten violence to persons or property." *Fain*, 94 Wn.2d at 398.

Ms. Winger's crimes are not minor. The State's witnesses testified that the Wingers' mistreatment of their animals was horrendous. Contrary to Ms. Winger's protestations, her failure to provide for her animals was not solely attributable to her poverty. A person who, as a result of poverty, cannot afford food for their animals, has other options besides simply letting the animals go hungry. There was evidence at trial that the Wingers were offered veterinary care and that there were organizations able to provide food. Yet the Wingers still let their animals starve to the brink of death. The first *Fain* factor is not indicative of disproportionality here.

2. Legislative purpose

The second *Fain* factor looks to legislative purpose. The legislature added the possibility of lifetime bans on animal ownership to the animal cruelty statutory scheme in 2009. *See* LAWS OF 2008, ch. 287. At the time, the Senate Bill Report on the proposed statutory change explained:

> People are allowed to mistreat animals time and again because the penalties involved are *not severe enough*. Right now, those who are convicted of killing or severely abusing animals are only prohibited from owning a like animal for a period of two years. Current law does not prohibit these offenders from owning other animals even though *they are likely to mistreat them as well*. . . . Many other states have already passed *more stringent* penalties for animal mistreatment and *Washington should follow suit.*

S.B. REP. ON SUBSTITUTE S.B. 5402, 61st Leg., Reg. Sess. (Wash. 2009) (emphasis added). Ms. Winger contends that this passage reveals the legislature intended for its strictest punishments to reach only repeat offenders. She misreads that passage. The Senate Bill Report reveals an intent to quell the possibility of recidivism by making lifetime bans on animal ownership possible.

Moreover, although she was sentenced under the former statute, since the commission of Ms. Winger's crimes the legislature made a lifetime ban on animal ownership *mandatory* for first degree animal cruelty rather than permissive. *See* LAWS OF 2020, ch. 158, §§ 5-6. Thus, legislative history, as well as the former statute's very text,

evidences the legislature's ongoing intent to expand protection of animals by imposing increasingly strict punishments on offenders. This factor does not suggest disproportionality.

3. Punishment in other jurisdictions

The third *Fain* factor requires this court to analyze what punishment Ms. Winger would have received in other jurisdictions for the same offenses. To analyze this factor, we do not need to conduct "an exhaustive analysis of laws in other jurisdictions" if it can be established that Washington's law is at least "similar" to legislation throughout the country. *Morin*, 100 Wn. App. at 31-32. Moreover, because a person "could have received" a different "sentence in another jurisdiction, that fact alone is not dispositive." *State v. Reynolds*, 21 Wn. App. 2d 179, 199, 505 P.3d 1174 (2022).

Ms. Winger contends that RCW 16.52.200(4)(b), making a lifetime ban on any animal ownership mandatory for a first degree animal cruelty conviction, is the harshest law in the country. But Ms. Winger was not sentenced under the present statute. Thus, the present statute's constitutionality is not properly before this court, and we need not reach that question. The sentencing prohibition on Ms. Winger owning any animals was instead made under former RCW 16.52.205(5)(a), which gave the trial court discretion to impose such a lifetime ban.

Former RCW 16.52.205(5)(a) is similar to legislation in other states. For example:

- In Colorado, in the event of a conviction for felony animal cruelty, trial courts must enter an order prohibiting the defendant from owning a pet animal for a period of three to five years unless a treatment provider specifically recommends against such a prohibition and the court agrees with the provider's assessment. Colo. Rev. Stat. § 18-9-202(a.5)(V.5).
- In Alaska, trial court judges have discretion to prohibit a defendant from owning animals for up to 10 years in the event of a felony or misdemeanor conviction for animal cruelty. Alaska Stat. § 11.61.140(g)(3), (h)(3).
- In Oregon, for various animal cruelty offenses, judges are required to impose a 5-year or 15-year prohibition of ownership of animals in the same genus as the abused animal. Or. Rev. Stat. § 167.332(1)(a)-(b).
- Maine allows lifetime bans. In Maine, trial courts are authorized to prohibit individuals convicted of a specific class of animal cruelty offense from owning animals "for a period of time that the court determines to be reasonable, *up to and including permanent relinquishment*." Me. Stat. tit. 17, § 1031.(3-B)(D)(1) (emphasis added). For another class of offense, Maine trial courts are required to impose such a prohibition, "up to and including permanent relinquishment."

Me. Stat. tit. 17, § 1031(3-B)(D)(2). And trial courts are permitted to "impose any other reasonable restrictions on a defendant's future ownership or custody of an animal as determined by the court to be necessary for the protection of animals." Me. Stat. tit. 17, § 1031(3-B)(D)(3).

- Virginia ostensibly allows lifetime bans. In Virginia, "[a]ny person convicted of [animal cruelty] may be prohibited . . . from . . . ownership of companion animals." Va. Code Ann. § 3.2-6570(G).
- In Delaware, "[a]ny person convicted of [felony animal cruelty] shall be prohibited from owning or possessing any animal for 15 years after said conviction, except for" animals raised for resale. Del. Code Ann. tit. 11, § 1325(d).
- Illinois ostensibly allows lifetime bans. In Illinois, trial courts "may order that the convicted person . . . may not own . . . any other animals *for a period of time that the court deems reasonable*." 510 Ill. Comp. Stat. 70/3.04(c) (emphasis added).

Although other states' legislation may not precisely track Washington's, former RCW 16.52.205(5)(a) is at the very least not dissimilar to the norm in several other states. And at least a handful of states—such as Maine, Virginia, and Illinois, listed above—apparently allow trial courts discretion to impose a lifetime ban. And Ms. Winger was punished under such a discretionary statute, not the present mandatory statute. The former

statute under which Ms. Winger was punished is not far outside the mainstream under national norms.

4. Punishment in Washington for other offenses

The final *Fain* factor asks this court to compare Ms. Winger's punishment to punishments for other offenses in Washington.

It is not unusual in Washington for a convicted person to lose privileges as a result of their criminal activity. For instance, Washington revokes driver's licenses for vehicle-related offenses that do not necessarily involve any harm to persons or property. *See* RCW 46.65.020; *cf. State v. Clifford*, 57 Wn. App. 127, 129-30, 787 P.2d 571 (1990) (driving is a privilege, not a right). Such revocations do not raise constitutional concerns even though, for many people, the ability to operate a motor vehicle is essential to their participation in society.

Ms. Winger contends her punishment is severe compared to others in Washington because, under the statutory scheme, there is no chance for her to ever restore her ability to own animals. *See* RCW 16.52.200(5) (allowing convicted individuals to petition for restoration of their legal ability to own animals, but only if their convictions are in the second degree). She attempts to compare the prohibition on animal ownership to prohibitions on firearm ownership. Ms. Winger notes that, except for those convicted of

the most severe crimes, convicted individuals are able to petition for restoration of the right to own guns after a few years. *See* RCW 9.41.040(1)(a), (4)(a); *State v. Swanson*, 116 Wn. App. 67, 70-71 & n.2, 76, 65 P.3d 343 (2003). She notes this is a contrast to her situation, where restoration will never be an option, and argues this supports a conclusion that her punishment is unconstitutionally cruel.

Ms. Winger's comparison to gun ownership undermines her argument. Gun ownership is constitutionally protected. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, __ U.S. __, 142 S. Ct. 2111, 2135, 213 L. Ed. 2d 387 (2022). Pet ownership is not. Despite its constitutional protection, gun ownership can, at times, be restricted based on compelling interests. *See District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). If a government can constitutionally forbid convicted individuals from owning guns—a specifically enumerated constitutional right—it can certainly limit convicted individuals' ability to own animals, which gets no mention in constitutional text.

None of the applicable factors support a conclusion that the ban on ownership of animals is grossly disproportionate to Ms. Winger's crimes. The punishment therefore survives constitutional scrutiny.

Restitution

RCW 16.52.200(6) requires an individual convicted of animal cruelty "be liable for reasonable costs incurred . . . by law enforcement agencies, animal care and control agencies, or authorized private or public entities involved with the care of the animals." The provision goes on to define "reasonable costs" to include "expenses of . . . the animal's care, euthanization, or adoption." RCW 16.52.200(6). Here, the trial court awarded restitution to two organizations that cared for the animals after the animals were taken from the Wingers' property.

Ms. Winger challenges the restitution award. She does not dispute the trial court had a legal basis for imposing restitution. She also does not claim the amounts awarded were inaccurate. Instead, she claims the restitution amount was unreasonably high because it exceeded the cost of euthanization.

We review a trial court's restitution order for abuse of discretion. *State v. Deskins*, 180 Wn.2d 68, 77, 322 P.3d 780 (2014). A trial court's decision is an abuse of discretion when it is based on untenable grounds or untenable reasons, or is otherwise manifestly unreasonable. *Id.* Ms. Winger's challenge falls far short of meeting this standard.

The restitution statute at issue plainly states a convicted individual may be held responsible for reasonable costs associated with "the animal's care, euthanization, *or*

adoption." RCW 16.52.200(6) (emphasis added). It does not limit a defendant's obligations to the least expensive of these options. In cases of extreme abuse or neglect, requiring months or years of rehabilitation, euthanasia will often be less expensive than providing medical care. Nevertheless, the statute allows care providers to make an appropriate decision based on an animal's medical needs, not cost. When it is medically appropriate to provide care, a convicted person is liable for this expense. The trial court did not abuse its discretion in awarding restitution.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Ms. Winger filed a pro se statement of additional grounds for review (SAG), raising what appear to be five points. Three of Ms. Winger's grounds appear to be based on facts outside the record. These include a claim of ineffective assistance of counsel based on counsel's alleged failure to introduce veterinary records; a claim that prosecutorial delay caused the unavailability of an expert witness; and allegations of professional misconduct by one of the State's veterinarians. We cannot review facts outside the record of this direct appeal. Ms. Winger's recourse for these claims is to file a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Ms. Winger also appears to request that we address arguments raised in a brief filed in the Division Two case of *State v. Shoop*, 22 Wn. App. 2d 242, 510 P.3d 1042 (2022). Ms. Winger does not explain why her case is analogous to *Shoop* or what aspects of the *Shoop* case are pertinent to her appeal. Division Two rejected all of Mr. Shoop's arguments in a partially published opinion. *See Shoop*, 22 Wn. App. 2d at 245-46. The Supreme Court subsequently affirmed Division Two's decision. *See State v. Shoop*, No. 101196-2 (Wash. May 4, 2023), https://www.courts.wa.gov/opinions/pdf/1011962.pdf. We decline to dig through the *Shoop* appellate brief in order to discern why this already-rejected argument might apply to Ms. Winger's case. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). This ground for relief fails as inadequately raised.

Finally, Ms. Winger attached a document to her SAG entitled "Issues with Animal Cruelty Cases & Specifically Mason [County] Sheriff's Dept." SAG at 3-10. Simply attaching this document is insufficient to "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). We therefore decline to address the attached document.

CONCLUSION

The judgment and sentence are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Staab, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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** under **Case No. 39502-2-III**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Timothy Whitehead
[timw@co.mason.wa.us]
Mason County Prosecuting Attorney

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: July 10, 2023

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