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King County Prosecutor
Appellate Unit
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON MARKLEY,

Appellant.

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

The Honorable Cheryl Carey, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

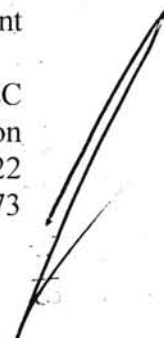


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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support the conviction for first degree animal cruelty.

2. The court erred in entering the following finding of fact under CrR 6.1(d): "No information was provided indicating where or from whom Alex was purchased." CP 79 (FF 6).

3. The court erred in entering conclusions of law "II" and "III" under CrR 6.1(d). CP 80.

Issue Pertaining to Assignments of Error

Whether appellant's conviction for first degree animal cruelty must be vacated due to insufficient evidence because the State failed to prove appellant was criminally negligent in starving a horse?

B. STATEMENT OF THE CASE

a. Procedural Facts

The State charged Jason Markley and his wife, Cherish Thomas, with first degree animal cruelty, alleging they were criminally negligent in starving or dehydrating a horse. CP 1; 3RP¹ 35-36. Markley opted to have his case tried by the judge while Thomas's case was tried to a jury, but evidence presented in front of the jury applied to both cases. 2RP 4;

¹ The verbatim report of proceedings is referenced as follows: 1RP - 10/24/12; 2RP - 12/4/12, 12/5/12; 3RP - 12/10/12; 4RP - 12/11/12; 5RP - 12/12/12; 6RP - 12/13/12, 12/14/12, 1/8/13.

4RP 9; 6RP 8. The court found Markley guilty as charged and sentenced him to 60 days in jail with 30 days converted to community restitution.² CP 70, 72, 78-81. This appeal follows. CP 82-90.

b. Trial

Jason Markley lived with his wife, Cherish Thomas, and their four children on a five acre parcel of rural property in the Auburn area. 4RP 97; 5RP 135-36. Markley was a stay-at-home dad and home-schooled the kids. 5RP 176. He decided to get a horse as an educational project and so the children could ride it. 5RP 136, 164. Markley looked on Craigslist to see what horses were for sale. 5RP 137. He noticed a horse that he thought would be good for the children because it was described in the posting as being good for beginners, liking children, and having a smooth gait for riding. 5RP 137, 164.

Markley and Thomas went to see the horse in Roy, Washington. 5RP 137, 154. The seller told them that if they wanted Hebow (the horse in the Craigslist posting), they would have to also take Alex (another horse) because the two horses could not be separated. 5RP 138-39. Hebow was fat and healthy. 5RP 141. Alex was old and thin. 5RP 138-39, 155-56, 168.

² The court declared a mistrial in Thomas's case after the jury was unable to reach a unanimous verdict. CP 111-12.

Markley acquired both horses sometime between the end of December 2010 and the beginning of January 2011. 5RP 136-37, 152. Neither Markley nor Thomas had ever cared for a horse before. 5RP 139.

It was soon discovered that Hebow was aggressive and would run Alex off to steal his food. 5RP 140. Thomas explained "previously they had been in one pen together at the previous owner's house and they had fed both horses together there for some time and Hebow had been taking the food of Alex for quite some time." 5RP 140. Markley, noticing Hebow's aggressive behavior towards Alex, separated the two horses at feeding time so that Alex could eat in peace. 5RP 140-42.

On April 8, 2011, Animal Control officer Jenee Westberg went to Markley's property after receiving two calls about one of the horses. 4RP 95-97, 135. She saw a horse with raised backbone, concaved skin around the ribs, and protruding hips. 4RP 99-100. The horse, identified as Alex, was emaciated. 4RP 100, 120-23. The other horse, Hebow, looked healthy and had a good weight. 4RP 109, 121.

Friendly and cooperative, Markley and Thomas told Westberg that they acquired the horse a few months before from Craigslist sometime

after Christmas. 4RP 101-02, 151. They thought it would be fun to ride a horse.³ 4RP 101, 151.

They never had horses before. 4RP 102. This was their first experience with a horse. 4RP 102. They had no previous horse knowledge. 4RP 103.

Markley told Westberg that he originally went to the local feed store (Reber Ranch), which had more expensive hay. 4RP 108. He switched to a local hay because it was less expensive and he could get more of it. 4RP 106, 108, 140. Markley told Westberg he was feeding three bales per week between the two horses.⁴ 4RP 156.

According to Westberg, horses cannot maintain on local hay alone, especially a horse in Alex's condition. 4RP 106-07. There are supplements available for horses. 4RP 108. Beet pulp is the most common. 4RP 108. Alfalfa pellets and timothy pellets are other supplements. 4RP 108. Markley had tried beet pulp as recommended by the farrier who shod Alex, but the beet pulp caused diarrhea so Markley

³ Thomas testified that her children rode Alex one time. 5RP 144. They enjoyed brushing and petting him. 5RP 151. No one rode Hebow because he was aggressive. 5RP 164.

⁴ In earlier testimony, Westberg said Markley was feeding the horses two bales of hay a week, but did not specify whether that was per horse or between the two horses. 4RP 108.

discontinued it. 4RP 108, 110-11, 141-42. He used another supplement but could not remember the name of it. 4RP 142.

They did not have a veterinarian. 4RP 111-12. They agreed with Westberg's recommendation that a vet come out to examine Alex. 4RP 113. Westberg explained: "I don't know that they were – they knew that they needed to be that concerned until I let them know that they needed to be that concerned because he was in pretty bad shape." 4RP 113. Westberg believed Alex was already thin when he came into their care. 4RP 160.

Dr. Heather Stewart, the veterinarian, was unable to come out that day, but recommended feeding timothy hay, which has more protein content, to Alex. 4RP 114. Thomas, accompanied by Westberg, bought the hay that same day from the feed store. 4RP 114. Alex ate it. 4RP 115. Westberg said she would make a follow up visit in two to four weeks to check on Alex. 4RP 146.

Dr. Stewart went to Markley's property on April 9, 2011 at Westberg's request. 4RP 19-20. She had both personal and professional experience working with horses. 4RP 17-18. Thomas told Dr. Stewart that Alex and Hebow were purchased off Craigslist as part of a package deal; the older horse was required to be taken along with the younger one. 4RP 24, 79.

Stewart saw Alex was emaciated, alert, bright eyed and grazing on grass. 4RP 20, 47, 67. She did a physical exam of Alex. 4RP 20-21. She did not examine Hebow, the much younger horse, because it did not look underweight. 4RP 24-25, 78-79.

The Henneke scale is used to judge a horse's body condition. 4RP 27. 1 is severely emaciated and 9 is obese. 4RP 27. Ideally, a horse should be between 4 and 6. 4RP 27. Stewart scored Alex as a 1.5 on the Henneke scale.⁵ 4RP 27-28. 1.5 is between emaciated and very thin. 4RP 28. She estimated Alex's weight as 750 pounds. 4RP 28-29. A horse of that size should be between 900 and 1100 pounds. 4RP 29. Dr. Stewart's overall conclusion was that Alex was "at risk for starving." 4RP 40. Horses, however, can live in an emaciated state for a very long time. 4RP 57.

Dr. Stewart estimated Alex to be in his late 20's judging from the condition of his teeth. 4RP 22. All teeth were present and there "weren't too many that were out of line where they would prevent him from being able to grind food." 4RP 22. Alex's teeth did not look bad enough to slow down eating. 4RP 81.

⁵ Westberg scored Alex as a 1.2. 4RP 105-06. Photos of Alex were admitted into evidence. Ex. 1-8, 10-14.

Alex had his hooves trimmed and new shoes put on a couple months earlier. 4RP 25. Alex was not examined by a vet before Stewart's arrival. 4RP 25-26.

Alex had access to five acres of pasture, which had been grazed down but still had some short grass in it.⁶ 4RP 29, 58, 61. According to Dr. Stewart, pastures in Western Washington are generally not good enough quality to feed a horse in winter. 4RP 61. Stewart explained that Western Washington hay has a lower nutritional value (lower in calories) than Eastern Washington hay. 4RP 73. The hay on site was a local Western Washington hay that was not a very good quality because it did not have a high-calorie per pound. 4RP 25. She described it as "decent" but "not very good for putting weight on horses." 4RP 25. It was only good for fat horses that maintain their weight without much food. 4RP 25, 75.

Stewart testified that Markley had been told to feed local hay. 4RP 42. Stewart recommended that Markley give Alex a better quality food like an orchard grass or alfalfa hay, which have more calories per pound. 4RP 25. Markley told Stewart that he had tried alfalfa pellets and beet

⁶ Westberg claimed there was no grass in the pasture. 4RP 158.

pulp supplements, which are often used to add calories to a horse's diet. 4RP 42-43, 72.

Stewart suspected Alex just needed a better diet but recommended checking for underlying medical conditions that might cause weight loss or inability to gain weight. 4RP 41. Horses pick up worms from pastures and the worms will "eat some of their food and make it hard for them to gain weight." 4RP 26. Parasites can interrupt the absorption of caloric intake. 4RP 43. Deworming is the remedy. 4RP 43. Deworming is an over-the-counter treatment for horses that removes worms from the horse's system. 4RP 26. Most horse owners will deworm on a varied schedule to maintain a horse's weight. 4RP 26. Markley had dewormed Alex two weeks before. 4RP 26, 43. Dewormer products vary in quality. 4RP 26. Stewart recommended another deworming using a brand name product that had a good success rate. 4RP 26-27, 49, 84.

Stewart did not recommend to Animal Control that Alex be seized, but rather that Alex quickly receive higher calorie food. 4RP 39-40, 52-53. Alex did not need to be seized if Markley followed her diet recommendations. 4RP 40.

Markley called Westberg the following day and asked if the horses could be placed somewhere else. 4RP 117. According to Westberg, "They didn't realize what they were getting into when they got horses, and

financially they didn't think they could afford to bring Alex back to health." 4RP 117. Markley turned the horses over to Westberg that same day.⁷ 4RP 117-18, 128.

Animal Control Shelter Sergeant Chelsea Eykel created a specialized feeding plan for Alex based on her experience with older, emaciated horses.⁸ 5RP 22-24, 34, 40. She explained that horses, while large, are actually fragile creatures. 5RP 25, 30. A horse without adequate ongoing nutrition can die if it is overloaded with nutrients too quickly. 5RP 24-28, 30. Beet pulp is a good, inexpensive way to put weight on horses. 5RP 29. But a horse can have an adverse reaction if suddenly given beet pulp. 5RP 29-30

Alex arrived at Dr. Hannah Mueller's facility on April 14, 2011. 5RP 69. Dr. Mueller is a veterinarian that specializes in horses and horse rehabilitation in particular. 5RP 62-64. Mueller scored Alex a 1 out of 9 on the Henneke scale — severe emaciation, the point before death. 5RP 70. Mueller maintained feeding only local hay to a horse of Alex's age is insufficient because it does not contain enough calories for a senior horse and most senior horses cannot be on a hay-only diet; such horses need a

⁷ Westberg was surprised and shocked that criminal charges were later brought against Markley and his wife. 4RP 126.

⁸ Eykel scored Alex as a 1.5 on the Henneke scale. 5RP 31.

mash supplement as an additional fat source, such as beet pulp, grass hay or alfalfa pellet. 5RP 86.

Dr. Mueller opined horses experience pain because they have the same nervous system as humans: "So when we feel hunger pains in our stomach and feel that ache, we haven't eaten, that's the same pain that horses are going to be feeling in their stomach." 5RP 65-66. Emaciation causes pain in a horse's stomach. 5RP 67. Ulcers are assumed to form. 5RP 67, 116. Achy muscles and joints are another form of pain caused by emaciation. 5RP 67. Horses are stoic animals. 5RP 31-32, 66-67. Dr. Mueller concluded Alex was in pain due to his severe emaciation and depressed demeanor. 5RP 117.

Dr. Mueller explained emaciated horses need to be fed small frequent meals over a two week period to allow their metabolism to adjust before allowing a free choice feed. 5RP 68. If the horse is fed too much too quickly, the horse can crash, get colic, and die. 5RP 68. For this reason, Mueller created an evolving feeding plan for Alex that included a mash diet consisting of soaked grass hay pellets and alfalfa pellets in addition to soaked beet pulp and hay and grains formulated for senior horses and oils and rice bran for fat sources. 5RP 82-84. Alex was in her care for three months. 5RP 83, 96.

Dr. Mueller was concerned about parasites. 5RP 70, 74. Testing confirmed Alex had a "severe" parasite load. 5RP 74. Parasites can harbor in the gastrointestinal system. 5RP 74. A high parasite load can cause weight loss through difficulty in absorbing food. 5RP 74, 76, 106.

Deworming or checking for parasites (fecal float) is routine horse husbandry and should be done every three months. 5RP 74-75. Horses with already high parasite loads need a special deworming schedule. 5RP 75. A normal horse with a high parasite load will have a load of 20 eggs per gram. 5RP 75. Alex had over 500 eggs per gram, which she described as "very excessive" and "extreme." 5RP 75, 106. The parasites were removed while Alex was in Mueller's care. 5RP 81-82, 107.

Alex was beginning to gain weight during the deworming process. 5RP 82. A severe enough parasite load can cause emaciation, but Mueller explained "it's always a combination of lack of nutrition and a parasite load. So you can have a severe parasite load and if you're feeding the horses twice as much of what they need, you can keep them at a good weight, so there's contribution here." 5RP 76.

Mueller was also concerned about Alex's teeth. 5RP 76. A dental exam showed "severe dental pathology." 5RP 77, 79. His teeth had not been floated (filed) in quite some time. 5RP 77. A dental float should be done once a year. 5RP 77. Without floating, the teeth can develop sharp

points and irregularities that cause difficulty with eating. 5RP 77-78. Dr. Mueller waited six weeks to float Alex's teeth. 5RP 78. Alex gained weight during that time, and was scored a 2.5 on the Henneke scale. 5RP 78. Alex was a 4 or 4.5 when he left Mueller's care after three months. 5RP 79, 96.⁹

Dr. Mueller opined Alex did not receive proper nutrition during the previous months. 5RP 86-88. The horse gained weight before he was dewormed and his teeth floated while in her care, so he could have been at a much better weight through increased nutrition. 5RP 87. Her opinion was that Alex was starved and experienced pain as a result of starvation for a long period of time. 5RP 99.

Dr. Mueller has clients for whom she does regular horse checkups. 5RP 97. She advises first time horse owners about food, deworming, teeth care and other medical needs. 5RP 97-98.

Cherish Thomas testified that Alex was thin when they acquired him and he looked the same when they surrendered him to Animal Control. 5RP 138-39, 155, 168. Alex's condition remained "pretty much constant" during the three months they had him. 5RP 143. Hebow was fat and

⁹ Photos of Alex showing an improved condition were admitted into evidence. Ex. 28, 29.

healthy when they acquired him and his condition remained unchanged. 5RP 141.

The farrier who put shoes on Alex told them in January 2011 that Alex was emaciated. 5RP 157. According to Thomas, Markley fed the horses about five times a day. 5RP 141. Markley bought local hay and feed from various establishments. 5RP 142-43. He also bought senior feed, alfalfa pellets, beet pulp, orchard grass, timothy grass, orchard/timothy mix, and alfalfa hay. 5RP 143. Thomas said "Everything that I saw was my husband was trying so hard to take care of Alex." 5RP 152.

Alex was given two deworming doses. 5RP 167-68. Alex was fed beet pulp during the deworming that caused diarrhea. 5RP 167. Before the deworming, Alex had been eating all the food given to him. 5RP 174-75. Earlier in the day, before Westberg arrived on April 8, Alex refused to eat the senior feed that Markley offered. 5RP 173.

Defense counsel argued Markley was not guilty of starving the horse because he fed the horse. 6RP 59-61. Alex was thin when acquired. 6RP 63, 70. At worst, Markley did not provide medical treatment in relation to the deworming process. 6RP 66-67. Counsel blamed the worms for Alex's emaciated state. 6RP 69-70.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR FIRST DEGREE ANIMAL CRUELTY.

Where a person has no previous horse experience, a failure to rehabilitate an old horse that was already starved before it came into that person's care does not constitute the crime of first degree animal cruelty. The evidence is insufficient to show Markley starved a horse with criminal negligence for this reason.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

After a bench trial, substantial evidence must support the trial court's findings of fact. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Markley challenges the finding that "No information was provided indicating where or from whom Alex was purchased." CP 79 (FF 6). Thomas testified that although she could not recall the seller's name, the horses were located in Roy, Washington. 5RP 154. Westberg testified that Markley told her "it was maybe the Yelm area." 4RP 101.

Conclusions of law following a bench trial are reviewed de novo. Stevenson, 128 Wn. App. at 193. Whether sufficient evidence supports a conviction is a question of law. State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2010). As set forth below, Markley challenges the trial court's conclusions of law that he violated the first degree animal cruelty statute. CP 80 (CL I, II).

A person is guilty of first degree animal cruelty "when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering." RCW 16.52.205(2).

"A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d).

The word "starves" is not defined by statute. Some dictionary definitions of "starve" include "to perish from lack of food," "to suffer extreme hunger," "to kill with hunger" and "to deprive of nourishment." Webster's Third New Int'l Dictionary 2228 (1993).

Markley was convicted of starving a horse.¹⁰ CL 80 (CL II). That horse, however, was already starved before it came into Markley's possession and control. What Markley was really convicted of is failing to timely rehabilitate the starved horse. The real legal theory of criminal liability is that Markley was criminally negligent in failing to get the horse's weight back up to a healthy level within the approximately three months it was in Markley's care.

Markley's conduct falls outside the ambit of the first degree animal cruelty statute. The law criminalizes the starvation of an animal. The law does not criminalize a failure to successfully rehabilitate a starved animal that a person has acquired. A person with no previous horse experience does not act with criminal negligence in failing to rehabilitate a starved horse.

Testimony demonstrated that Alex was an old horse that was already in an emaciated condition when acquired by Markley. Alex was

¹⁰ Because the trial court did not find Markley dehydrated the horse, that alternative means of committing the crime is not addressed on appeal. CP 78-80.

estimated to be in his late 20's. 4RP 22. Thomas testified that Alex's condition remained "pretty much constant," although he was looking better towards the end of March in that his ribs were less visible. 5RP 143, 167, 175. Alex dropped back to his earlier weight after he was dewormed and given beet pulp, to which he had an adverse reaction of diarrhea. 5RP 166-67. The uncontroverted testimony from Thomas was that Alex was in the same condition when they initially went to see him as he was when he was surrendered on April 9. 5RP 138-39, 155, 168.

Westberg, the State's witness, testified to her belief that the horse was already thin when it came into Markley's care. 4RP 160. This is consistent with the trial court's finding that "Alex had been starved for a prolonged period of time" and Dr. Stewart's testimony that horses can live in an emaciated state for a very long period of time. CP 79 (FF 20); 4RP 57. It is also consistent with evidence showing Alex was from the Roy or Yelm area, both of which are on the west side of the mountains where the quality of hay is lower in nutritional value. 4RP 101; 5RP 154.

Westberg also testified on direct that Markley had increased the food at first because Alex had started looking thinner. 4RP 110. On cross-examination, Westberg clarified Markley increased the food when Alex's condition did not improve. RP 140.

A person is negligent when he "fails to be aware of a substantial risk that a wrongful act *may occur*." RCW 9A.08.010(1)(d) (emphasis added). The "wrongful act" at issue here is the starvation of the horse. That wrongful act occurred *before* the horse came into Markley's possession. A person is not criminally negligent in failing to be aware of a substantial risk that a wrongful act had already occurred before the animals came into his or her care. Whether Markley is guilty hinges on whether he can be held criminally liable for not rehabilitating an already starved horse within the approximately three months that the horse was in his care.

Markley regularly fed Alex. 4RP 106, 108, 140, 156. According to the State's evidence, he used an alfalfa supplement and a beet supplement in addition to hay. 4RP 42-43, 72, 108, 110-11, 141-42. The beet supplement was discontinued because Alex had an adverse reaction to it. 4RP 108, 110-11, 141-42. Markley was trying. This is not a case where the owner of an animal just stopped feeding it to the point where the animal became emaciated. Markley fed Alex. The evidence, viewed in the light most favorable to the State, shows Markley did not feed Alex with the type of food needed to rehabilitate the elderly horse during the three months he was under Markley's care. But Alex maintained the weight he came in with. Significantly, Hebow, the young horse Markley

acquired at the same time as Alex, was of healthy weight even though it was only fed local hay. 4RP 24-25, 78-79, 106, 108-09, 121, 140, 156; 5RP 141. Hebow, like Alex, maintained his weight under Markley's care. 5RP 141. The difference is that Alex was an old horse in a starved state when he first came into Markley's care whereas Hebow was a young horse of adequate weight.

A person is guilty of starving a horse when that person acquires a healthy horse of proper weight and then, through lack of feeding food, causes the horse to become emaciated. In State v. Zawistowski, for example, the evidence was sufficient to convict for failure to provide necessary food under the former second degree animal cruelty statute¹¹ where one horse that had been chubby and healthy was transferred to the care of Zawistowski, at which point the horse became severely underweight. State v. Zawistowski, 119 Wn. App. 730, 732, 737, 82 P.3d

¹¹ Under former RCW 16.52.207(2)(a) (Laws of 1994, ch. 261, § 9), an owner of an animal is guilty of second degree animal cruelty if he or she knowingly, recklessly, or with criminal negligence "[f]ails to provide the animal with necessary food, water, shelter, rest, sanitation, ventilation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure." In 2005, the legislature amended RCW 16.52.207 to remove failure to provide food, water, and ventilation from the second degree animal cruelty statute and make starvation, dehydration, and suffocation a first degree offense under RCW 16.52.205(2). Laws of 2005, ch. 481, §§ 1-2; State v. Peterson, 174 Wn. App. 828, 855 n.11, 301 P.3d 1060, review denied, 178 Wn.2d 1021, 312 P.3d 650 (2013).

698 (2004), review denied, 152 Wn.2d 1010, 99 P.3d 896 (2004). Another horse was also severely underweight while under Zawistowski's care, with no indication that it was in that condition before it came into her care. Zawistowski, 119 Wn. App. at 732, 737. The circumstances are far different in Markley's case.

Additionally, the failure to be aware of the substantial risk of the wrongful act of starvation causing substantial pain must constitute "a gross deviation from the standard of care that a reasonable person would exercise in *the same situation*." RCW 9A.08.010(1)(d) (emphasis added). The salient question is what a reasonable person would have done in Markley's situation.

Markley had never owned a horse before. 5RP 139; CP 79 (FF 10). He had no previous horse knowledge. 4RP 102-03. Markley was not a veterinarian or animal care professional with specialized knowledge about how to safely put weight on an aged, emaciated horse like Alex. Veterinarians and those with previous horse experience have that kind of knowledge. 5RP 22-30, 34, 40, 62-64, 68, 82-84. People with the requisite training or experience also know that local hay is poor in nutrition and that an old horse like Alex cannot maintain on local hay for that reason. 4RP 25, 73, 75, 106-07, 5RP 86. Markley, as a rookie horse owner, did not have such knowledge. The standard of care of a reasonable

person in Markley's situation differs from the standard of care of those with specialized knowledge about how to properly feed a senior, emaciated horse in Western Washington.

Further, those with specialized horse knowledge know that horses are stoic animals and therefore a horse, even though in a starved condition, would typically show no obvious sign of being in pain from that condition. 5RP 31-32, 67, 116; CP 79 (FF 22). There is no evidence that Markey had such knowledge.

Criminal negligence in this circumstance turns on whether the failure to be aware of the substantial risk that the horse was suffering substantial pain as a result of starvation constitutes a gross deviation from the standard of care a reasonable person would exercise "in the same situation." RCW 16.52.205(2); RCW 9A.08.010(1)(d). The failure to be aware of a substantial risk that Alex was suffering substantial pain as a result of starvation does not constitute a gross deviation from the standard of care that a reasonable person would use in Markley's situation. Markley's situation does not include knowledge of the stoic nature of horses or the special feeding regimen that is required to properly rehabilitate a senior, emaciated horse. Without that knowledge, a person like Markley who acquires an old, skinny horse without previous horse

knowledge and proceeds to regularly feed that horse has not grossly deviated from what a reasonable person would do in the same situation.

Perhaps sensing the problem, the prosecutor argued there was criminal negligence because a reasonable person would have gone to the vet to find out how to care for and feed a horse of Alex's age and condition properly.¹² 6RP 34-35, 73-74. That sounds like a failure to obtain needed medical attention, which only constitutes the non-felony crime of second degree animal cruelty.¹³ See State v. Smith, 154 Wn. App. 272, 274, 278, 223 P.3d 1262 (2009) (owner's failure to consult veterinarian on how to put weight on llama factually supported a second degree animal cruelty conviction for failure to seek necessary medical attention).

The prohibition against starving an animal with criminal negligence does not criminalize the acquisition of an already-starved animal and subsequent failure to rehabilitate that animal within an undefined period of time where the owner has no previous horse experience. Convictions must be reversed for insufficient evidence where,

¹² The prosecutor's closing argument in front of the jury was incorporated into Markley's case. 6RP 11-12.

¹³ RCW 16.52.207(2)(a) provides "[a]n owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence . . . Fails to provide the animal with necessary . . . medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure."

viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a reasonable doubt. Hundley, 126 Wn.2d at 421-22. Markley's first degree animal cruelty conviction must therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

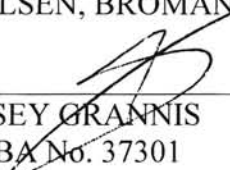
D. CONCLUSION

For the reasons set forth, Markley respectfully requests reversal of the conviction for first degree animal cruelty.

DATED this 19th day of December 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69968-7-1
)	
JASON MARKLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 19TH DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON MARKLEY
P.O. BOX 8892
COVINGTON, WA 98042

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF DECEMBER 2013.

X Patrick Mayovsky

