30883-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHERINA L. EVERMAN-JONES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

30883-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHERINA L. EVERMAN-JONES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

I.

APPELLANT'S ASSIGNMENTS OF ERROR

The State will not be repeating the defendant's Assignments of Error due to their bulk.

II.

ISSUES PRESENTED

A. ARE THERE ANY ERRORS IN THE TRIAL COURT'S FINDINGS OF FACT OR CONCLUSIONS OF LAW?

B. DID THE ANIMAL CONTROL OFFICER VIOLATE THE DEFENDANT'S RIGHTS BY ENTERING THE DEFENDANT'S OPEN BACKYARD TO EXAMINE THE DOG AND THE DOG'S CIRCUMSTANCES?

C. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS?

D. DOES REPEATING A SERIES OF ARGUMENTS RENDER THOSE ARGUMENTS MORE VALID?

III.

STATEMENT OF THE CASE

The State notes that the defendant does not put forward a proper Statement of the Case. The Statement in the defendant's opening brief is largely argument which is counter to the requirements of a Statement of the Case under RAP 10.3(5). The rules require no argument be present in the Statement of the Case.

[The citations to the Verbatim Report of Proceedings are listed as "RP pg. Number" and refer to the transcript labeled "2 February and 20 April 2012."]

Ms. Nicole Montano works for the Spokane County Regional Animal Protection Service. RP 22. Before going to work for SCRAPS. Ms. Montano worked as a veteran airy assistance for approximately 15 years with various veterinary clinics around Spokane. RP 22-23. On August 10, 2011 SCRAPS received a phone call in the early afternoon with a complaint regarding the condition of a dog located in Marshall. RP 23. Officer Montano responded to the call and arrived at the location at approximately 1:30 p.m. RP 23.

The officer pulled into the driveway at the residence and got out of her truck. RP 23. Standing next to her truck the officer observed what appeared to be a very thin dog tethered in the backyard. RP 23. Ofc. Montano was able to see the dog's hip bones, its ribs, and its spinal process. RP 24. Ms. Montano went to the front door of the residence and knocked but there was no answer. RP 24.

Given the original assessment from the driveway, the officer went into the backyard and approached the dog. RP 24. The officer could see a "completely emaciated" dog. RP 24. According to Officer Montano, there were no fat deposits on the dog and there appeared to be a loss of muscle mass. RP 24. The Ofc. looked around the yard had determined that the dog was tethered in the backyard with no doghouse and no food. RP 24. There was some water. RP 24.

After finishing her examinations, Officer Montano "...determined that the situation warranted immediate removal for the dog." RP 25.The officer took pictures of the dog and then loaded him into her vehicle for transport to the Legacy Animal Medical Center where the dog was seen by Dr. Mark Fosberg. RP 29.

Prior to departing the area, Officer Montano contacted a neighbor who turned out to be any defendant's father. RP 31.

Once the feeding was commenced by the caretakers, the dog gained 26.1 pounds in 21 days. RP 33.

Dr. Mark Fosberg testified that he is a veterinarian of some 30 years. RP 71. Dr. Fosberg examined the dog in question and determined that the dog was "...a very thin, emaciated dog." RP 73. Dr. Fosberg noted that Dodd had muscle wasting along the legs and various signs of malnutrition. RP 74,75.

Ms. Rachael McCully is the defendant's sister and Ms. McCully testified for the defendant. According to Ms. McCully, the dog in question was fed in a normal manner. RP 160-66.

A Mr. Lyle Polack testified that the defendant is the daughter of a long-time friend of Mr. Pollack. RP 169. Mr. Pollack stated that he never saw the dog in pain and had observed the defendant feeding the dog on a two meal per day schedule. RP 171.

Ms. Amy Tobin testified that she was a neighbor of the defendant. RP 175. According to Ms. Tobin, she knew that the defendant bought dog food. Ms. Tobin testified that she did not see the dog in pain. RP 178.

Ms. Diana Everman testified that she is the defendant's mother. RP 182. Ms. Everman testified that the dog was fed regularly and was not in pain.

Ms. Rhonda Perry testified that she lived not far from the defendant and that she had not seen the dog in pain. RP 189-193.

The defense called Ms. Erica Hearrean who is the wife of one of the defense counsels. RP 195. She testified that she took some pictures of the dog and researched the flavor of Taste of the Wild dog food. RP 196, 198.

The defendant testified as to the types of food she fed the dog, the frequency of meals, etc. As with previous defense witnesses, she stated that she had not seen the dog showing pain. 210-225. The defendant testified regarding her efforts to get the dog returned to her. RP 234-35.

The jury was instructed on one count of First Degree Animal Cruelty. RP 277-78. The jury was also instructed as to the lesser included charge of Second Degree Animal Cruelty RP 279-81.

Following deliberations the jury returned a verdict of guilty on the charge of Second Degree Animal Cruelty. RP 311.

This appeal followed.

IV.

ARGUMENT

A. THERE WERE NO ERRORS IN THE TRIAL COURT'S FINDINGS OF FACT FROM THE DEFENDANT'S SUPPRESSION HEARING.

The defendant contests the findings of fact signed by the judge.

We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). We review the court's suppression hearing conclusions *de novo*. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).

The defendant claims that Finding of Fact No. 2 was erroneous because Officer Montano only "appeared" to see a thin dog when she pulled into the

defendant's driveway. The dog was chained in the backyard. 2/2/12 RP 5. The defendant reaches his conclusion of an erroneous finding by interpreting "appeared" as meaning not really seen, only something that *might* have been a thin dog seen from the driveway. This is a very strained interpretation of the finding of fact in question. The officer's actual testimony was that while standing next to her truck the officer could see the dog's hip bones, its ribs and its spinal process. Ms. Montano testified that from the driveway she could see the dog was in poor condition. 2/2/12 RP 5. "It was completely emaciated." *Id.* The defendant is incorrect when she claims the officer testified only that she could see a "thin" dog from the driveway. In fact there is no mention of "thin" in the officer's testimony on page 13 of the transcript referenced by the defendant) and the other reference by the defendant is an ongoing discussion regarding some pictures, not what the officer could see. 2/2/12 RP 32.

Other than the defendant's strained interpretation of the facts, there was ample evidence to support Ofc. Montano's description of the condition of the dog.

Finding of Fact No. Three is contested by the defendant pointing out that if someone were standing on the other side of the defendant's residence from the dog, that person would not be able to see the dog. Brf. of App 17. The defendant also claims the dog's chain was long enough to almost cover the backyard area.

What the defendant does not explain is how either of these claims affects the substantial evidence pertaining to the dog. The finding of fact No. Three

stated that the dog was in open view of anyone passing by on the public road. This was Ofc. Montano's testimony. 2/2/12 RP 6. There were no fences, trees, plants or other objects obstructing the view of the dog. Finding of Fact No. Three.

The defendant is quite correct that if an observer placed him or herself on the other side of the house from the dog, the dog would go unseen. The defendant does not cite to authority that requires all possible viewing angles to be included in an entry decision.

The defendant's claims do not mitigate the testimony of Ofc. Montano that there was little in the backyard and the road traversing the area was open to the public. There was substantial evidence in the form of Ofc. Montana's testimony that the backyard allowed essentially unimpeded observation of the dog.

The defendant's challenge to Finding of Fact No. Six does not present a proper challenge. The defendant's goal should have been to show there was no substantial evidence to support the Finding of Fact. Instead, the defendant launches into attacks on the officer for the officer's investigative procedures and not obtaining a search warrant. No search warrant was needed under RCW 16.52.085(1):

> (1) If a law enforcement officer or animal control officer has probable cause to believe that an owner of a domestic animal has violated this chapter or a person owns, cares for, or resides with an animal in violation of an order issued under RCW 16.52.200(4) and no responsible person can be found to assume the animal's

> care, the officer may authorize, with a warrant, the removal of the animal to a suitable place for feeding and care, or may place the animal under the custody of an animal care and control agency. In determining what is a suitable place, the officer shall consider the animal's needs, including its size and behavioral characteristics. An officer may remove an animal under this subsection without a warrant only if the animal is in an immediate life-threatening condition.

RCW 16.52.085(1).

It should be noted that the language of the statute does *not* say that the animal needs to be on death's doorstep. The statute discusses a "life-threatening condition." The officer is the only one who saw the dog in the backyard, the empty food bowl, spoke to the neighbor who clearly would not care for the dog, the lack of shelter and the dog's emaciated condition. The defendant called no witnesses at all and certainly no witness who had the same training, level of experience and direct knowledge of the case as did officer Montano.

The defendant claims that Finding of Facts 7-9 were "irrelevant, misleading and prejudicial...." Brf. of App. 20.

The Findings were relevant as they showed that the officer had no person with whom to leave the dog. The Findings were certainly not "misleading" as Ofc. Montano was relating what the neighbor (defendant's father) told her. The neighbor's attitude and his request that Ofc. Montano should just "...take the dog" make it plain that the dog was in a dangerous situation with no proper care available. 2/2/12 RP 9-11.

The defendant challenges Finding of Fact No. Ten which states that Ofc. Montano removed the dog "...given the life threatening condition of the dog as well as for safe keeping as there was no shelter for the dog." RP 287.

The defendant claims that there was no statement by Ofc. Montano at the time of the taking of the dog that the dog was in an immediate life threatening condition. Brf. of App. 21. The defendant is simply incorrect. Ofc. Montano testified that the reason she took the dog "was the totality of the situation, which is I have a dog in extremely poor physical condition tied up in a backyard with no protection from the sun." 2/2/12 RP 11. Despite the defendant's arguments, saving the dog from death *prior* to its demise would seem to be a laudable goal of animal control. The officer testified that the dog was in an "immediate life threatening condition." 2/2/12 RP 42.

Once again, the defendant misunderstands the purpose of appealing a set of Findings of Fact. To be sure, the defense has a completely different view of the events occurring on the day the dog was taken, as well as arguments pertaining to the situation of the dog and its surroundings. As mentioned previously, the purpose of challenging Findings of Facts is to show there was insufficient evidence to support the findings. If the trial court chooses to accept a certain set of facts, and the there is substantial evidence to support those facts, there can be no error on the part of the trial court.

Assuming this court agrees with the State's arguments in this brief regarding the Finding of Facts, the Conclusions of Law are likewise correct.

B. THE DEFENDANT'S CONSTITUTIONAL PRIVACY RIGHTS WERE NOT VIOLATED.

The defendant claims that her rights were violated when Ofc. Montano entered her backyard and seized her dog. Brf. of App. 26. The defendant argues that the animal control officer entered the curtilage of the backyard when she stepped away from her vehicle and into the yard.

The trial court had a debate with the parties regarding "curtilage," but a definition of curtilage has little direct bearing on this case. CP 297-302. The Washington State Supreme Court has held that the simple presence of an officer within the curtilage of a residence is not a violation of the owner's privacy rights. *State v. Seagull,* 95 Wn.2d 898, 632 P.2d 44 (1981). According to the *Seagull* court, each case must be evaluated to determine just how private the particular observation point might have been. *Seagull, supra* at 902.

The question is how much a reasonably respectful citizen might intrude to reach the same point as the officer. An officer with legitimate business may enter areas of the curtilage that are "impliedly open." While the officer is going to the questioned location, he or she is entitled to see whatever he or she can see. *Id.*

In other words an officer has the same license to enter the curtilage as would a reasonably respectful citizen.

In this case, Ofc. Montano reported that there was no fence, no buildings and the backyard was open to a public street traversing near the property. 2/2/12 RP 5-12. Given that the dog was chained in the open yard, it would seem to be a classic "open view" case. Ofc. Montano rang the home's doorbell but received no answer. The dog was loose, except for the restraining chain. Any citizen passing by could have heard the dog bark (if it barked), the chain rattle and generally see the presence of the dog.

The difference in this case is that the "reasonably respectful citizen" was a trained Animal Control Officer.

C. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF THE LESSER INCLUDED CRIME OF SECOND DEGREE ANIMAL CRUELTY.

The defendant makes several legally incorrect arguments along the lines of insufficient evidence.

The first error comes when the defendant attempts to claim the lesser included charge of second-degree animal cruelty was an "uncharged crime." Brf. of App. 37. Actually the lesser included charge of second degree animal cruelty was not "uncharged."

Even if the trial court had not read the amended information to the defendant, the defendant was on notice that she could be convicted of any lesser

included offense by way of being arraigned on the greater charge of First Degree Animal Cruelty. *State v. Royster,* 43 Wn. App. 613, 719 P.2d 149 (1986).

The next error made by the defendant is the attempt to claim that there was insufficient evidence to support the jury's conviction. "There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). The defendant admits to the truth of the State's evidence and the viewing of the State's evidence in a light most favorable to the prosecution.

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State asks that the information inserted by the defendant on pages 31-38 of the defendant's brief be stricken. The information was *not* part of the trial,

was not subject to challenge by the State and the majority of the data is irrelevant. The insertion of the type of data submitted by the defendant is not supported by any law or procedure. This case is not a Personal Restraint Petition, it is a direct appeal.

The defendant cites to her cross-examination in attempts to prove points regarding the condition of the dog and the feeding of the dog. These sorts of arguments are completely fallacious. In a sufficiency of the evidence argument, the evidence is viewed in a light most favorable to the State. The fact that the defendant puts forth her views of the evidence are completely pointless. As stated previously, "a claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d at 201. If the State's evidence is admitted as the truth, it makes no sense to argue about the facts of the case from the defendant's viewpoint. An appellate review is not a chance to re-argue the case.

The defendant has not shown that there was insufficient evidence to support the conviction, but rather, the defendant has shown repeatedly that she does not agree with the jury's decision. That is not a reason to reverse the jury's decision.

D. REWORDING AND REPEATING PREVIOUS ARGUMENTS DOES NOT MAKE THE DEFENDANT'S ARGUMENTS ANY MORE VALID.

For her final argument, the defendant re-words some of her previous arguments and puts them forth for another try at dismissal.

The defendant again argues that she was not arraigned on the lesser-included charge upon which she was convicted. As pointed out previously, the defendant was arraigned on the amended information which included the charge of First Degree Animal Cruelty. It has been the law for many years in Washington State that being arraigned on a charge puts the defendant on notice that he or she also faces any lesser included charges. *State v. Royster, supra.*

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 19th day of March, 2013.

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent, v. CHERINA L. EVERMAN-JONES, Appellant,	)	NO. 30883-9-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 22, 2013, I mailed a copy of the Respondent's Brief in this matter, addressed to:

David R. Hearrean
Attorney at Law
PO Box 10630
Spokane WA 99209

and to:

Cherina L. Everman-Jones
PO Box 23
Marshall WA 99020

3/22/2013 (Date) Spokane, WA (Place) Kathleen L. Owens (Signature)